

# LEGISLATIVE CONSENT MEMORANDUM

## DEFAMATION BILL

### Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

“That the Parliament agrees that the relevant provisions of the Defamation Bill, introduced in the House of Commons on 10 May 2012, relating to the privilege which may apply in respect of peer-reviewed material in scientific or academic journals and reports of proceedings of scientific or academic conferences, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

### Background

2. This memorandum has been lodged by Kenny MacAskill, Cabinet Secretary for Justice, under Rule 9.B.3.1(c)(ii) of the Parliament’s Standing Orders. The Defamation Bill was introduced in the House of Commons on 10 May 2012. Amendments to the Bill seeking to extend certain provisions to Scotland were lodged on 21 June 2012. The latest version of the Bill and the amendments can be found at:

<http://services.parliament.uk/bills/2012-13/defamation/documents.html>.

### Content of the Defamation Bill

3. The main purpose of the Defamation Bill is to reform aspects of the law of defamation in England and Wales to address a range of concerns which have been raised about the detrimental effects caused by the current law on libel in England and Wales.

4. Issues included in the Bill are:

- A new requirement that a statement must have caused serious harm in order for it to be defamatory.
- A statutory defence of truth (replacing the current common law defence of justification).
- A statutory defence of honest opinion (replacing the current common law defence of fair/honest comment).
- A new statutory defence of responsible publication on matters of public interest.
- A defence for operators of websites (in respect of statements posted on their website) where it was not the operator who posted the statement.
- Creation of a new defence of privilege relating to peer reviewed material in scientific or academic journals.
- Provisions updating and extending the circumstances in which the defences of absolute and qualified privilege are available.

- Introduction of a single publication rule to prevent an action being brought in relation to publication of the same material by the same publisher after a one year limitation period has passed.
- Action to address libel tourism by ensuring a court will not accept jurisdiction unless satisfied that England and Wales is clearly the most appropriate place to bring an action against someone who is not domiciled in the UK or an EU Member State.
- Provision limiting the circumstances in which an action for defamation can be brought against someone who is not the author, editor or publisher of the statement.
- Removal of the presumption in favour of jury trial, so that the judge would have a discretion to order jury trial where it is in the interests of justice.
- Provision repealing the Slander of Women Act 1891 and overturning a common law rule relating to special damage.

### **Provisions which relate to Scotland**

5. None of the provisions in the Bill, as introduced, extended to Scotland.

6. However, amendments to the Bill were lodged on 21 June 2012 which seek to extend to Scotland the Bill's provisions about privilege in relation to scientific and academic activities. Where a statement is subject to qualified privilege the pursuer in a defamation action has the additional burden (as well as showing that the statement was defamatory) of proving that the publication was made maliciously. Where absolute privilege applies to a statement, even if the statement is defamatory, a pursuer cannot succeed in a defamation action against the statement maker.

7. The Bill extends qualified privilege to fair and accurate reports of proceedings of a scientific or academic conference, and to copies, extracts and summaries of matter published by such conferences. In addition, the Bill provides that statements in peer-reviewed material in scientific or academic journals are privileged unless it is shown that the statements were made with malice.

8. Given that much scientific and academic research is done collaboratively and without reference to national borders, limiting these provisions to England and Wales only could potentially inhibit constructive and robust scientific and academic exchange. Extending these provisions to Scotland would therefore ensure parity of protection in relation to these scientific and academic activities.

9. The amendments are limited and do not seek to extend any further changes to Scotland because Scots law on defamation (and the related area of privacy) has attracted little concern and we consider it robust enough for present purposes.

10. Amendments to the Bill are the preferred route to make these changes. The changes are limited and focussed and this is a resource efficient method for giving effect to them in a timely manner so that there is no disparity of protection. There are also currently no plans to consult on, or legislate for, changes to the Scots law of

defamation. It might therefore be some time before changes could otherwise be effected.

11. The Bill as amended would contain provisions, which are within the legislative competence of the Scottish Parliament, making it a 'relevant' Bill under the Standing Orders of the Scottish Parliament and consequently requiring the consent of the Scottish Parliament.

12. The amendments to clause 16, which sets out commencement provisions and defines the territorial extent of the Bill, are the necessary vehicle by which the scientific and academic related provisions in the Bill could be extended to Scotland. The following paragraphs describe the specific provisions, which the amendments to clause 16, would extend to Scotland and for which consent is sought in terms of the Legislative Consent Motion.

***Clause 6 – Peer reviewed statement in scientific or academic journal etc.***

13. *Policy Intent:* To extend to Scotland the new defence of privilege in connection with statements in peer-reviewed material in scientific or academic journals, unless the statements have been made maliciously. The term "scientific journal" would include medical journals.

14. *The provisions:* *Subsection (1) to (3)* provide the privilege will apply where two conditions are met. These are condition 1: that the statement relates to a scientific or academic matter; and condition 2: that before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned. The requirements in condition 2 are intended to reflect the core aspects of a responsible peer-review process. *Subsection (8)* provides that the reference to "the editor of the journal" is to be read, in the case of a journal with more than one editor, as a reference to the editor or editors who were responsible for deciding to publish the statement concerned. This may be relevant where a board of editors is responsible for decision-making.

15. *Subsection (4)* extends the protection offered by the defence to publications in the same journal of any assessment of the scientific or academic merit of a peer-reviewed statement, provided the assessment was written by one or more of the persons who carried out the independent review of the statement, and the assessment was written in the course of that review. This is intended to ensure that the privilege is available not only to the author of the peer-reviewed statement, but also to those who have conducted the independent review who will need to assess, for example, the papers originally submitted by the author and may need to comment.

16. *Subsection (5)* provides that the privilege given by the clause to peer-reviewed statements and related assessments also extends to the publication of a fair and accurate copy of, extract from or summary of the statement or assessment concerned.

17. By *subsection (6)* the privilege given by the clause is lost if the publication is shown to be made with malice. This effectively makes the privilege provided by this clause the same as qualified privilege. *Subsection (7)* ensures that the new clause is not read as protecting the publication of matter the publication of which is prohibited by law, or preventing a person who publishes a statement in a scientific or academic

journal from relying on other forms of privilege, such as the privilege conferred under clause 7(9) to fair and accurate reports etc. of proceedings at a scientific or academic conference.

### **Clause 7(9) – Reports etc protected by privilege**

18. Policy Intent: To extend to Scotland clause 7(9) which extends qualified privilege to fair and accurate reports of proceedings of a scientific or academic conference, and to copies, extracts and summaries of matter published by such conferences.

19. Provision: Clause 7 amends the provisions contained in the Defamation Act 1996 relating to the defences of absolute and qualified privilege to extend the circumstances in which these defences can be used. *Subsection (9)* inserts a new paragraph into Schedule 1 to the 1996 Act to extend qualified privilege to fair and accurate reports of proceedings of a scientific or academic conference held anywhere in the world, and to copies, extracts and summaries of matter published by such conferences. It is possible that in certain circumstances qualified privilege may already apply to such publications (where the conference falls within the description of a “public meeting”, or where findings or decisions are published by a scientific or academic association, both of which are covered by Part 2 of Schedule 1). However, the amendments made by *subsection (9)* will ensure there is not a gap in protection.

20. To ensure that these scientific and academic related provisions have full effect, the amendments to clause 16 also seek to extend two technical provisions to Scotland at the same time. These are:

- Clause 14 which sets out definitions of the terms “publish”, “publication” and “statement” for the purposes of the Bill. Broad definitions have been used to ensure that the provisions of the Bill cover a wide range of publications in any medium, reflecting the current law. This technical and supporting clause will need to be extended to Scotland, as the words “publish” and “statement” appear in clause 6 and “published” in clause 7;
- Clause 15(5) which provides that the Bill will not operate retrospectively.

### **Consultation**

21. The provisions set out in the Bill were drafted in light of a detailed UK Government consultation process (*Draft Defamation Bill Consultation*) following widespread and sustained concern about defamation law in England and Wales, in large part driven by particular concern about London being a magnet for ‘libel tourism’ and its alleged “chilling effect” on free speech and open debate across the globe, together with concern about the costs of libel actions. Reform of libel law featured in the General Election manifestos of the Conservative, Liberal Democrat and Labour Parties in 2010. The Bill builds on the work of the preceding UK Administration and, without seeking the involvement of the Devolved Administrations, the Coalition Government consulted last Spring on a draft Defamation Bill (with an ‘extent provision’ of England and Wales only).

22. The draft Bill received pre-legislative scrutiny by a Parliamentary Joint Committee which published its report in October 2011 (essentially concluding that additional reforms were required). The Ministry of Justice (MoJ) had previously published a

summary of responses to its consultation exercise (November 2011) and consequently published a response to the Committee's report (February 2012).

23. There has been no consultation by the UK Government on the proposed new defence for peer reviewed articles. The recommendation that a provision be added to the draft Bill extending privilege to peer-reviewed articles in scientific or academic journals was suggested by the Parliamentary Joint Committee in their report on the draft Bill. MoJ, in their response to that report advised that: "*we are sympathetic to the need to provide clear protection for peer-reviewed articles published in scientific and academic journals and will consider further whether this can best be achieved through qualified privilege or other means, and how key elements of the peer-review process can be defined to ensure that the scope of any provision is clear.*"

24. There has been no specific consultation on defamation law in Scotland. However, the Scottish Law Commission did undertake a consultation exercise before undertaking its current law reform programme and defamation law was not seen as a priority. The current law is considered robust enough for present purposes and the law on defamation (and the related area of privacy) has generally attracted little interest, with calls for review/reform being few and far between. Two limited exceptions to this lack of interest have been:

- Defamation of the deceased. In response to interest from the Public Petitions Committee linked to the long-running campaign of the bereaved parents of Diane and Alan Watson, the Scottish Government conducted a consultation exercise on this narrow issue. This resulted in a provisional conclusion on this issue that – pending the outcome of the Leveson Inquiry – better media regulation seemed likely to be more appropriate than reform of defamation law. A few of the respondents to that consultation exercise, however, did comment that a wider review of defamation law in Scotland may be worthwhile.
- “Giggs-gate” and super-injunctions. In May 2011, in a front-page article entitled “The madness of privacy laws”, the Sunday Herald claimed that Ryan Giggs had obtained a super-injunction in the English courts to suppress allegations of infidelity. This article helped to focus interest both on privacy laws and on cross-border enforcement.

25. The position in England and Wales has been quite different. There has been widespread and sustained concern about defamation law, in large part driven by particular concern about London being a magnet for 'libel tourism' and its alleged "chilling effect" on free speech and open debate across the globe, together with concern about the costs of libel actions. Reform of libel law featured in the election manifestos of the Conservative, Liberal Democrat and Labour Parties in 2010.

26. Scottish Government officials have, however, considered extending privilege to the scientific and academic related activities contained in the Bill. The conclusion was that parity of protection across the UK was desirable given that much scientific and academic research is done collaboratively and without reference to national borders. Therefore, limiting these provisions to England and Wales only could potentially inhibit constructive and robust scientific and academic exchange.

27. In light of the fact that there has been no requirement identified for reform of the law of defamation in Scotland and that the wider body of Scots law on defamation appears robust enough for present purposes, it is not proposed that the Legislative Consent Motion should seek to extend any further changes to Scotland other than the limited scientific and academic related provisions.

### **Financial Implications**

28. No additional costs are envisaged as a result of extending these limited provisions to Scotland.

### **Conclusion**

29. Extending the relevant provisions in the Bill to apply in Scotland will ensure parity of protection in relation to peer reviewed statements in scientific or academic journals etc. and to academic conference reports etc.

30. It is the view of the Scottish Government that it is in the interests of the Scottish people and good governance that the relevant provisions as outlined above which fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.

**Scottish Government**

June 2012