

Defamation and Malicious Publication (Scotland) Bill

[AS INTRODUCED]

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**THE FOLLOWING ACCOMPANYING DOCUMENTS ARE ALSO PUBLISHED:
Explanatory Notes (SP Bill 61-EN), a Financial Memorandum (SP Bill 61-FM), a Policy
Memorandum (SP Bill 61-PM) and statements on legislative competence (SP Bill 61-LC).**

Defamation and Malicious Publication (Scotland) Bill [AS INTRODUCED]

An Act of the Scottish Parliament to amend the law of defamation; replace the common law delicts of verbal injury with delicts of malicious publication; and for connected purposes.

PART 1

DEFAMATION

5 *Actionability and restrictions on bringing proceedings*

1 **Actionability of defamatory statements**

- (1) This section applies to a defamatory statement made or published by a person (A) about another person (B).
- (2) A right to bring defamation proceedings in respect of the statement accrues only if—
 - 10 (a) A has published the statement to a person other than B, and
 - (b) the publication of the statement has caused (or is likely to cause) serious harm to the reputation of B.
- (3) For the purposes of subsection (2)(b), where B is a non-natural person which has as its primary purpose trading for profit, harm to B's reputation is not "serious harm" unless
15 it has caused (or is likely to cause) B serious financial loss.
- (4) For the purposes of this Act, unless the context otherwise requires—
 - (a) a statement about a person is defamatory if it causes harm to the person's reputation (that is, if it tends to lower the person's reputation in the estimation of ordinary persons),
20 (b) a reference to publishing a statement is a reference to communicating the statement by any means to a person in a manner that the person can access and understand, and
 - (c) a statement is published when the recipient has seen or heard it.
- (5) Nothing in this section affects a right to bring proceedings which accrued before the
25 commencement of this section.

2 Prohibition on public authorities bringing proceedings

- (1) A public authority may not bring defamation proceedings.
- (2) For the purpose of subsection (1), a person is a “public authority” if the person’s functions include functions of a public nature.
- 5 (3) But, where the person—
- (a) is a non-natural person which—
 - (i) has as its primary purpose trading for profit, or
 - (ii) is a charity or has purposes consisting only of one or more charitable purposes, and
 - 10 (b) is not owned or controlled by a public authority,
it is not a public authority by reason only of its carrying out functions of a public nature from time to time.
- (4) For the purposes of subsection (3)(b), a non-natural person is owned or controlled by a public authority if the authority—
- 15 (a) holds (directly or indirectly) the majority of shares or voting rights in it,
- (b) has the right (directly or indirectly) to appoint or remove a majority of the board of directors of it, or
- (c) has the right to exercise, or actually exercises, significant influence or control over it.
- 20 (5) For the avoidance of doubt, nothing in this section prevents an individual from bringing defamation proceedings in a personal capacity (as distinct from the individual acting in the capacity of an office-holder).
- (6) The Scottish Ministers may by regulations make provision specifying persons or descriptions of persons who are not to be treated as a public authority for the purpose of subsection (1).
- 25 (7) Regulations under subsection (6) are subject to the affirmative procedure.
- (8) Before laying a draft of a Scottish statutory instrument containing regulations under subsection (6) before the Scottish Parliament, the Scottish Ministers must consult such persons as they consider appropriate.
- 30 (9) In this section—
- (a) a reference to a charity is a reference to a non-natural person—
 - (i) registered in the Scottish Charity Register, or
 - (ii) managed or controlled wholly or mainly outwith Scotland and which is registered in a register equivalent to the Scottish Charity Register for the purposes of the country in which it operates,
 - 35 (b) “charitable purposes” is to be construed in accordance with section 7(2) of the Charities and Trustee Investment (Scotland) Act 2005.

3 Restriction on proceedings against secondary publishers

- (1) Except as may be provided for under section 4, a right to bring defamation proceedings in respect of a defamatory statement does not accrue against a person unless the person is—

- 5 (a) the author, editor or publisher of the statement, or
(b) both—
(i) an employee or agent of such a person, and
(ii) responsible for the statement’s content or the decision to publish it.

- (2) In this section, subject to subsections (3) to (5)—

10 “author” means the person from whom the statement originated, but does not include a person who did not intend the statement to be published,

“editor” means a person with editorial or equivalent responsibility for the content of the statement or the decision to publish it,

15 “publisher” means a commercial publisher (that is to say, a person whose business is issuing material to the public or to a section of the public) who issues material containing the statement in the course of that business.

- (3) Where a statement is in electronic form, a person is not to be considered the editor of the statement if—

- 20 (a) the person’s involvement with the statement is only—
(i) publishing the same statement or providing a means to access the statement (for example a hyperlink) in a manner which does not alter the statement, or
(ii) marking the person’s interest in, approval of or disapproval of the statement in a manner which does not alter the statement (typically by means of a symbol), and
25 (b) that involvement does not materially increase the harm caused by the publication of the statement.

- (4) A person is not to be considered the author, editor or publisher of a statement if the person’s involvement with the statement is only—

- 30 (a) printing, producing, distributing or selling printed material containing the statement,
(b) processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part 1 of the Copyright, Designs and Patents Act 1988) containing the statement,
35 (c) processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded,
(d) operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form,
(e) broadcasting a live programme containing the statement in circumstances in which the person has no effective control over the maker of the statement,
40 (f) operating or providing access to a communications system by means of which another person over whom the person has no effective control transmits the statement or makes it available,

(g) moderating the statement (for example, by removing obscene language or correcting typographical errors without altering the substance of the statement).

(5) Where a person does not fall within subsection (3)(a) or (4)(a) to (g), the court may have regard to those paragraphs by way of analogy in determining whether a person is the author, editor or publisher of a statement.

(6) The Scottish Ministers may by regulations modify subsections (3) or (4) to add, amend or remove activities or methods of disseminating or processing material.

(7) Regulations under subsection (6) are subject to the affirmative procedure.

(8) Before laying a draft of a Scottish statutory instrument containing regulations under subsection (6), the Scottish Ministers must consult such persons as they consider appropriate.

4 Power to specify persons to be treated as publishers

(1) The Scottish Ministers may by regulations specify categories of persons who are to be treated as publishers of a statement for the purpose of defamation proceedings despite not being—

(a) the author, editor or publisher of the statement as defined in section 3, or

(b) an employee or agent of such a person.

(2) Regulations under subsection (1) may also provide for a defence to defamation proceedings for a person who—

(a) is treated as a publisher under such regulations,

(b) did not know and could not reasonably be expected to have known that the material which the person disseminated contained a defamatory statement, and

(c) satisfies any further conditions specified by the regulations.

(3) Regulations under subsection (1) are subject to the affirmative procedure.

(4) Before laying a draft of a Scottish statutory instrument containing regulations under subsection (1), the Scottish Ministers must consult such persons as they consider appropriate.

Defences

5 Defence of truth

(1) It is a defence to defamation proceedings for the defender to show that the imputation conveyed by the statement complained of is true or is substantially true.

(2) Where defamation proceedings are brought in respect of a statement conveying two or more distinct imputations, the defence under subsection (1) does not fail if—

(a) not all of the imputations have been shown to be true or substantially true, and

(b) having regard to the imputations that have been shown to be true or substantially true, publication of the remaining imputations has not caused serious harm to the reputation of the pursuer.

6 Defence of publication on a matter of public interest

- (1) It is a defence to defamation proceedings for the defender to show that—
- (a) the statement complained of was, or formed part of, a statement on a matter of public interest, and
 - (b) the defender reasonably believed that publishing the statement complained of was in the public interest.
- (2) Subject to subsections (3) and (4), in determining whether the defender has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
- (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the pursuer was a party, the court must, in determining whether it was reasonable for the defender to believe that publishing the statement was in the public interest, disregard any omission of the defender to take steps to verify the truth of the imputation conveyed by it.
- (4) In determining whether it was reasonable for the defender to believe that publishing the statement was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.
- (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

7 Defence of honest opinion

- (1) Subject to subsections (5) and (6), it is a defence to defamation proceedings for the defender to show that the conditions in subsections (2) to (4) are met.
- (2) The first condition is that the statement complained of was a statement of opinion.
- (3) The second condition is that the statement indicated, either in general or specific terms, the evidence on which it was based.
- (4) The third condition is that an honest person could have held the opinion conveyed by the statement on the basis of any part of that evidence.
- (5) The defence fails if the pursuer shows that the defender did not genuinely hold the opinion conveyed by the statement.
- (6) Where the statement complained of was published by the defender but made by another person (“the author”)—
- (a) subsection (5) does not apply, but
 - (b) the defence fails if the pursuer shows that the defender knew, or ought to have known, that the author did not genuinely hold the opinion conveyed by the statement.
- (7) For the purpose of subsection (2), a “statement of opinion” includes a statement which draws an inference of fact.
- (8) For the purpose of subsections (3) and (4), “evidence” means—
- (a) any fact which existed at the time the statement was published,
 - (b) anything asserted to be a fact in a privileged statement made available before, or on the same occasion as, the statement complained of, or

(c) anything that the defender reasonably believed to be a fact at the time the statement was published.

(9) For the purpose of subsection (8)(b), a statement is a “privileged statement” if the person responsible for its publication would have one or more of the following defences if defamation proceedings were to be brought in respect of it—

- (a) the defence of publication on a matter of public interest under section 6,
- (b) the defence of absolute privilege under section 9, or
- (c) the defence of qualified privilege under section 10 or 11.

8 Abolition of common law defences and transitional provision

(1) Any rules of law providing for—

- (a) the defence of innocent dissemination,
- (b) the defence of veritas,
- (c) the defence known as the Reynolds defence,
- (d) the defence of fair comment,

cease to have effect.

(2) Nothing in sections 5 to 7 or subsection (1) of this section has effect in relation to defamation proceedings if the right to bring the proceedings accrued before the commencement of the section or subsection in question.

Absolute privilege

9 Contemporaneous reports of court proceedings

(1) The contemporaneous publication of a statement which is a fair and accurate report of proceedings in public before a court to which this section applies is absolutely privileged.

(2) Where the publication of a report of proceedings is required to be postponed—

- (a) by an order of the court, or
- (b) as a consequence of a statutory provision,

it is to be treated as being contemporaneously published if it is published as soon as practicable after that is permitted.

(3) This section applies to—

- (a) any court in the United Kingdom,
- (b) any court established under the law of a country or territory outside the United Kingdom, and
- (c) any international court or tribunal established by the Security Council of the United Nations or by an international agreement.

(4) For the purposes of subsection (3)(a) and (b), “court” includes any tribunal or body exercising the judicial power of the State.

Qualified privilege

10 Peer-reviewed statement in scientific or academic journal etc.

- (1) The publication of a statement in a scientific or academic journal is privileged if the conditions in subsections (2) and (3) are met.
- (2) The first condition is that the statement relates to a scientific or academic matter.
- 5 (3) The second condition is that before the statement was published an independent review of the statement's scientific or academic merit was carried out by—
- (a) the editor of the journal, and
 - (b) one or more persons with expertise in the scientific or academic matter concerned.
- 10 (4) Where the publication of a statement in a scientific or academic journal is privileged by virtue of subsection (1), the publication in the same journal of any assessment of the statement's scientific or academic merit is also privileged if—
- (a) the assessment was written by one or more of the persons who carried out the independent review of the statement, and
 - (b) the assessment was written in the course of that review.
- 15 (5) Where the publication of a statement or assessment is privileged by virtue of this section, the publication of a fair and accurate copy of, extract from or summary of the statement or assessment is also privileged.
- (6) The publication of a statement is not privileged by virtue of this section if it is shown to have been made with malice.
- 20 (7) Nothing in this section is to be construed as—
- (a) protecting the publication of matter the publication of which is prohibited by law, or
 - (b) limiting any privilege subsisting apart from this section.
- 25 (8) The reference in subsection (3)(a) 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.

11 Other statements protected by qualified privilege

- (1) Other than as provided in this section, the publication of any statement mentioned in the schedule (however described) is privileged.
- 30 (2) The publication of a statement is not privileged by virtue of this section if it is shown to have been made with malice.
- (3) Subsection (4) applies to defamation proceedings brought in respect of the publication of a statement mentioned in Part 2 of the schedule.
- (4) If the pursuer shows that the defender—
- 35 (a) was requested by the pursuer to publish, in a suitable manner, a reasonable statement by way of explanation or contradiction, and
- (b) refused or neglected to do so,
- the publication of the statement complained of is not privileged by virtue of this section.
- (5) For the purpose of subsection (4)(a), “in a suitable manner” means—
- 40 (a) in the same manner as the statement complained of, or

(b) in a manner that is adequate and reasonable in the circumstances.

(6) This section does not apply to the publication of matter which is not of public interest and the publication of which is not for the public benefit.

(7) Nothing in this section is to be construed as—

(a) protecting the publication of matter the publication of which is prohibited by law, or

(b) limiting any privilege subsisting apart from this section.

12 Privilege: transitional provision

Nothing in sections 9 to 11 (or the schedule) has effect in relation to defamation proceedings if the right to bring the proceedings accrued before the commencement of the section in question.

Offers to make amends

13 Offer to make amends

(1) An offer to make amends is an offer made by a person (A) who has published a statement which another person (B) alleges is defamatory to make amends to B by—

(a) making a suitable correction of—

(i) the statement generally, or

(ii) a specific defamatory meaning conveyed by the statement,

(b) giving a sufficient apology,

(c) publishing the correction and apology in a manner that is reasonable and practicable in the circumstances,

(d) paying to B such compensation and expenses as may be agreed or determined to be payable (if any), and

(e) taking such other steps (if any) as A may propose.

(2) The offer must—

(a) be made before A lodges defences in any defamation proceedings brought by B in relation to the statement,

(b) be in writing,

(c) state that it is an offer to make amends under this section, and

(d) if made in relation to a specific defamatory meaning only, state that it is a qualified offer and set out the meaning in relation to which it is made.

(3) An offer made under this section—

(a) may be withdrawn before it is accepted,

(b) may be renewed (such renewal being treated as a new offer),

(c) is deemed to have been rejected if not accepted within a reasonable period.

14 Acceptance and enforcement of offer to make amends

- (1) This section applies where a person (B) accepts an offer to make amends made under section 13.
- (2) B may not bring or continue defamation proceedings against the person who made the offer (A) in respect of—
- 5 (a) in the case of a qualified offer, the specific defamatory meaning set out in the offer, or
- (b) in any other case, the statement,
- but may enforce the offer in accordance with this section.
- 10 (3) If A and B agree on the steps to be taken in fulfilment of the offer, B may apply to the court for an order requiring A to take the agreed steps.
- (4) If A and B do not agree on the steps to be taken by way of correction, apology and publication, A may take such steps as A considers appropriate, and may in particular—
- 15 (a) make the correction and apology in open court in terms approved by the court, and
- (b) give an undertaking to the court as to the manner in which A will publish the correction and apology.
- (5) If A and B do not agree on the amount to be paid by way of compensation, the court must determine the appropriate amount on the same principles as damages in defamation proceedings.
- 20 (6) In determining the appropriate amount to be paid under subsection (5), the court must take account of—
- (a) any steps taken in fulfilment of the offer, and
- (b) so far as not agreed between A and B—
- 25 (i) the suitability of the correction,
- (ii) the sufficiency of the apology, and
- (iii) whether the manner of the publication of the correction and apology was reasonable in the circumstances.
- (7) If A and B do not agree on the amount to be paid by way of expenses, the court must determine the appropriate amount on the same principles as expenses awarded in court proceedings.
- 30 (8) Proceedings under this section are to be heard and determined without a jury.
- (9) In this section, a “qualified offer” is an offer to make amends made under section 13 that is made only in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys.
- 35

15 Offer to make amends: multiple persons responsible for statement

- (1) This section applies where a person (B)—
- (a) has a right to bring defamation proceedings against more than one person in respect of an allegedly defamatory statement, and

(b) has accepted an offer to make amends under section 13 made by one of the persons (A) in respect of the statement.

(2) B's acceptance of the offer made by A does not affect any right to bring defamation proceedings that B has against another person in respect of the statement.

5 (3) Section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 ("the 1940 Act") (right of one joint wrongdoer as respects another to recover contribution towards damages) applies in relation to compensation paid under an offer to make amends as it applies in relation to damages in an action to which that section applies.

10 (4) Where a person other than A is liable in respect of the same damage (whether jointly or otherwise), A is not required to pay by virtue of any contribution under section 3(2) of the 1940 Act an amount greater than the amount of compensation payable under the offer made by A.

16 Rejection of unqualified offer to make amends

(1) This section—

15 (a) applies where a person (B) rejects or is deemed to have rejected an offer to make amends made under section 13, but

(b) does not apply to the rejection or deemed rejection of a qualified offer (see section 17).

20 (2) It is a defence to defamation proceedings brought by B against the person who made the offer (A) that B rejected the offer (or is deemed to have rejected it).

(3) The defence is not available if (at the time of making the statement complained of) A knew or had reason to believe that the statement—

(a) referred to B or was likely to be understood as referring to B, and

(b) was both false and defamatory of B,

25 but it is to be presumed, unless the contrary is shown, that A did not know and had no reason to believe that this was the case.

(4) Where A relies on the defence under this section, A may not rely on any other defence.

(5) The offer may be relied on in mitigation of damages whether or not it was relied on as a defence.

30 (6) In this section, a "qualified offer" is an offer to make amends made under section 13 that is made only in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys.

17 Rejection of qualified offer to make amends

35 (1) This section applies where a person (B) rejects or is deemed to have rejected a qualified offer.

(2) In so far as relating to the specific defamatory meaning set out in the offer, it is a defence to defamation proceedings brought by B against the person who made the qualified offer (A) that B rejected the offer (or is deemed to have rejected it).

40 (3) The defence is not available if (at the time of making the statement complained of) A knew or had reason to believe that the meaning that A accepts the statement conveys—

(a) referred to B or was likely to be understood as referring to B, and

(b) was both false and defamatory of B,

but it is to be presumed, unless the contrary is shown, that A did not know and had no reason to believe that this was the case.

5 (4) Where A relies on the defence under this section, A may not rely on any other defence in respect of the accepted meaning.

(5) The qualified offer may be relied on in mitigation of damages whether or not it was relied on as a defence.

10 (6) In this section, a “qualified offer” is an offer to make amends made under section 13 that is made only in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys.

18 Offers to make amends: transitional provision

Nothing in sections 13 to 17 has effect in relation to defamation proceedings if the right to bring the proceedings accrued before the commencement of the section in question.

Jurisdiction

19 Actions against a person not domiciled in the UK or a member State etc.

15 (1) This section applies to defamation proceedings brought in Scotland against a person who is not domiciled—

(a) in the United Kingdom,

(b) in another member State, or

20 (c) in a state which is for the time being a contracting party to the Lugano Convention.

(2) A court does not have jurisdiction to hear and determine proceedings to which this section applies unless the court is satisfied that, of all the places where the statement complained of has been published, Scotland is clearly the most appropriate place to bring proceedings in respect of the statement.

25 (3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of.

(4) Nothing in this section limits the availability of, or otherwise affects, any plea of forum non conveniens in respect of proceedings to which this section applies.

30 (5) For the purposes of this section—

(a) a person is domiciled in the United Kingdom or another member State if the person is domiciled there for the purposes of the Brussels Regulation,

35 (b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention.

(6) In this section—

40 “the Brussels Regulation” means Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), as amended from time to time and as applied by virtue of the Agreement made on 19 October 2005 between the European Community and the Kingdom of

Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ No L 299, 16.11.2005, p62; OJ No L79, 21.3.2013, p4),

“the Lugano Convention” means the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30 October 2007.

- (7) Nothing in subsections (1) to (6) has effect in relation to defamation proceedings begun before the commencement of this section.

Removal of presumption that proceedings are to be tried by jury

20 Removal of presumption that proceedings are to be tried by jury

- (1) In section 11 of the Court of Session Act 1988 (jury actions), paragraph (b) is repealed.
- (2) Subsection (1) does not have effect in relation to defamation proceedings begun before the commencement of this section.

PART 2

MALICIOUS PUBLICATION

Actionable types of malicious publication

21 Statements causing harm to business interests

- (1) A person (B) may bring proceedings under this section against another person (A) where—
- (a) A has—
- (i) made a false and malicious statement about B’s business or business activities, and
- (ii) published the statement to a person other than B, and
- (b) the statement has caused (or is likely to cause) financial loss to B.
- (2) For the purposes of subsection (1)(a)(i), a statement is malicious only if B shows—
- (a) that the imputation conveyed by the statement complained of was presented as being a statement of fact (rather than a statement of opinion) and was sufficiently credible so as to mislead a reasonable person, and
- (b) either—
- (i) that A knew that the imputation was false or was indifferent as to the truth of the imputation, or
- (ii) that A’s publication of the statement was motivated by a malicious intention to cause harm to B’s business or business activities.

22 Statements causing doubt as to title to property

- (1) A person (B) may bring proceedings under this section against another person (A) where—
- (a) A has—
 - (i) made a false and malicious statement about B's title to land or other property, and
 - (ii) published the statement to a person other than B, and
 - (b) the statement has caused (or is likely to cause) financial loss to B.
- (2) For the purposes of subsection (1)(a)(i), a statement is malicious only if B shows—
- (a) that the imputation conveyed by the statement complained of was presented as being a statement of fact (rather than a statement of opinion) and was sufficiently credible so as to mislead a reasonable person, and
 - (b) either—
 - (i) that A knew that the imputation was false or was indifferent as to the truth of the imputation, or
 - (ii) that A's publication of the statement was motivated by a malicious intention to delay or jeopardise a transaction involving the land or other property of B.

23 Statements criticising assets

- (1) A person (B) may bring proceedings under this section against another person (A) where—
- (a) A has—
 - (i) made a false and malicious statement criticising or denigrating the quality, condition, use or treatment of assets owned, possessed or controlled by B, and
 - (ii) published the statement to a person other than B, and
 - (b) the statement has caused (or is likely to cause) financial loss to B.
- (2) For the purposes of subsection (1)(a)(i), a statement is malicious only if B shows—
- (a) that the false imputation conveyed by the statement complained of was presented as being a statement of fact (rather than a statement of opinion) and was sufficiently credible so as to mislead a reasonable person, and
 - (b) either—
 - (i) that A knew that the imputation was false or was indifferent as to the truth of the imputation, or
 - (ii) that A's publication of the statement was motivated by a malicious intention to cause B financial loss.

General provision

24 Limit on requirement to show financial loss

A pursuer in proceedings under this Part does not need to show financial loss if the statement complained of is more likely than not to cause such loss.

25 Statements conveying two or more meanings

- (1) This section applies where proceedings are brought under this Part in respect of a statement that is capable of conveying two or more distinct meanings.
- (2) It is not necessary for the purposes of deciding whether harm has occurred for the court to determine—
- (a) which of the meanings is conveyed by the statement in the circumstances, or
 - (b) that one meaning should be preferred to the exclusion of the other or others.
- (3) But nothing in this section prevents the court from excluding or disregarding possible meanings where it considers it appropriate to do so.

26 Damages for anxiety and distress

- (1) In determining the appropriate amount of damages to award in proceedings under this Part, the court may take into account any distress and anxiety caused to the pursuer by the statement complained of.
- (2) This section does not limit any other basis of claim for damages or remedy that may be available to a pursuer in proceedings under this Part.

*Abolition of common law verbal injuries***27 Abolition of common law verbal injuries**

- (1) Any rules of law providing for a right to bring proceedings for a verbal injury cease to have effect.
- (2) Subsection (1) does not affect any right to bring proceedings for a verbal injury which accrued before the commencement of that subsection.

PART 3

GENERAL

*Remedies***28 Power of court to order a summary of its judgment to be published**

- (1) A court may, in finding for the pursuer in defamation proceedings or proceedings under Part 2, order the defender to publish a summary of the judgement.
- (2) It is for the parties to agree—
- (a) the wording of the summary, and
 - (b) the time, manner, form and place of its publication.
- (3) But if the parties cannot agree—
- (a) the wording of the summary, the court must determine it,

- (b) a matter in subsection (2)(b), the court may give such directions as it considers appropriate.

29 Making a statement in open court

- (1) In defamation proceedings or proceedings under Part 2, where the parties have reached an agreement in settlement of the proceedings, the court may allow a statement to be made in open court.
- (2) The wording of the statement—
 - (a) may be agreed between the parties, or
 - (b) in the absence of agreement, may be determined by the pursuer.
- (3) The statement may not be made unless the court has approved its wording.

30 Power of court to require removal of a statement etc.

- (1) In defamation proceedings or proceedings under Part 2, a court may order—
 - (a) the operator of a website on which the statement complained of is posted to remove the statement, or
 - (b) any person who was not the author, editor or publisher of the statement to stop distributing, selling or exhibiting material containing the statement.
- (2) This section does not limit the other powers available to the court in respect of the statement or any person who is publishing it.
- (3) In this section, “author”, “editor”, and “publisher” are to be construed in accordance with section 3.

31 Remedies: transitional provision

Nothing in sections 28 to 30 has effect in relation to defamation proceedings begun before the commencement of the section in question.

Limitation

32 Limitation of actions

- (1) Section 18A of the Prescription and Limitation (Scotland) Act 1973 (limitation of defamation and other actions) is amended as follows.
- (2) In subsection (1)—
 - (a) after “defamation” insert “or under section 21, 22 or 23 of the 2020 Act (actionable types of malicious publication)”,
 - (b) for “3 years” substitute “one year”.
- (3) After subsection (1), insert—
 - “(1A) Where—
 - (a) a person publishes a statement to the public or to a section of the public (“the first publication”), and

(b) the person subsequently publishes (whether or not to the public) the same statement or a statement that is substantially the same (“the subsequent publication”),

any right of action against the person for defamation or under section 21, 22 or 23 of the 2020 Act in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

(1B) Subsection (1A) does not apply where the court determines that the manner of the subsequent publication is materially different from the manner of the first publication.

(1C) In determining whether the manner of the subsequent publication is materially different from the manner of the first publication, the court may have regard to—

- (a) the level of prominence that the statement is given,
- (b) the extent of the subsequent publication, and
- (c) any other matter that the court considers relevant.”.

(4) In subsection (2), after “defamed” insert “or harmed by a malicious publication in a manner described in section 21, 22 or 23 of the 2020 Act”.

(5) After subsection (3) insert—

“(3A) This section continues to have effect in relation to a statement which was published before the day on which section 32 of the 2020 Act comes into force as if it had not been amended by section 32 of the 2020 Act.

(3B) In determining whether subsection (1A) applies, no account is to be taken of a statement which was published before the day on which section 32 of the 2020 Act comes into force.”.

(6) In subsection (4)—

(a) for paragraph (a) substitute—

“(aa) “the 2020 Act” means the Defamation and Malicious Publication (Scotland) Act 2020,”,

(b) in paragraph (b)—

- (i) after “construed” insert “(subject to subsection (1A))”,
- (ii) for “publication or communication” substitute “statement”,
- (iii) after “defamation” insert “or, as the case may be, under section 21, 22 or 23 of the 2020 Act”,
- (iv) for “first came to the notice of the pursuer.” substitute “was published, and”,

(c) after paragraph (b), insert—

“(c) “statement” has the meaning given in section 36 of the 2020 Act (interpretation).”.

33 Interruption of limitation period: mediation

After section 19CA of the Prescription and Limitation (Scotland) Act 1973 (interruption of limitation period: arbitration) insert—

“19CB Interruption of section 18A(1) limitation period: mediation

(1) In any computation of the period specified in section 18A(1), any period of mediation in relation to a relevant matter is to be disregarded.

(2) For the purposes of this section, a period of mediation—

(a) begins on the day on which a mediator is appointed by the parties, and

(b) ends on such day as the parties may agree or, otherwise, on the day—

(i) on which a party notifies another party that they are withdrawing from the mediation,

(ii) which falls 14 days after the day on which a party makes a request for confirmation that another party is continuing with the mediation (and no response has been received), or

(iii) which falls 14 days after the day on which the mediator resigns or dies or otherwise becomes incapable of acting (and no replacement has been appointed).

(3) In this section—

“mediation” means a structured process, whereby two or more parties to a dispute attempt, with the assistance of a mediator, to resolve or reduce disagreement between or among them with a view to resolution of the dispute without recourse to court,

“mediator” means an independent person who is appointed by the parties to conduct a mediation, whether or not for remuneration, in an effective, impartial, and competent way,

“party” means a party to the mediation, and

“relevant matter” means a matter to which a limitation period applies by virtue of section 18A(1).

(4) This section does not apply to a cross-border dispute within the meaning given by section 19F(4).”.

Information society services

34 Provision of information society services

(1) The Scottish Ministers may by regulations specify circumstances in which persons providing information society services are, or are not, to be held liable in defamation proceedings or proceedings under Part 2.

(2) In subsection (1), “information society services”—

(a) has the meaning given in Article 2(a) of the E-Commerce Directive (which refers to Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations), and

(b) is summarised in recital 17 of the E-Commerce Directive as covering “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service”.

- 5 (3) In subsection (2), “the E-Commerce Directive” means Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).
- (4) Regulations under subsection (1) are subject to the negative procedure.

10 *Miscellaneous*

35 Consequential modifications

- (1) The Defamation Act 1952 is amended as follows—
- (a) sections 3, 5, 6 and paragraph (b) of section 14 are repealed,
- (b) in section 14 (application of Act to Scotland), in paragraph (d)—
- 15 (i) after “pursuer” insert “and”,
- (ii) the words from “for” where it second occurs, to the end are repealed.
- (2) The Rehabilitation of Offenders Act 1974 is amended as follows—
- (a) in section 8(6) (defamation actions: reports of court proceedings), after “1996” insert “, section 9 of the Defamation and Malicious Publication (Scotland) Act 2020”,
- 20 (b) in section 8(8) (defamation actions)—
- (i) after paragraph (b), the word “and” is repealed,
- (ii) for paragraph (c) substitute—
- 25 “(c) for references to a defence under section 2 of the Defamation Act 2013 there is substituted a reference to a defence under section 5 of the Defamation and Malicious Publication (Scotland) Act 2020, and
- (d) for the reference to a defence under section 3 of the Defamation Act 2013 there is substituted a reference to a defence under section 7 of the Defamation and Malicious Publication (Scotland) Act 2020.”.
- (3) The Defamation Act 1996 is amended as follows—
- (a) sections 1 to 4, 14, 15, 17(2) and schedule 1 are repealed,
- (b) in section 18(2) (provisions extending to Scotland)—
- (i) the words “section 1 (responsibility for publication),” are repealed,
- (ii) the words “sections 2 to 4 (offer to make amends), except section 3(8),”
- 35 are repealed,
- (iii) the words “section 14 and 15 and Schedule 1 (statutory privilege)” are repealed.
- (4) The Defamation Act 2013 is amended as follows—
- (a) sections 6, 7(9), 15 and 16(5) are repealed,

- (b) in section 17 (short title, extent and commencement)—
 - (i) in subsection (2), the words “Subject to subsection (3),” are repealed,
 - (ii) subsections (3) and (5) are repealed,
 - (iii) in subsection (4), for “subsections (5) and” substitute “subsection”.

5 **36 Interpretation**

In this Act, unless the context otherwise requires—

- (a) “publish” (and cognate expressions), in relation to a statement, are to be construed in accordance with section 1,
- 10 (b) “statement” means words, pictures, visual images, gestures or any other method of signifying meaning,
- (c) a reference to proceedings brought under Part 2 is a reference to proceedings brought under section 21, 22 or 23,
- (d) in relation to proceedings generally, a reference to—
 - 15 (i) a pursuer includes a petitioner,
 - (ii) a defender includes a respondent,
 - (iii) defences includes answers.

37 Regulations

- (1) Any power conferred by this Act on the Scottish Ministers to make regulations includes the power to make—
 - 20 (a) such incidental, supplementary, consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate,
 - (b) different provision for different purposes.
- (2) This section does not apply to regulations made under section 38 or 39.

38 Ancillary provision

- 25 (1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act.
- (2) Regulations under this section may—
 - 30 (a) modify any enactment (including this Act),
 - (b) make different provision for different purposes.
- (3) Regulations under this section which contain provision adding to, replacing or omitting any part of the text of an Act are subject to the affirmative procedure.
- (4) Otherwise, regulations under this section are subject to the negative procedure.

39 Commencement

- 35 (1) This section and sections 36 to 38 and 40 come into force on the day after Royal Assent.

- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.
- (3) Regulations under this section may—
- (a) include transitional, transitory, or saving provision,
 - (b) make different provision for different purposes.
- (4) Regulations under this section which bring section 32 into force may amend section 18A of the Prescription and Limitation (Scotland) Act 1973 so that, instead of referring to the day on which section 32 comes into force, it specifies the date on which section 32 actually comes into force.

10 **40 Short title**

The short title of this Act is the Defamation and Malicious Publication (Scotland) Act 2020.

SCHEDULE
(introduced by section 11)

STATEMENTS HAVING QUALIFIED PRIVILEGE

PART 1

5 STATEMENTS HAVING QUALIFIED PRIVILEGE WITHOUT BEING SUBJECT TO EXPLANATION OR
CONTRADICTION

Reports of legislative proceedings

1 A fair and accurate report of proceedings in public of a legislature anywhere in the world.

10 *Legislature and government documents*

2 A fair and accurate copy of or extract from matter published by or on the authority of a legislature or government anywhere in the world.

Reports of court and inquiry proceedings

15 3 A fair and accurate report of proceedings in public before a court anywhere in the world (see also section 9).

4 A fair and accurate report of proceedings in public of a person appointed to hold a public inquiry by a legislature or government anywhere in the world.

Court notices, advertisements etc.

20 5 A notice or advertisement published by or on the authority of a court, or of a judge or officer of a court, anywhere in the world.

Public registers and documents

6 A fair and accurate copy of or extract from any register or other document required by law to be open to public inspection.

International organisations and conferences

25 7 A fair and accurate report of proceedings in public anywhere in the world of an international organisation or an international conference.

8 A fair and accurate copy of or extract from matter published anywhere in the world by an international organisation or an international conference.

PART 2

30 STATEMENTS HAVING QUALIFIED PRIVILEGE SUBJECT TO EXPLANATION OR CONTRADICTION

Notices etc. issued by legislatures, governments, certain authorities, international organisations etc.

9 (1) A fair and accurate copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of—

35 (a) a legislature or government anywhere in the world,

- (b) an authority anywhere in the world performing governmental functions,
- (c) an international organisation or international conference.

(2) In this paragraph, “governmental functions” includes police functions.

Documents released by courts, judges and court officers

5 10 A fair and accurate copy of, extract from or summary of a document made available by a court anywhere in the world, or by a judge or officer of such a court.

Reports of proceedings of local government, committees, commissions, inquiries, tribunals etc.

11 (1) A fair and accurate report of proceedings at any public meeting or sitting in the United Kingdom of—

10 (a) a local authority, local authority committee or, in the case of a local authority which is operating executive arrangements, the executive of that authority or a committee of that executive,

(b) a justice or justices of the peace acting otherwise than as a court exercising judicial authority,

15 (c) a commission, tribunal, committee or person appointed for the purposes of any inquiry by any statutory provision, by Her Majesty or by a Minister of the Crown, a member of the Scottish Government, the Welsh Ministers or the Counsel General to the Welsh Government or a Northern Ireland Department,

20 (d) a person appointed by a local authority to hold a local inquiry in pursuance of any statutory provision,

(e) any other tribunal, board, committee or body constituted by or under, and exercising functions under, any statutory provision.

25 (2) In the case of a local authority which is operating executive arrangements, a fair and accurate record of any decision made by any member of the executive where that record is required to be made and available for public inspection by virtue of section 22 of the Local Government Act 2000 (access to information etc.) or of any provision in regulations made under that section.

(3) In sub-paragraphs (1)(a) and (2)—

30 “executive” and “executive arrangements” have the same meaning as in Part 2 of the Local Government Act 2000,

“local authority” means—

35 (a) in relation to Scotland, a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 or an authority or body to which the Public Bodies (Admission to Meetings) Act 1960 applies,

(b) in relation to England and Wales, a principal council within the meaning of the Local Government Act 1972, any body falling within any paragraph of section 100J(1) of that Act or an authority or body to which the Public Bodies (Admission to Meetings) Act 1960 applies,

40 (c) in relation to Northern Ireland, any authority or body to which sections 23 to 27 of the Local Government Act (Northern Ireland) 1972 apply, and

“local authority committee” means any committee of a local authority or of local authorities, and includes—

- 5 (a) any committee or sub-committee in relation to which sections 50A to 50D of the Local Government (Scotland) Act 1973 apply by virtue of section 50E of that Act, and
- (b) any committee or sub-committee in relation to which sections 100A to 100D of the Local Government Act 1972 apply by virtue of section 100E of that Act (whether or not also by virtue of section 100J of that Act).

- 10 (4) A fair and accurate report of any corresponding proceedings in any of the Channel Islands or the Isle of Man or in another member State.

Reports of press conferences on matters of public interest

- 12 A fair and accurate report of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest.

Reports of public meetings on matters of public interest

- 15 13 (1) A fair and accurate report of proceedings at any public meeting held anywhere in the world.

- (2) In this paragraph, a “public meeting” means a meeting which is held—

- (a) lawfully and in good faith,
(b) for a lawful purpose, and
20 (c) for the furtherance or discussion of a matter of public interest,

whether admission to the meeting is general or restricted.

Listed companies: reports of meetings and certain other documents

- 14 (1) A fair and accurate report of proceedings at a general meeting of a listed company.

- 25 (2) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company—

- (a) by or with the authority of the board of directors of the company,
(b) by the auditors of the company, or
(c) by any member of the company in pursuance of a right conferred by any statutory provision.

- 30 (3) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company which relates to the appointment, resignation, retirement or dismissal of directors of the company or its auditors.

- (4) In this paragraph, “listed company” has the same meaning as in Part 12 of the Corporation Tax Act 2009 (see section 1005 of that Act).

35 *Findings or decisions of certain associations*

- 15 (1) A fair and accurate report of any finding or decision of any of the following descriptions of association, formed anywhere in the world, or of any committee or governing body of such an association.

(2) The descriptions of association are—

(a) an association—

- (i) formed for the purpose of promoting or encouraging the exercise of or interest in any art, science, religion or learning, and
- (ii) empowered by its constitution to exercise control over or adjudicate on matters of interest or concern to the association, or the actions or conduct of any person subject to such control or adjudication,

(b) an association—

- (i) formed for the purpose of promoting or safeguarding the interests of any trade, business, industry or profession, or of the persons carrying on or engaged in any trade, business, industry or profession, and
- (ii) empowered by its constitution to exercise control over or to adjudicate on matters connected with that trade, business, industry or profession, or the actions or conduct of those persons,

(c) an association—

- (i) formed for the purpose of promoting or safeguarding the interests of a game, sport or pastime to the playing or exercise of which members of the public are invited or admitted, and
- (ii) empowered by its constitution to exercise control over or adjudicate on persons connected with or taking part in the game, sport or pastime,

(d) an association—

- (i) formed for the purpose of promoting charitable purposes or other purposes beneficial to the community, and
- (ii) empowered by its constitution to exercise control over or to adjudicate on matters of interest or concern to the association, or the actions or conduct of any person subject to such control or adjudication.

Reports of scientific and academic conferences and associated documents

16 A fair and accurate—

- (a) report of proceedings of a scientific or academic conference held anywhere in the world, or
- (b) copy of, extract from or summary of matter published by such a conference.

Reports and summaries etc. by Scottish Ministers' designees

17 (1) A fair and accurate report or summary of, copy of or extract from, any adjudication, report, statement or notice issued by a body, officer or other person designated for the purposes of this paragraph by regulations made by the Scottish Ministers.

(2) Regulations under this paragraph are subject to the negative procedure.

PART 3

SUPPLEMENTARY PROVISION

Interpretation

18 In this schedule—

5 “court” includes—

(a) any tribunal or body established under the law of any country or territory exercising the judicial power of the State,

(b) any international tribunal established by the Security Council of the United Nations or by an international agreement,

10 (c) any international tribunal deciding matters in dispute between States,

“international conference” means a conference attended by representatives of two or more governments,

15 “international organisation” means an organisation of which two or more governments are members, and includes any committee or other subordinate body of such an organisation,

“legislature” includes a local legislature, and

“member State” includes any European dependent territory of a member State.

Defamation and Malicious Publication (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to amend the law of defamation; replace the common law delicts of verbal injury with delicts of malicious publication; and for connected purposes.

Introduced by: Humza Yousaf
Supported by: Ash Denham
On: 2 December 2019
Bill type: Government Bill

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