

This document relates to the Defamation and Malicious Publication (Scotland) Bill (SP Bill 61) as introduced in the Scottish Parliament on 2 December 2019

# Defamation and Malicious Publication (Scotland) Bill

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## Financial Memorandum

### Introduction

1. As required under Rule 9.3.2 of the Parliament's Standing Orders, this Financial Memorandum is published to accompany the Defamation and Malicious Publication (Scotland) Bill, introduced in the Scottish Parliament on 2 December 2019.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 61–EN);
- a Policy Memorandum (SP Bill 61–PM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 61–LC).

3. This Financial Memorandum has been prepared by the Scottish Government to set out the costs associated with the measures introduced by the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

### The Bill

4. The central aim of this Bill is to more appropriately address the balance between protection of reputation and freedom of expression. The existing law of defamation in Scotland is piecemeal in nature, scattered across aged common law rules<sup>1</sup> and several statutes.<sup>2</sup> The Bill does not

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<sup>1</sup> For example, *Mackay v M'Cankie* (1883) 10 R 537 is the leading case in Scots law which holds that defamation can arise if an imputation is communicated merely to the person who is the subject of it; in others words if it is seen, read or heard only by its subject and no one else.

<sup>2</sup> The statutes are the Defamation Act 1952 available at <http://www.legislation.gov.uk/ukpga/Geo6and1Eliz2/15-16/66>; the Defamation Act 1996 available at <http://www>.

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completely replace the Scots common law on defamation, instead it places certain key elements of it on a statutory basis.<sup>3</sup> At the same time, the Bill replaces and restates, in one place, a number of the existing statutory provisions. The overarching policy objectives of the Bill are to modernise and simplify the law of defamation and the related actions of verbal injury, which are replaced with new statutory actions relating to malicious publication.

5. The Bill implements in large part the legislative recommendations contained in the Scottish Law Commission's ("the Commission") Report on Defamation.<sup>4</sup> Greater detail as to the legal and practical issues which informed these aspects of the Bill are set out in that Report and also in the Commission's preceding Discussion Paper on Defamation.<sup>5</sup> On 14 January 2019, the Scottish Government published a consultation – Defamation in Scots Law ("the consultation").<sup>6</sup> The consultation sought further views on various aspects of proposed reform.

6. The Bill covers a variety of areas, and the Scottish Government does not anticipate any more than minimal costs related to the proposals. These costs are likely to be centred on the training of media law specialists, an estimate of which is provided at paragraph 23. By way of an overview, the Bill:

- defines what makes a statement defamatory;
- provides that in order to be actionable the publication of the statement must have caused (or be likely to cause) serious harm to the reputation of the claimant;

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[legislation.gov.uk/ukpga/1996/31](http://www.legislation.gov.uk/ukpga/1996/31); the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) available at <http://www.legislation.gov.uk/uksi/2002/2013/contents/made>; and sections 6, 7(9), 15, 16(5) (in so far as it relates to sections 6 and 7(9)) and 17 of the Defamation Act 2013 available at <http://www.legislation.gov.uk/ukpga/2013/26/contents/enacted>.

<sup>3</sup> For instance, while a number of common law defences are replaced with a statutory equivalent, the common law "single meaning rule" is not.

<sup>4</sup> SLC Report on Defamation (No. 248) December 2017 [https://www.scotlawcom.gov.uk/files/7315/1316/5353/Report\\_on\\_Defamation\\_Report\\_No\\_248.pdf](https://www.scotlawcom.gov.uk/files/7315/1316/5353/Report_on_Defamation_Report_No_248.pdf).

<sup>5</sup> Discussion Paper on Defamation, Scottish Law Commission (No. 161) [https://www.scotlawcom.gov.uk/files/5114/5820/6101/Discussion\\_Paper\\_on\\_Defamation\\_DP\\_No\\_161.pdf](https://www.scotlawcom.gov.uk/files/5114/5820/6101/Discussion_Paper_on_Defamation_DP_No_161.pdf).

<sup>6</sup> Available at <https://www.gov.scot/publications/defamation-scots-law-consultation/>.

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- places certain key principles of defamation law on a statutory footing for the first time, including the Derbyshire principle that defamation actions cannot competently be brought by public authorities;
- seeks to prevent defamation actions being brought against “secondary publishers”, i.e. people other than authors, editors or publishers of material containing a defamatory statement;
- restates in modern terms the main defences available in defamation actions, and introduces a statutory defence of publication on a matter of public interest, replacing common law equivalents;
- provides for the abolition of common law verbal injury in so far as relating to injury to feelings, as well as creating statutory equivalents of verbal injury affecting business interests;
- strengthens the powers of the courts in granting remedies in defamation actions;
- introduces a “single publication rule” to avoid the time limit being artificially extended by stale publication of the same material and makes provision to reduce the limitation period within which defamation actions can be brought from three years to one;
- provides for the repeal and re-enactment of key sets of provisions of relevance to defamation proceedings, namely those relating to absolute and qualified privilege and those relating to offers to make amends.

7. Overall, the Scottish Government expects the Bill to result in fewer defamation cases where little is at stake in terms of damaged reputation. This is in line with reports from England and Wales after commencement of the Defamation Act 2013.<sup>7</sup> It is possible, therefore, to expect a similar impact in Scotland, but it must be recognised that the number of court proceedings in defamation are substantially less than those in England and Wales.

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<sup>7</sup> See, for instance, the article available at <https://www.pressgazette.co.uk/higher-defamation-threshold-has-seen-number-of-uk-cases-drop-as-celebs-look-to-privacy-actions-to-fight-libel/>.

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## Costs on the Scottish administration

8. The Scottish Courts and Tribunals Service (SCTS) gave estimates as to the amount of judicial and administrative time and costs involved in defamation cases. The SCTS cannot isolate exact numbers and figures for defamation cases specifically, however, as outlined in the Business and Regulatory Impact Assessment (BRIA), it expressed a general feeling that defamation cases take longer than average cases. Anecdotally, it has been well documented that the numbers of annual reported defamation cases are small, usually in single figures. While the provisions in the Bill are not likely to increase the number of proceedings, there is a general societal trend around the use of electronic communication that means there is a potential for an increase in the number of proceedings.<sup>8</sup>

9. The proposals are unlikely to result in costs to the Scottish Administration other than those associated generally with the enactment of any new legislation. These are, for instance, printing and publication costs and which are regarded as routine running costs rather than being attributable to the Bill.

## Costs on Scottish Courts and Tribunals Service (SCTS)

10. The introduction of a “serious harm” threshold should mean that any case that is spurious or “vanity” in nature does not trouble the court and should result in a saving of the cost and time associated with bringing these actions to court and of defending them.

11. The re-stated “offer of amends” procedure as set out in the Bill should, if taken up as an option by parties, again avoid disputes reaching the courts and therefore save costs and time in the process.

12. Even if cases do reach court, it is likely that the increased clarity and certainty that the Bill provisions bring will make proceedings quicker, with a resultant saving in costs for parties (see above at paragraph 8). In particular, cases that do not meet the serious harm criterion should be filtered out at an early stage. If this could be done at the debate stage of

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<sup>8</sup> See article “Defamation cases fall”, dated 2 June 2017 in the New Law Journal.

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proceedings rather than at proof, there would likely be savings in legal costs in individual cases.

13. In terms of costs, SCTS gave rough estimates of judicial costs based on applying an hourly divisor (which takes into account guidance on allocation of court business, in particular judicial annual leave and training requirements) to overall salary costs, including pension and NI contributions. Staff costs are calculated in a similar way.

14. Applying the criteria above SCTS estimate the current costs per hour of a case to be:

- For an Inner House case = £965;
- For an Outer House case = £312;
- For a Sheriff court case = £238.

15. Whilst these figures are estimates they do give an indication as to how much judicial time costs in a litigation. Of course, these figures do not include running and overhead costs to the courts and also costs to the parties in paying for legal representation.

16. It is possible that initial training on the legislative changes to be brought in by the Bill may be provided to the judiciary. Taken from the BRIA for the Scottish Law Commission report, the average daily cost (as opposed to cost per head) of providing training to the judiciary by the Judicial Institute for Scotland at its premises is estimated to be £913.66.<sup>9</sup> It is anticipated that training in respect of the Bill would likely comprise a “one off” session of no more than one hour, which could be delivered within a half day’s training on other assorted issues not directly related to the Bill.

## Costs on local authorities

17. The Scottish Government does not anticipate any costs related to the proposals to be borne by local authorities. Under the common law public authorities are prohibited from raising proceedings in defamation. This is often referred to as the Derbyshire principle. A local authority is considered to be a public authority for these purposes. Under the current legal

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<sup>9</sup> See [https://www.scotlawcom.gov.uk/files/2415/1316/5437/BRIA - Report on Defamation Report No 248.pdf](https://www.scotlawcom.gov.uk/files/2415/1316/5437/BRIA_-_Report_on_Defamation_Report_No_248.pdf)

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framework, this principle is a matter of the common law. The Bill restates this principle in statutory form and does not seek to extend it. No impact is therefore expected on local authorities as a result of this reform.

## Costs on other bodies, individuals and businesses

### Costs on Scottish Legal Aid Board (SLAB)

18. Currently civil legal aid is made available for defamation and verbal injury cases only in very restricted circumstances in line with a 2010 Direction.<sup>10</sup> Accordingly, implementation of the Bill, which it is hoped will prevent the number of disputes where little is at stake resulting in court actions, is not expected to have any adverse impact on legal aid.

19. The Scottish Legal Aid Board offered its view. It is content that the Bill would not have a significant impact on either the legal aid scheme or the legal aid fund as set out in the BRIA.

### Costs on individuals and businesses

20. The Bill puts forward a package of reforms that does not single out any particular sector or group. Instead, the reforms are capable of impacting upon a broad spectrum of persons or bodies in Scotland involved in the communication to a third party of statements about some identifiable person or body.

21. Recommendations reflected in the Bill are intended to result in a reduction in resort to court action because of increased clarity in comparison with the current law, for example in relation to the application of privilege and the defences of truth and public interest, and the liability of secondary publishers. The introduction of the “serious harm” threshold should reduce the number of spurious or “vanity” cases in court and it is hoped that the “offer of amends” procedure set out in the Bill will also mean that fewer disputes result in court actions proceeding to final disposal. One solicitor, in evidence to the Justice Committee, estimated the cost of raising proceedings and obtaining a final determination in the Sheriff Court would

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<sup>10</sup> See <https://www.slab.org.uk/solicitors/legal-aid-legislation/legislation/the-legal-aid-scotland-act-1986/defamation-or-verbal-injury-direction-2010/>

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be in the region of £25,000, but that having a case proceed to debate stage would cost £7,000.<sup>11</sup>

22. No significant cost implications are anticipated to result from the commencement of the Bill. It is likely that the following sectors will be most impacted by the reform of defamation law:

- Writers, journalists, broadcasters, online commentators;
- Media organisations (broadcast, print, online);
- Internet intermediaries (for example, search engines, social media platforms, blogging hosts);
- The publishing industry;
- Private individuals, either when protecting their own reputations in court or as consumers of media or users of social media;
- Legal professionals – such as solicitors, advocates and sheriffs.

23. Anticipated costs are likely to be borne by firms in making their staff aware of the changes to the law affected by the Bill. An initial training and familiarisation cost, principally for solicitors but perhaps also for other professionals in relevant fields, would be likely. The costs would likely be small, and would be incurred only on first implementation. Any such costs are expected to be subsequently offset by savings made under the Bill. For example, one leading provider of legal training charges an average of £255 for a 3-hour course that would likely be sufficient to cover the reforms addressed in the Bill.

24. Generally, familiarisation costs of any change in the law will be incurred by those providing training within legal firms. However, the provision of such training is typically already provided for within a firm's budget, with the cost of maintaining solicitors' legal knowledge being covered by the firm's fee earning income. Scottish solicitors are required to undertake 20 hours of Continuing Professional Development each year and familiarisation training on changes to the law would typically count towards

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<sup>11</sup> See Column 7,  
<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11599>.

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this figure. It is therefore likely that initial training in relation to this Bill would not represent a significant additional cost to law firms.

25. As referred to in the BRIA for the Scottish Law Commission report, the Scottish Newspaper Society (SNS) informed the Commission that no formal system of continuing professional development exists in the news publishing industry. Staff training is therefore generally undertaken on an ad hoc and bespoke basis. In larger companies this might be undertaken in conjunction with their legal representatives. Approaches would vary from company to company, but given the nature of the legislation, if enacted as contained in the Bill, SNS has advised that it would not expect extensive re-training to be necessary, and that costs would be minimal. The SNS also undertook to organise free training sessions for small, independent companies, as a service to its members, with those companies being liable only for associated travel costs.

## Summary of costs and savings

26. The table below summarises the potential costs and savings based on a number of assumptions identified in this Memorandum. These costs and savings are indicative only.

<b>Annual costs and savings for the Scottish Administration</b>	
SCTS costs through judicial training	£913.66 per day
Minus SCTS savings (based on a case disposed at an earlier debate stage in proceedings and that would have required a 1-day proof lasting 5 hours in the Sheriff Court)	£1,190 per case
<b>Total</b>	(£913.66 if delivered as a one day training session) <sup>12</sup>  Minus (annual number of notional cases in Scottish Courts as described above multiplied by £1,190)

<sup>12</sup> See the Judicial Institute for Scotland's Annual report for an example of how training is delivered to the judiciary (available at <http://www.scotland-judiciary.org.uk/Upload/Documents/JudicialInstituteForScotlandAnnualReport20172018.pdf>).

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	= Estimated to be cost neutral
<b>Annual costs and savings for solicitors' firms and clients</b>	
Training costs (assuming one 3-hour course delivered by an external agency)	£255 per person
Litigation savings for firm / client (based on a case disposed at an earlier debate stage of proceedings)	£18,000 per case
<b>Total</b>	<p>(£255 multiplied by annual number of persons receiving training)</p> <p style="text-align: right;">Minus</p> <p>(annual number of notional cases as described above brought by firm multiplied by £18,000)</p> <p style="text-align: right;">= Estimated to be cost neutral</p>



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[www.scottish.parliament.scot](http://www.scottish.parliament.scot)

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