

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

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Defamation and Malicious Publication (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.

Outline of Bill provisions

3. The Defamation and Malicious Publication (Scotland) Bill implements the Scottish Law Commission's *Report on Defamation* which was published in December 2017. It brings together key elements of the current law of defamation from both common law and statutory sources and makes a number of changes to clarify, simplify and modernise the law as well as to strike a more appropriate balance between freedom of expression and the protection of individual reputation.
4. The Bill is comprised of 3 parts and 1 schedule.
 - Part 1 – Defamation: makes provision on aspects of defamation including the actionability and restrictions on the bringing of proceedings; restates the main defences to a defamation claim; sets out the extent of absolute and qualified privilege as well as

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the offers to make amends procedure; and covers some aspects of jurisdiction;

- Part 2 – Malicious Publication: sets out new statutory wrongs relating to certain types of malicious publication; makes general provision in respect of damages; and abolishes the common law on verbal injuries;
- Part 3 – details miscellaneous and general provisions relating to Parts 1 and 2, including the remedies available through the courts and the rules on limitation of actions.

Rationale for subordinate legislation

5. The Scottish Government has had regard, when deciding where and how provisions should be set out in subordinate legislation rather than on the face of the Bill, to the need to:

- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- make proper use of valuable parliamentary time;
- take account of the likely frequency of amendment;
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation; and
- anticipate unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

6. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power was taken in the Bill and, where relevant, why the selected form of parliamentary procedure has been considered appropriate.

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Delegated Powers

Section 2(6) – Prohibition on public authorities bringing proceedings

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

7. Section 2(6) provides the Scottish Ministers with the power, by way of regulations, to specify exceptions to the prohibition on public authorities bringing defamation proceedings in section 2(1). This power allows the Scottish Ministers to prescribe new exceptions as to persons or descriptions of persons who are not to be treated as a public authority for the purpose of section 2. The regulations are to be the subject of consultation by the Scottish Ministers with such persons as they consider appropriate.

Reason for taking power

8. The power in section 2(6) enables the Scottish Ministers to take account of persons or organisations who may in the future carry out functions made up of a number of different aspects, only one aspect of which is exercising functions of a public nature. It is intended to ensure that the scope of the prohibition on persons or organisations, classed as public authorities in terms of section 2(2), prevented from raising proceedings is not unjustifiably wide. This is to ensure that the right balance is maintained between allowing criticism of public authorities whilst not unduly restricting others undertaking only some public functions from raising proceedings to protect their reputations.

Choice of procedure

9. Considering the significance of the provision that could be made under this power, it is considered that the affirmative procedure together

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with a requirement for consultation affords an appropriately high level of scrutiny.

Section 3(6) – Restriction on proceedings against secondary publishers

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

10. Sections 3(6) enables the Scottish Ministers, by way of regulations, to modify subsections (3) and (4) to add, amend or remove activities or methods of disseminating or processing material which would result in a person being treated as an author, editor or publisher.

Reason for taking power

11. The power in section 3(6) enables the Scottish Ministers to future-proof the Bill to allow for changing activities and methods of communication, for example to take account of the rapidly evolving technological methods by which society communicates including those which are presently unknown.

Choice of procedure

12. Considering that regulations made under this power would alter primary legislation, and could alter the liability for certain types of activity or dissemination, it is considered that the affirmative procedure together with a requirement for the Scottish Ministers to consult such persons as they consider appropriate affords an appropriately high level of scrutiny.

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Section 4(1) – Power to specify persons to be treated as publishers

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

13. Section 4(1) provides for Scottish Ministers to make regulations specifying categories of persons to be treated as publishers for the purposes of defamation proceedings who would not otherwise be classed as authors, editors or publishers, nor as employees or agents of such persons. Section 4(2) provides that any provision made by regulations in section 4(1) may also provide for a defence as specified by the Scottish Ministers.

Reason for taking power

14. Regulations made under this section are intended to enable the Scottish Ministers to take account of future circumstances which are not yet known where a new category of secondary publisher emerges who is in a position to cause harm but would not otherwise be subject to defamation proceedings.

Choice of procedure

15. Considering that regulations made under this power could alter the persons who may be subject to proceedings as publishers, it is considered that the affirmative procedure together with a requirement for consultation affords an appropriately high level of scrutiny.

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

Section 34(1) – Provision of information society services

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

16. Section 34(1) enables Scottish Ministers to make regulations which will specify the circumstances in which persons providing information society services are, or are not, to be held liable in defamation proceedings or proceedings under Part 2 of the Bill. These regulations require detailed provision, the effect of which will be to exclude providers of such services from having defamation proceedings brought against them as required by Directive 2000/31 EC of the European Parliament on electronic commerce.

Reason for taking power

17. Regulations made under this section are intended to effect compliance with the Directive. The Directive sets out certain requirements which must be implemented in national law in relation to the liability of information society services (which include internet providers) and which are directly applicable to aspects of the law of defamation and malicious publication. The detail is of such a level that it is not appropriate to be included on the face of the Bill.

Choice of procedure

18. The regulations are to make detailed provisions in compliance with the Directive and it is considered uncontroversial in nature. In the circumstances, the Scottish Government considers that it is appropriate for the regulations to be subject to the negative procedure.

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Section 38(1) – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative (unless adding to, replacing or omitting any part of the text of an Act, in which case affirmative)

Provision

19. This section enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision for the purposes of, in connection with or for giving full effect to the Bill.

Reason for taking power

20. This power is necessary to allow flexibility when commencing provisions in the Bill or otherwise to address unforeseen circumstances which may arise. While the Scottish Government has given careful consideration to the provisions of the Bill, this power is considered necessary to ensure that any unexpected issues which require further changes are able to be dealt with effectively so as the purpose of the Bill is not inadvertently obstructed.

Choice of procedure

21. Regulations made under this section which contain a provision which adds to, replaces or omits any part of primary legislation are subject to the affirmative procedure. Otherwise, regulations made under this section are subject to the negative procedure. This approach is typical for ancillary powers of this type.

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Section 39(2) – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no further procedure

Provision

22. This section enables Scottish Ministers, by regulations, to appoint the day or days on which the provisions of the Act (other than sections 36, 37, 38, 39 and 40) come into force. Such regulations may include transitional or transitory provision, or the saving of repealed or amended provisions, as well as to make different provision for different purposes.

23. This section also enables Scottish Ministers to specifically reference the actual date on which section 32 of the Bill comes into force in section 18A of the Prescription and Limitation (Scotland) Act 1973.

Reason for taking power

24. The Scottish Government considers it appropriate for the substantive provisions of the Bill to be commenced at such a date as Ministers appoint to be suitable. It is usual procedure for such commencement provisions to be dealt with by subordinate legislation.

25. The Scottish Government considers it appropriate to amend section 18A of the Prescription and Limitation (Scotland) Act 1973 by specific reference to the date on which section 32 of the Bill comes into force for the purposes of clarity and accessibility of the legislation. This is to make this provision as accessible as possible to practitioners and other end users.

Choice of procedure

26. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. Commencement regulations bring into force provisions whose underlying policy has already been considered by the Parliament during the passage of the Bill. Any regulations under this

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section will be laid before the Parliament as soon as practicable after being made.

Schedule, paragraph 17(1) – Reports and Summaries etc. by Scottish Ministers’ designees

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

27. Paragraph 17(1) of the schedule confers powers on the Scottish Ministers to make provision for additional statements to be added to Part 2 of the schedule which will attract the qualified privilege protections set out in section 11(3). Scottish Ministers are enabled to do so by designating additional bodies, officers or other persons who issue adjudications, reports, statements or notices in respect of which such additional qualifying statements can be made.

Reason for taking power

28. It is appropriate for the Scottish Ministers to have flexibility to consider and respond to changing operational circumstances in the issuing of statements and the like on a worldwide level, which may result in the need to provide for other types of statement to be eligible for qualified privilege protections.

Choice of procedure

29. This power relates to the practical operation of qualified privilege at the level of fine detail. The extent of this power is to add a limited extra category to the application of qualified privilege rather than recasting it entirely. In light of these factors, the Scottish Government considers that negative procedure provides an appropriate level of parliamentary scrutiny in the exercise of this power.

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