

Justice Committee

Defamation

Supplementary written submission from the Scottish Law Commission

I was grateful for the opportunity to attend the Justice Committee on 23 January along with our project manager, Graham McGlashan, to give a briefing to members on our recently published Report on Defamation. I hope that Committee members found the session useful. I would repeat here the offer I made in evidence for us to come along to the Committee again to offer further assistance should the Committee decide to conduct further work in this area.

Towards the end of the meeting, the Committee asked for further information on the definition of public authorities provided for in our draft Bill, including whether universities would be covered. I am happy to follow up on that issue now.

Section 2(1) of the draft Bill that accompanies our Report provides that a public authority may not bring defamation proceedings. As I explained in evidence, this places what is known as the common-law *Derbyshire* principle on a statutory footing. This proposed reform was supported by stakeholders, including the Libel Reform Campaign.

Section 2(2) states that a person is a “public authority” if the person’s functions include functions of a public nature. This definition was chosen as it reflects a similar tried and tested formulation used in section 6(3) of the Human Rights Act 1998.

Section 2(3) provides that where a non-natural person (a) has as its primary purpose trading for profit or is a charity or has purposes consisting of only one or more charitable purposes and (b) is not owned or controlled by a public authority, then it is not a public authority by reason only of its carrying out functions of a public nature from time to time. Subsections (4) and (9) provide further definitions relevant to this provision (e.g. what is meant by “owned or controlled by a public authority”, what is a “charity” and “charitable purposes”).

Section 2(5) clarifies that nothing prevents an individual from bringing defamation proceedings in a personal capacity (as distinct from the individual acting in the capacity of an office-holder).

From these provisions it can be seen that the question whether a particular body is a public authority for the purposes of section 2 of the draft Bill will ultimately be a question for the courts to resolve on the basis of the particular facts of the case. The details of the constitution, structure and framework of the particular body may have to be looked at closely, along with its purposes, the nature of its activities and the extent to which it is carrying out functions of a public nature. So far as we have been able to ascertain there is no definitive ruling by any UK court on the question whether a university is a public authority for the purposes of the Human Rights Act, although

it was conceded in one case (without the point being argued) that the University of Southampton was subject to the Act¹.

We did not receive any responses to the consultation on our draft Bill from or on behalf of the universities.

In one of the leading cases in this area, Lord Nicholls of Birkenhead had this to say on the factor-based approach which the courts take in an HRA context –

“What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant functions the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.”²

It may also be worth recalling the regulation-making power provided for in section 2(6) of the draft Bill: this could be used by Ministers to specify universities as persons not to be treated as a public authority for the purposes of section 2(1).

I hope that members find this additional information of assistance but please do revert to us if there is anything more we can provide the Committee with.

Lord Pentland «Name»
31 January 2018

¹ *R. (on the application of Ben-Dor) v University of Southampton* [2016] EWHC 953 (Admin); [2016] E.L.R. 279

² *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 at paragraph 12.