Justice Committee

Defamation

Written submission from Scottish PEN

Defamation law in Scotland is out-dated and inadequate and in need of reform, to ensure that free expression is protected across Scotland. As the law has been largely untouched since 1996, it offers no clear guidance or protections for the millions of people who use online platforms to express themselves, source information and publish content. Further to this the existing laws have insufficient protections for journalists, scientists, academics, activists, whistle-blowers and social media users, while empowering wealthy and powerful interests to control and stifle critical but necessary speech.

Scottish PEN would like to applaud the work of the Scottish Law Commission (SLC) on their work to date on reform. The draft bill produced in December 2017 represents a significant way forward and a robust foundation upon which to build a law that is fit for purpose in the modern age.

The following reforms outlined by the SLC are vital to protecting free expression:

- The inclusion of a serious harm threshold;
- Requiring the defamatory statement to be communicated to a 3rd party;
- A public interest defence;
- The implementation of a single publication rule;
- Reducing period within which a defamation action can be brought to 1 year;
- Barring public authorities from bringing defamation actions, by bringing the Derbyshire Principle into law;
- An honest opinion defence.

These reforms are significant and necessary steps towards modernising Scots Law.

The inclusion of a serious harm threshold

For too long, defamation law in Scotland has enabled pursuers to bring actions based on trivial issues or solely to silence criticism. A serious harm threshold is vital to dissuade these sorts of cases as the lack of said threshold has enabled the mere *threat* of a defamation action to chill freedom of expression. This, often manifesting through the sending of legal letters, has had a significant impact in Scotland. Scottish PEN has spoken to a number of editors and journalists who have confirmed that the threat of defamation action has resulted in pieces being spiked or severely rewritten prior to any formal proceedings being brought. This was evidenced in the threat brought against National Collective in 2014 by Vitol CEO, Ian Taylor which resulted in their website being shut down, for coverage based on publically-available source material. Without a serious harm threshold, these threats can be sent to publishers at very little expense or risk on behalf of the pursuer, with no public scrutiny or independent safeguards. In this manner, the *perceived* defamatory nature of the content in question is enough to remove content, shutdown websites and silence free expression.

While we believe that corporations should not be able to bring actions, without this reform, we believe it is vital that the serious harm threshold is in place for companies as well as private individuals. A threshold that requires private companies to demonstrate serious financial loss is an important improvement to the law that ensures private companies cannot use their legal resources to stifle legitimate criticism from customers or broader civil society, without there being a significant impact on their finances.

The threshold can also encourage robust journalistic practice as it positions prompt correction and a public apology as mitigating factors that can be shown to limit the harm caused to the pursuer, as evidenced by the case in England, *Cooke v MGN Ltd* [2014].

While there may be concerns that by bringing this in line with the Defamation Act 2013, a small number of pursuers may seek to commence their proceedings in another jurisdiction, thus weakening the Scottish legal system, there is no evidence to support this claim. In the absence of any evidence, this is an insufficient justification to disregard this vital threshold that establishes robust free expression protections in Scotland.

There have also been concerns that the inclusion of a preliminary hearing to establish whether this threshold has been met for the proceedings to commence may add unnecessary time and expense to all defamation proceedings. However, where the harm caused by the defamatory statement is easily deemed to be serious, the preliminary hearing would be significantly straightforward and limited in terms of time and expense, while ensuring that marginal cases are scrutinised and cases that fail to reach this threshold do not make it to court at all.

The creation of a public interest defence

The absence of a public interest defence places undue pressure and restrictions on media outlets, activists, scientists and academics. To date, Scots Law has depended on the Reynolds test, as outlined in the House of Lords ruling on *Reynolds v Times Newspapers Ltd.* However, this test is far too narrow as it is framed around journalistic processes alone. However, NGOs, researchers, scientists, bloggers and social media users are increasingly publishers of public interest material, and there is a level of uncertainty as to whether they can enjoy the protections outlined in the Reynolds test. Any defence which is uncertain will chill public interest discussions as many publishers would rather settle claims out of court or avoid publication than face the legal uncertainty of mounting a complex and unpredictable defence.

An example of the need for a robust public interest defence is the ongoing case brought against Scottish Green Party MSP, Andy Wightman by Wildcat Haven Enterprises CIC for a blog he wrote asking questions as to their business practices and financial background. This case is a significant threat to public interest reporting, demonstrating how defamation law as it stands can silence robust but legitimate criticism and scrutiny. Depending on a public interest defence, as opposed to a narrow list of criteria, will expand the landscape within which public interest reporting can help inform the public and strengthen transparency and accountability.

Freedom of expression has been shown to be of particular importance as a means of ensuring political accountability, advancing understanding, and achieving personal fulfilment. This is not because everything that people say is true, but because an open society tends towards noisy imperfection more than silence. A public interest defence would allow the publication of speech on matters of public interest in cases where the demonstration of truth may be inappropriate. This is a principle that recognises that the public interest may be best served by the publication of uncertain information, leaving the subject of such information to respond publicly.

Single Publication

As it stands Scots Law depends on the multiple publication rule, which allows for a perpetual resetting of the limitation clock for pieces of content that require only a single act of publication by the author. This rule is especially problematic for online expression as it establishes the legal principle that the sharing or retweeting of a defamatory statement, or a hyperlink containing said statement can restart the time within which an action can be brought. Although a page from an Internet archive may be downloaded many times, it is self-evidently a single 'publication', because it derives from a single computer file or entry made on a single occasion. This is how ordinary people conceive of the process and the law should not confound common sense by counting retweets or clicks on archive links as a new publication. Due to the nature of the Internet, which is based on sharing information free from central editorial control the multiple publication rule makes indefinite renewal of liability possible online.

A single publication rule will require substantial changes to be made to the original statement before it would restart the time within which an action can be brought. This would better reflect the nature of expression in the digital age, where content can be shared in the same format by different users independent of the original post. It is also for this reason that we support the SLC's recommendation to reduce the period of time within which a defamation action can be brought to one year, down from three.

Further reforms not included in the SLC's draft bill but are worth pursuing include:

Restricting the ability of corporations to bring defamation proceedings

The law of defamation exists because defamatory statements can cause psychological damage to the victim. Corporations, as non-natural persons, do not have feelings and therefore cannot suffer psychological damage. In contrast, in recent years corporations have been behind some of the most notorious recent defamation cases that have caused public outrage at the state of the law of libel in England and Wales. As it stands, there are already a number of economic delicts in Scots Law that enable private bodies to protect themselves, including but not limited to actions against those encouraging others to break contracts and the law of confidence which establishes remedies for the publication of private information about private business. Private companies are also able to use their free expression to counter negative press and publications.

Corporations can use defamation laws to silence critics and use their financial resources to make defending a claim prohibitively expensive. This inequality of arms represents a significant threat to free expression, with legal protections or representation out of reach for the majority of people in Scotland. Without reform, defamation laws remain a powerful tool for the wealthy to attack critics and intimidate whistle blowers into silence.

This will also equalise the legal principle in place for authorities that deliver public services. As the Derbyshire Principle outlaws public bodies from bringing actions, by restricting private bodies from bringing defamation actions, it will ensure that individuals whose public services are delivered by private corporations are as protected as those whose services are delivered by public authorities. Access to justice or the realisation of the fundamental right to free expression should not be reliant on the organisational structure of the body who delivers certain public services.

Amendments to categories should be made through primary legislation

Sections 2, 3 & 4 of the SLC draft bill outline the criteria for membership of a number of different relevant bodies: s.2 (public bodies), s.3 (definitions of author, publisher and editor) and s.4 (definition of publisher). Within each section is a subsection that enables ministers to make regulations that modify these definitions. While this ensures the bill remains flexible enough to represent changing situations such as technological advancements, we are concerned these processes will not be afforded due independent scrutiny. The affirmative procedure will ensure a certain level of accountability, but we believe this process should be made through changes to primary legislation. This will enable a full and robust process of independent scrutiny, while also ensuring the face of the bill reflects Scots Law related to defamation law in its entirety.

Defamation of the dead

Measures that would allow proceedings to be brought on behalf of a deceased person would fundamentally alter the nature of defamation and we support the SLC's decision to omit this from the draft bill. It would discourage investigative journalism and historical research and could have prevented the reporting of the abuse perpetrated by Jimmy Saville (reporting that was thwarted during Saville's lifetime by his reliance on legal threats against journalists and his victims). We recognise that distress can be caused to the relatives of victims of a crime or an accident. However, such distress is best remedied through press standards, regulation and editorial codes. Existing laws that prevent harassment could also be used to prevent persistent intrusion into grief.

Protecting against unjustified threats

The Intellectual Property (Unjustified Threats) Act 2017 amended the law on patents, trade-marks and registered design rights to discourage frivolous litigation based on "unjustifiable threats" of legal action. As the SLC report underscores, economically powerful litigants can misuse the law of defamation for identical purposes. We propose any reform should mirror this approach, tailored to the context of defamation

proceedings. While the serious harm threshold will go some way to addressing the risk of unfounded threats of defamation proceedings, we believe making specific provision for unjustifiable threats would represent a powerful additional safeguard to discourage litigants from launching or threatening to launch vexatious actions. Mirroring this approach and introducing a parallel “unjustifiable threats” provision to defamation reform would improve the proposals made by the SLC. Such a provision would not inhibit well-founded claims, while empowering the court to address the wrong of making groundless threats of defamation proceedings.

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