Law Society of Scotland

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# Consultation Response

## Defamation

April 2019

## Introduction

The Law Society of Scotland is the professional body for around 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We welcome the opportunity to consider and respond to the We responded to the Scottish Law Commission's consultation on this topic in 2016[1] and the call for evidence on the draft Defamation and Malicious Communications Bill in 2017.[2] This response has been prepared on behalf of the Law Society by members of our Obligations Law Sub-Committee with input from practitioners who specialise in defamation law. We have the following comments to put forward for consideration.

## General remarks

As we set out in response to the Scottish Law Commission's call for evidence, we support the overarching aim to modernise the law of defamation in Scotland. However, we identified a number of issues with the drafting of the Bill along with a number of policy concerns, which are reflected in our responses to this consultation also. In particular, we are concerned that the Bill does not provide for sufficient levels of parliamentary scrutiny in terms of delegated powers. The signposting of the Bill could also be improved to facilitate accessibility of the legislation.

[1] https://www.lawscot.org.uk/media/891709/obl-written-evidence-scottish-law-commission-discussion-paper-on-defamation.pdf

[2] https://www.lawscot.org.uk/media/360144/obl-law-society-of-scotland-response_-slc-call-for-evidence-on-draft-defamation-and-malicious-communications-scotland-bill-2017-002.pdf

## Response to questions

**Question 1**

**Do you agree with the analysis contained in the Commission's Business and Regulatory Impact Assessment (BRIA)? If not, please explain your reasons for disagreement.**

☐ **Yes**

☐ **No**

**Please explain your answer**.

We have no comment on this question

**Question 2**

**Do you consider defamation should be defined in statute?**

☒ **Yes**

☐ **No**

**Please explain your answer.**

We observe that it seems anomalous to codify the law of defamation but retain the common law test when all other common law rules are specifically abolished. It would be better to transpose the existing common law test from *Sim v Stretch*[3] into the legislation, with an explicit reference to the continuing relevance of the existing jurisprudence if this is considered necessary. While we do not consider that the lack of a statutory definition has proved problematic to date, this would make the law more accessible as it would all be found in one place. At the same time, this approach would allow us to retain the benefits of existing jurisprudence which gives greater detail to the way in which the test should be interpreted.

**Question 3**

**Should a statutory threshold test of serious harm like section 1(1) of the Defamation Act 2013 be introduced?**

☐ **Yes**

☒ **No**

**Please explain your answer.**

[3] [1936] 2 All ER 1237

Section one introduces a “serious harm” test which we note follows the example of the English legislation. We would be interested to see further evidence of the necessity of introducing this test in Scotland as we are not aware that there is a problem with vexatious litigation at present.

There is a balance to be found - as discussed in *Jameel (Yousef) v Dow Jones & Co Inc.*[4] – between the right of freedom of expression as found in Article 10 of the European Convention on Human Rights and the right of protection of individual reputation. From an access to justice perspective, our concern would be that a threshold would deter legitimate claims. There may also be practical challenges around preliminary hearings to assess whether significant harm has occurred.

A pragmatic approach around the deployment of existing court procedures to deter vexatious claims may be the most appropriate response, and we argued similarly in response to the Courts Reform (Scotland) Act 2014 and its introduction of a permission stage for judicial review at the Court of Session, again because we did not see evidence of vexatious claims being brought in our jurisdiction.

**Question 4**

**If a statutory test is adopted, should we define what constitutes ‘serious harm’?**

☒ **Yes**

☐ **No**

**Please explain your answer.**

The concerns highlighted in response to question three may be alleviated (at least to some extent) if the serious harm threshold is defined in such a way as to guard against vexatious litigation without presenting a hurdle to legitimate claimants.

**Question 5**

**Do you have any suggestions about would should constitute ‘serious harm’?**

We have no comment on this question.

[4] [2005] EWCA Civ 75.

**Question 6**

**Legal persons which have as its primary purpose trading for profit may have a reputation that they wish to protect. Do you agree that such bodies should be able to raise actions in defamation?**

☒ **Yes**

☐ **No**

**Please explain your answer.**

We are aware of developments in defamation law reform in Australia, which have limited the rights of profit-making bodies in defamation actions.[5] The issue of whether such bodies are able to bring actions for loss of reputation raises a number of issues which merit further consideration. A significant requirement of access to justice is equality of arms, and actions brought by profit-making bodies could risk this principle, as was found in *Steel and Morris v. United Kingdom*[6] in which the European Court of Human Rights stated, "At the time of the proceedings in question, McDonald's economic power outstripped that of many small countries (they enjoyed worldwide sales amounting to approximately $30 billion in 1995), whereas the first applicant was a part-time bar-worker earning a maximum of £65 a week and the second applicant was an unwaged single parent. The inequality of arms could not have been greater."

We know, however, that many profit-making businesses, however, are either SMEs (under 250 employees) or micro-businesses (under 10 employees) and that defamatory statements about a profit-making company could generate significant economic harm. The Australian approach has been to remove title for any profit-making body save a micro-business and this could be a means to achieve more effective equality of arms. Equally, the availability of legal aid (the lack of which was found to breach human rights in *Steel and Morris*) could be a means to address such inequality.

**Question 7**

**Damage to the reputation of such legal persons may not take the form of financial loss. If the Scottish Government were to take forward (and the Scottish Parliament agreed to) the Commission's recommendation that such bodies are allowed to continue to raise proceedings in defamation, do you agree that these types of legal persons should face a threshold test of showing that serious harm to their reputation has caused (or is likely to cause) financial loss?**

☒ **Yes**

☐ **No**

[5] For instance, *Corporations' right to sue for defamation: an Australian perspective*, David Rolph, Ent. L.R. 2011, 22(7), 195-200

[6] [2005] E.M.L.R. 15

**Please explain your answer.**

Introducing a serious harm test in the case of non-financial loss to legal persons could help protect freedom of expression. It could mitigate against the potential chilling effect which might result from a well-resourced legal person threatening legal action, particularly in a situation where there was inequality of arms.

**Question 8**

**If legal persons were allowed to continue to raise proceedings in defamation subject to a threshold test, should this be further limited to allow only micro enterprises to continue to raise proceedings?**

☐ **Yes**

☒ **No**

**Please explain your answer.**

We do not consider that the test needs to be limited only to micro enterprises as long as the pursuer can prove serious harm and robust defences operate so that the defender is not in practice prevented from exercising their right to freedom of expression.

**Question 9**

**While the intention to state the Derbyshire principle in statute was widely welcomed, a number of responses questioned the definition of 'public authority' used in the Commission's draft Bill, with some uncertainty about whether a charity or even a doctor could be caught by the definition. Is there anything captured by the definition that is not by the Derbyshire principle?**

From a policy perspective we would support the express inclusion of the "Derbyshire principle" in statute. Practitioners confirm the view expressed in the Draft Explanatory Notes that the principle is already recognised in Scots law and we believe it would be helpful for this assumption to be placed on a statutory footing.

However, we do not believe that the definition of "public authority" provides clarity. The idea that "a person is a "public authority" if the person's functions include functions of a public nature" could lead to "public authority" being interpreted very widely indeed. It could even potentially extend to, for example, public sector workers such as nurses or civil servants.

We do not believe that this is what the SLC intended and consider that the definition should be amended accordingly. Indeed, definition may not be strictly necessary as we consider that the term "public authority" could usually be understood without requiring further definition.

It is also not clear whether it is the intention to exclude organisations such as universities, social housing providers etc from being able to bring defamation actions. As they operate functions of a public nature it seems they would be excluded under the current drafting of s.2(2). In terms of s.2(3)(a) these sorts of organisations do not have a primary purpose to trade for profit so could fail to meet the requirements of s.2(3)(a)(i) and may have arguably some purposes which are non-charitable (eg in the case of universities the recruitment of fee paying students) despite being charities, so would not be captured by s.2(3)(a)(ii). Therefore, one interpretation would be universities, social housing providers and other "public authorities" with mixed functions cannot bring defamation proceedings. Taking universities as an example, Scottish universities have a good reputation in terms of international recruitment and world class research. They are becoming global brands and are increasingly seeking to proactively manage their reputations. To the remove the ability to bring defamation proceedings would be detrimental to this. We consider that s.2(3)(a) should be amended accordingly.

Furthermore, we consider that in the case of individuals, at least, there should be recognition of the detrimental impact on public individuals in the private sphere. For example, false statements about an elected representative could have a significant impact on their private life, while being of little relevance to people's assessment of their ability or suitability to perform their public functions. It seems unjust that public figures should have no remedy for wrongs which have a detrimental effect on them in a private context, even if there are sound public interest justifications for barring them from bringing defamation actions on the basis of their public "personality".

While we recognise that certain categories of person could be excluded from the definition of public authority (and therefore able to bring defamation proceedings) through regulations made under s.2(5), we do not consider that this is a satisfactory solution to the problem.

Furthermore, s.2(5) leaves too much discretion to the Scottish ministers. It would be preferable to consult on the list of exclusions and list these in a schedule, or at least to set criteria for the persons (legal or natural) who could be excluded under such regulations.

**Question 10**

**Conversely, is there anything not captured by the definition that is caught by the Derbyshire principle?**

We are not aware of any situation which is caught by the Derbyshire principle and would not be included within the scope of the new definition.

**Question 11**

**Should the Derbyshire principle be recast so that private companies delivering public functions are not able to raise an action in defamation?**

☐ **Yes**

☐ **No**

**Please explain your answer.**

On the one hand, we consider that where a private company performs a public function, for example, when it does so as a one-off contract performance or as a small element of its overall activities, then it should be allowed to bring an action in defamation to protect its reputation. However, in a situation where a particular public function was effectively outsourced to a company, or where work for public authorities formed the large majority of a private firm's work, it might not be reasonable for that company to be able to bring an action for defamation. Similarly, we do not consider that a private company in which a public authority was the sole or even a primary shareholder should be permitted to bring a defamation action.

**Question 12**

**Public authorities are barred from raising proceedings in defamation under the Derbyshire principle, but are able to fund proceedings brought by an individual in their employment. Do you agree that public authorities should continue to be able to meet the expense of defamation proceedings in this situation?**

☒ **Yes**

☐ **No**

**Please explain your answer.**

The answer to this question depends to some extent on the definition of public authority – see further the concerns we outline in response to question 9. We note that an individual would only be able to raise a competent action if they have personally been defamed. We see no reason why a public authority should be prevented from meeting the expense of defamation proceedings (although we are not aware of many situations where this would be likely to occur in practice) where this would be in the interests of justice and is within the scope of their remit and purpose. It could, for example, be appropriate for a person seeking to bring a defamation case to receive legal aid or be funded by a charity (if charities were to be caught within the scope of public authority) where they happened to be employed by the Scottish Legal Aid Board or charity in question. However, this should not extend to cases where the public authority would effectively be bringing a defamation case "by the back door".

**Question 13**

**Do you agree that a new action of unjustified threats is necessary over and above the recommendations made by the Commission in their Report?**

☐ **Yes**

☐ **No**

**Please explain your answer.**

We have no comment on this question.

**Question 14**

**Do you agree that the definitions of author, editor and publisher in section 3 of the draft Bill contained in the Commission's Report will remove liability for secondary publishers?**

☐ **Yes**

☐ **No**

**Please explain your answer.**

We do not think that the title of section 3 is helpful.

Firstly, s.3(1) defines the categories of persons against whom a defamation claim can be brought (presumably as they are identified as having primary responsibility). The heading is therefore misleading as it is only at s.3(3) that secondary publishers are dealt with.

In confining the persons against whom a statement can be brought to authors, editors, publishers and the employees or agents of authors, editors or publishers who have responsibility for the statement's content of the decision to publish it, s.3(1) appears to exclude many of the individuals against whom a claim might otherwise be brought under s.1. We are not sure if the SLC intended to limit the scope of those against whom action may be brought in this way but our reading of s.3 is that this is the effect of the current drafting.

Furthermore, we are concerned that the definitions of author, editor and publisher are not sufficiently clear.

Definition of author: it is not clear exactly how far the concept of author extends. For example, would it include someone who posted a link to a newspaper story containing defamatory statements, or indeed a comment on the story itself from which it was unclear whether the individual agreed with the defamatory statements contained in the original piece? Similar questions could be raised regarding a person who reshares (or eg retweets) social media content originally generated by another party, or even the author of an algorithm in circumstances where the algorithm selects and publishes particular materials or content.

Definition of editor: it is not apparent who is intended to be caught within the scope of the definition from a policy perspective, nor is the drafting sufficiently clear to provide legal certainty.

Definition of publisher: we do not think that definition of publisher is sufficient. For example, a company providing goods or services might circulate customer/client updates or newsletters, have a twitter account, or publish a blog on its website. While they would not be regarded as a commercial publisher as defined in

s.3(2) they would be issuing the material containing the statement in the course of their business and it is difficult to see why a claim should not be brought against them if they made defamatory statements.

Even if the definition were to be confined to commercial publishers, it is not clear whether for example an individual with say a YouTube channel with over 100,000 followers (not uncommon) receiving YouTube royalties would be considered a commercial publisher. We anticipate that there will be many examples similar to this where it would be difficult to ascertain whether a person was a “commercial publisher” for the purposes of the act.

The idea of “secondary publishers” could suggest a different category to that which is intended, particularly in the context of social media where a story may be shared (for example on Facebook or Twitter), increasing the circulation of the initial text but with neither authorship nor editorial functions attaching.

We note that the categories listed in s.3(3) are those deemed “secondary publishers” under the existing common law. All of these categories perform a function in the publishing process but without exercise control over the content. In other parts of the Bill, modernisation of the law includes modernisation of terminology. We support this approach and suggest that an alternative term - perhaps something along the lines of “disseminators” – could be used which would be more in line with modern technology.

Similarly, guidance on how the law would apply to those who select material to replicate or publicise with the intention that it should reach a wider audience could be helpful, particularly in an online context.

The SLC has noted that the position on internet intermediaries should be settled at a UK level but the proposed legislation would nonetheless apply to online issues and as drafted the Bill leaves a number of questions which are likely to arise in an online context unanswered. For example, it is unclear what the status of a social media post, for example sharing a story with a comment attached, would be. Similarly it is not clear what would happen to private emails which were later published without the author’s consent. We note that s.5 of the English Defamation Act succeeds in providing a little more guidance and framework for this type of “secondary” publisher and it is not clear why the same cannot happen here.

**Question 15**

**Do you agree that the regulations made by Scottish Ministers under these sections and which will be subject to consultation and parliamentary approval achieve the correct balance between scrutiny and the use of legislative resources?**

☐ **Yes**

☒ **No**

**Please explain your answer.**

We consider that s.2(5) leaves too much discretion to the Scottish ministers. It would be preferable to consult on the list of exclusions and list these in a schedule, or at least to set criteria for the persons (legal or natural) who could be excluded under such regulations.

As in our comments in relation to s.2(5) we are concerned by the lack of democratic scrutiny if the Scottish Ministers can add categories of persons to the definition of "publisher" under s.4(1). Likewise under s.4(2) the Scottish Ministers are to be given powers to provide defences. Both the definition of "publisher" and the defences to be available go to the heart of the substantive law. As a point of principle, we are therefore of the view that any changes required should be brought by way of an amending Bill.

Failing this, powers under s.4 should be limited by reference to particular categories of person who may be added to the existing definition or guiding principles which would determine who could be included. Similarly, categories or guiding principles should be set out in primary legislation to restrict the scope of defences. If amendment outwith these limitations were required, it would be appropriate to pursue primary amending legislation.

**Question 16**

**Should the defence of honest opinion make allowance for instances where rhetorical devices are used to express an opinion conveyed by the statement that the defender does not genuinely hold? If so, can you provide instances where such a device may have been considered defamatory?**

☒ **Yes**

☐ **No**

**Please explain your answer.**

Where the context indicates that a person did not seriously intend to espouse a view as their own or was, eg, quoting another person or group, we do not consider that they should be capable of being sued for defamation.

**Question 17**

**Do you agree that the second condition of the recast defence of honest opinion should be capable of taking into account situations where the relevant facts are likely to be known to readers?**

☒ **Yes**

☐ **No**

**Please explain your answer.**

We would favour adopting this approach as, in practice, a lot of important debate proceeds on the back of implicit assumptions. The controversies which are big enough to generate prolonged discussion are often news stories where familiarity with the underlying facts is reasonably assumed. We consider that this would be in line with the Scottish tradition allowing fair comment.

**Question 18**

**Should it be made clear that an offer of amends is made without admitting that a threshold test has been met?**

☒ **Yes**

☐ **No**

**Please explain your answer.**

We have no comment on this question.

**Question 19**

**Should the test of whether a statement complained of is a malicious publication be strengthened, and if so, how?**

☐ **Yes**

☐ **No**

**Please explain your answer.**

We have no comment on this question.

**Question 20**

**Do you agree that the single publication rule is tied to the date of accrual as the date of first publication?**

☐ **Yes**

☐ **No**

**Please explain your answer.**

The single publication rule referred to is a matter of English law. However, we consider it would be possible in principle to separate the single publication rule from the Scottish rule which dictates that the date of accrual is the date upon which a person becomes aware of the defamatory statement.

**Question 21**

**Given the previous recommendation of the Law Commission of England and Wales that 1 year is insufficient time in which to prepare litigation, and given the impact that a shorter period may have on parties' ability to utilise alternative means of resolution, should the current limitation period be retained?**

☒ **Yes**

☐ **No**

**Please explain your answer.**

We do not believe that there should be further reduction of the limitation period for defamation actions. We note the gradual reduction in limitation periods for defamation in England and Wales, from six years, to three years, to one year. As HHJ Richard Parkes stated in *Frank Otuo v The Watchtower Bible and Tract Society of Britain*[7], "The rationale of those reductions is clear. Time is of the essence in defamation actions, and the claimant will normally be anxious – and will be expected to be anxious — to obtain an apology or correction at the earliest possible moment, in order to undo the damage to his reputation."

We do maintain that there is an obligation on parties to litigation to mitigate any economic loss, and it may be, with longer limitation periods, arguments could be advanced that a party had failed to do so in bringing an action late within a limitation period. We do not, though, see significant issues around delayed defamation actions in Scotland. There may be situations in which a defamatory statement may not be discovered for a significant period (for instance, contained in an employment reference). As the discussion paper notes, this issue had been considered by the Law Commission of England and Wales in 2001, with a recommendation (though unimplemented) that the limitation period extend from one to three years, in part as the former created challenges for claimants in preparing their cases.

Though we do not agree with this approach, if a reduction in the limitation period were pursued, we believe that the court should have the discretion to permit otherwise time-barred claims if good grounds are shown (similar to the equitable exception in England and Wales contained in s32A of the Limitation Act 1984). The discretionary power could be used to disapply the one year period in cases in which the claimant became aware of the publication at date beyond the end of the limitation period (such as with an employment reference) in the interests of ensuring access to justice. However, we consider that the current approach would give greater certainty and is therefore to be preferred.

**Question 22**

[7] [2015] EWHC 509 (QB)

**If the limitation period is shortened to 1 year, do you agree that the period of limitation should be capable of being extended to reflect the period of time parties engage in alternative methods of dispute resolution?**

☒ **Yes**

☐ **No**

**Please explain your answer.**

Yes. We consider that this would be a sensible way to encourage alternative dispute resolution without prejudicing the pursuer's right to bring a claim.

**For further information, please contact:**
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