Libel Reform Campaign

Submission to the Scottish Law Commission's consultation on the Defamation and Malicious Publication (Scotland) Bill.

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The publication of the working draft of the Defamation and Malicious Publication (Scotland) Bill 2017 by the Scottish Law Commission is a significant step towards defamation reform in Scotland that will help protect free expression across the country. Scotland has the potential to lead in Europe with a new defamation law that provides strong defences for free speech and balances the ability of individuals to seek redress for serious damage to their reputations. Yet, in key areas such as the public interest defence, this draft bill falls short of the Defamation Act 2013, which reformed the law in England and Wales. Scotland has the chance to lead, with minor amendments the law can be a blueprint for reform both in Europe but also globally.

Key reforms contained within the draft that we support include:

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

This is a step in the right direction, but to ensure that this reform can fully protect free expression we are calling for:

Serious Harm Test

We are fully supportive of the inclusion of a serious harm test and the requirement for non-natural persons to demonstrate serious financial loss. It is vital to dissuade trivial cases or cases brought solely to silence legitimate criticism. 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 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. Even if a small number of economically-mobile pursuers did attempt to take proceedings outside of Scotland concerning defamation principally committed within Scotland, we fail to see the compelling public interest to remove this threshold in defence of limited private interests.

Restricting the ability of corporations to bring defamation proceedings

Related to s. 2

The law of defamation exists because defamatory statements can cause psychological damage to the victim. Corporations as non-natural person 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.

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 out of reach for the majority of people in Scotland. Without reform, defamation laws remain a powerful tool to attack critics and intimidate whistle blowers into silence. The UK government, in its Response to the Report of the Joint Committee on the Draft Defamation Bill 2013, reiterated this concern:

> It is unacceptable that corporations are able to silence critical reporting by threatening or starting libel claims which they know the publisher cannot afford to defend and where there is no realistic prospect of serious financial loss.

While balancing the need to protect people who speak out against private companies and offering companies an avenue for legal recourse, we do not believe defamation to be the most suitable avenue for this.

Part 2 of this working draft that focuses on malicious publication offers an avenue for recourse available to private companies that establishes a higher threshold that needs to be met, that of malice. In view of the additional statutory grounds for malicious publication proceedings in Part 2 of the Bill, we believe that non-natural persons should be prohibited from bringing actions for defamation under Part 1. Beyond this draft bill, there remain alternative avenues for redress. In a briefing to the House of Lords during the passage of the Defamation Act 2013, the Libel Reform Campaign stated: "Laws governing advertising, competition and business practices govern what one company may say about its competitor. And through their PR and Marketing teams, a company may use its own right to free expression to counter negative publicity."

Private Companies & Public Services

We welcome the move to bring the Derbyshire Principle in to law. Yet, with private companies delivering public services across Scotland this amendment establishes an imperfect process that restricts public bodies but is unable to limit private bodies that deliver identical or complementary services. Former Shadow Justice Secretary, Sadiq Khan, highlighted this in the House of Commons during the passage of the Defamation Act 2013: 'just because a school, prison or hospital is run by a private company doesn't mean it should be insulated from public criticism.' Placing restrictions on private companies, especially those delivering public services will level the playing field and ensure public scrutiny can cover every aspect of modern society. Many of the reforms established within this working draft seek to develop guidelines or protections that can ensure this law remains relevant as technology and society changes. Establishing restrictions on private companies who deliver public services would be in line with this intention, due to the increasing dependence on the private sector for public service provision.

Further clauses within s.2 further undermine the principle that public authorities cannot bring defamation proceedings. S.2(5) & (6) establish a power for Scottish Ministers to specify persons who are not to be treated as a public body, and thusly able to bring defamation actions outside of s.2. While there is merit in such flexibility due to ever-changing nature of public service provision, this gives a great deal of latitude to Ministers to make exemptions that could weaken this section without due scrutiny and debate. This is further reinforced by s. 2(6) which identifies the procedure to be undertaken when making such regulations. The negative procedure does not require debate, and so represents a less robust mechanism by which exemptions can be made. Moving away from statutory instruments such as this will ensure amendments can be made in Parliament with Ministers not limited to rejection or acceptance alone. Due to the impact of s.2 on free expression and active citizenship, we believe a more robust mechanism, with a higher threshold of scrutiny and public involvement is necessary.

<u>Private Proceedings</u>

It is important to note that there is nothing in this reform, nor a requested reform from us, that restricts individuals within a public or private body to bring defamation action on a personal basis. However this represents a distinct threat to the full realisation of the powers outlined in the proposed bill and reforms we are calling for in terms of restrictions for private corporations. The restrictions for public bodies to bring proceedings outlined in s.2 of the proposed bill and our proposed restriction on private companies could be significantly weakened if these bodies are able to financially support natural persons who they employ or represent. This support could allow private proceedings to achieve the aims of the parent organisation or authority thusly undermining the restrictions outlined above.

In 2013 the chief executive of Carmarthenshire county council brought a libel action that resulted in blogger, Jacqui Thompson paying £25,000 in damages. The significance of this case was that, while Thompson had to pay her costs and the settlement herself, Mark James' action was funded by the council (and thusly

the ratepayers of Carmarthenshire). Similar cases in South London and South Tyneside demonstrate how the Derbyshire Principle can be undermined through private proceedings. To ensure restrictions written into the bill remain effective we need to address potential restrictions on public and private bodies financially supporting private proceedings.

We are calling for:

- At minimum, the same level of hurdle against corporations suing individuals as seen in the Defamation Act 2013 in England and Wales, but we believe Scotland can go further with:
- a total restriction on non-natural persons whose primary purpose is to trade for profit from bring defamatory actions in Scotland.
- a restriction that states that no action for defamation can be brought by a legal person trading for profit or charitable purposes in respect to how they have exercised any public functions even where the legal person only exercises those public functions from time to time.
- These restrictions could form part of s.1, by stating that a suit brought by private companies is not actionable. Alternatively this could form the basis of a defence to a defamation claim by an organisation not categorised as a public authority under section 2 that the alleged defamation was concerned with the organisation's exercise of public functions.
- If a person within a private or public organisation decides to bring an action based on their personal capacity within their organisation, we are calling for it to be unlawful for any public or private body to transfer money to natural persons to undertake defamation proceedings.
- S. 2(5) & (6) should be removed to ensure that any move to specify persons who are not to be treated as a public authority, and thusly able to bring defamation actions, must be made through primary legislation. This will establish a far more robust and open process, as well as ensuring the legislation will accurately outline the bodies that fall inside and outside the definitions established in s.2.
- Failing this, s.2(6) should be amended to replace the negative procedure with the affirmative procedure. This will ensure debate is carried out prior to any modifications being made through the use of regulation.
- S.2 may be weaker than the current situation where we depend on the Derbyshire Principle and existing case law due to the lack of clarity as to which bodies or individuals would be defined as a public authority. An example of this is the restriction for political parties established through *Goldsmith v Bhoyrul* (1998) that is not contained in s.2 and the lack of clarity as to institutions such as universities and publicly owned utilities. A way to tackle this would be to establish a Schedule to this bill that contains which public authorities are to be subject to s.2 and so are unable to bring defamation proceedings.

Online Expression

Related to s.3

Social media and new media platforms continue to redefine how we edit, create and publish content both online and off. The move to outline responsibility and limit the scope of liability for defamatory statements establishes a set of definitions that individuals and organisations can use to understand which protections are available to them. The section is a significant improvement on s.5 in the Defamation Act 2013 in force in England and Wales, which, while ostensibly giving operators of websites a process by which to protect their outlet, results in operators taking down the content irrespective of any potential defence the original commentator may have.

S.3(3) establishes a list of roles that a person can undertake in relation to a statement that will not open them up to liability in terms of defamation actions. To ensure these remain relevant as technology changes, we are calling for:

- The examples, while not limiting judicial interpretation, should seek to highlight the complex and varied activities that are undertaken within each role. This will help ensure these exemptions can be deployed in real life situations. An example of this is s.3 (3)(g), as moderation goes beyond 'correcting typographical errors' and plays a vital role on online platforms including Reddit and Facebook, it is important that the stated wording in the bill can speak to this complexity effectively.
- In addition to section 3(4), which gives the courts the power to proceed on the basis of analogy in determining who is an author, editor or publisher, to ensure that the protections keep pace with technological developments, the draft Bill should be amended to give Scottish Ministers the power by order to supplement but not subtract from the protections in section 3(3).

Definitions of Secondary Publishers

Related to s.3

We are concerned that the draft Bill's definition of "an editor" may be ambiguous, and open to a more expansive interpretation than section 3's headline restriction on proceedings against secondary publishers suggests.

Section 3(2) enshrines a limited definition of a "publisher" of a defamatory statement, extending only to "commercial publishers" who publish the potentially defamatory statement "in the course of that business." This definition would clearly exclude an individual using social media platforms to publish content in a personal capacity, including retweeting, linking to, or repeating on content primarily published elsewhere on the internet.

By contrast, Section 3(2) defines an "editor" as "a person with editorial or equivalent responsibility for the content of the statement or the decision to publish it." We are concerned this clause will substantially defeat the principal purpose of section 3. Even if they cannot be classified as "publishers", there is a substantial danger that pursuers will argue that individual social media users are effectively the "editors" of the content they choose to publish on online platforms, and consequently, remain liable in defamation proceedings.

Manually linking to online content, or deciding to retweet content published by other social media accounts, is not an automated process, analogous to Google's algorithm-led archiving of online "publications", or a constantly updating RSS feed, which communicates new content on an ongoing basis without human interference or an individual "decision to publish," in the language of the draft of the Bill. Nothing in section 3(4), as currently drafted, excludes this interpretation of what constitutes the "editor" of a publication.

We are calling for:

- The Bill to be amended so the definition of editor is narrowly drawn in the same manner as the definition of a "publisher" has been established to protect social media users or those retweeting content or posting links. It is important that online free expression is not unduly limited by the definition of "editor" that may not explicitly capture the complex roles undertaken by online media users that are substantially different to the same roles in conventional offline communication or publication.

Specifying Persons as Publishers

Related to s. 4

The capabilities outlined in s.4 establish a process by which Scottish Ministers can treat persons as publishers and so liable for defamation actions. We believe that while future-proofing the legislation is necessary, this section establishes a less rigorous process than the creation or amending of primary legislation that could result in more groups of persons being liable for potential defamation actions. The lack of a detailed and transparent process by which the definitions in s.3 are expanded could threaten different groups of individuals and organisations with fewer stages of independent scrutiny that can enable civil society to engage. This also weakens the potential of this bill to consolidate all legislation and regulation in relation to defamation law in Scotland.

Adding categories of persons who can be treated as publishers is a significant step towards expanding the reach of defamation actions and so should only be deployed through a vigorous, open and transparent process that supports independent scrutiny and increased levels of civil society awareness. The process that has been outlined in this proposed bill does not, in our opinion, meet this threshold.

We are calling for:

- S.4 to be removed to ensure that any move to add categories to the definitions established in s.3 must be made through primary legislation. This will establish a far more robust and open process, as well as ensuring the legislation will accurately outline the bodies who fall inside and outside the definitions established in s.3

Truth Defence

Related to s.5

It is of concern that the defence as drafted provides less protection for free speech as the defence in the 2013 Defamation Act.

This is a welcomed reform but requires a degree of reworking to ensure it can protect defenders as intended. S.5 (2) outlines how the defence can be used if there are at least two distinct imputations. We need to ensure that this defence is not defeated on a balance between the number of imputations which are true, raising potential issues of preponderance that obscures the underlying truth of any one imputation.

We are calling for:

- S.5(2)(a) to be rewritten so that **not all** is replaced by **one or more** to reduce the high threshold that the defender would need to meet to be able to utilise this defence.

Public Interest Defence

Related to s. 6

The difficulty in mounting a Reynolds defence under the common law public interest defence prior to the Defamation Act 2013 in England and Wales led to significant public support for the Libel Reform Campaign. It is of serious concern that Public Interest Defence as suggested by the SLC does not reflect the Flood v Times judgement, which was reiterated by Parliament in the scrutiny and amendments of the Defamation Act 2013. It is important that the court must make allowance for editorial judgement, as the judgement of a single citizen critic writing about the behaviour of a powerful corporation on their blog is different from an investigative journalist with the full legal and editorial resources of a major national newspaper. To ensure the public interest defence is fit for purpose, s. 6(3)(b) needs to be stronger so that courts must make allowance for editorial judgement when determining whether it was reasonable for the defender to believe that publishing the statement was in the public interest.

We are calling for:

- S. 6 (3)(a) to be rewritten to ensure that court **must** make allowance for editorial judgement.

Honest Opinion Defence

Related to s. 7

As outlined in the working draft, the second condition for the honest opinion defence is that the 'statement indicated, either in general or specific terms, the evidence on which it was based'. This is an excessively onerous condition that

can restrict publication on issues that are explicitly known by the readership (or is likely to be known) and so should not require the defender to state the evidence on which the statement is based.

S. 7(5) outlines the requirement that the defender genuinely holds the opinion conveyed by the statement. While this attempts to prevent the sharing of malicious opinion, it may also invalidate the sharing of opinion that, while not representing the opinion of the author, utilises rhetorical devices such as devil's advocacy, parody, satire or the sharing of a counter-argument to facilitate discussion on the opinion shared in the statement. This sort of provocative speech should not fall outside of this defence as it could limit artistic speech and homogenise discourse. The existence of such speech does not modify the author's honestly held opinion, only how they express themselves in a published statement and so should enable the defender to access the defence as outlined in s. 7.

We are calling for:

- S. 7(3) of the draft Bill should be amended to make clear that where the relevant facts are known, or likely to be known by the readership or recipients of the publication, it is not necessary for the defender to establish the evidential basis.
- S. 7(5) to be amended to establish protections for authors who deploy rhetorical devices to express themselves that may involve the publication of opinion they do not honestly hold in a manner that is related to this opinion. This includes but should not be limited to devil's advocacy, satire, parody and the publication of counter-arguments.

Malicious Publication & Financial Loss

Related to s.23

Section 23 of the Bill provides that pursuers do not need to "show financial loss if the statement complained of is more likely than not to cause such loss". We believe that there should be a requirement to present evidence to prove loss that has resulted from the publication of the statement in question. In the same manner that the serious harm threshold established in s.1 of this bill seeks to dissuade trivial cases, ensuring there is a requirement to prove the basis of loss will ensure that actions brought under this part are responding to a meaningful concern, not deployed to silence critical voices.

We are calling for:

- S.23 to be revised to establish a requirement for evidence to be provided by the pursuer to demonstrate financial loss.
- Failing this, the threshold should be increased from **more likely than not** to ensure wealthy litigants attempting to silence critics do not abuse this power.

Power of court to require removal of a statement

Related to s. 29

While we are not opposed to a court ordering the removal of content that has been complained of, it should be established as narrowly as possible to avoid this functioning as a takedown notice. This will ensure entire statements, pages or URLs are not removed when the statement complained of related to a specific utterance, link or paragraph that could be removed while leaving the rest of the statement untouched. The court order should include the exact wording that needs to be removed or amended, leaving the editorial choice with the author, editor or publisher (as defined in s.3) as to whether the piece remains published.

This power ensures that the ruling of the court is reflected in the statement ruled as defamatory. However, outlined in the explanatory notes there is a power in the bill to order the "removal or cessation of distribution on an interim basis, before the outcome of the proceedings is known." This is problematic due to the idea that defamation can only be proved through the court proceedings. At this point, there is no court-backed ruling on the nature of the statement in question and as a result the impact of a ruling should not come before the ruling itself. There is also nothing in the bill or explanatory note that establishes the mechanism by which this order can be reversed were the proceedings to rule that the statement in question was not defamatory.

We are calling for:

- The statement should be defined as narrowly as possible, down to the individual word, phrase, link or paragraph that needs to be removed or amended.
- Any order to remove or cease distribution of a statement should only arise following court proceedings and not during them. As this distinction is made in the explanatory notes and not the bill, we call on this to be made apparent in the bill to avoid confusion and judicial interpretation.

Parliamentary Privilege

Under section 41 of the Scotland Act 1998, any statement (a) made in proceedings of the Scottish Parliament or (b) published under its authority is "absolutely privileged" for the "purposes of the law of defamation." The concept of "the law of defamation" is not further defined in the 1998 Act. While section 41 of the 1998 Act would protect free parliamentary speech against proceedings brought under Part 1 of the draft Bill, it is less clear that this privilege would extend to proceedings for "malicious publications causing harm" taken under Part 2. This technical ambiguity is undesirable. There is no principled basis for any distinction between defamation and verbal injury actions.

We are calling for:

- It to be made explicit on the face of the Bill that for the purposes of section 41 of the Scotland Act, "the law of defamation" includes both Part 1 and Part 2 of the draft Bill.