Defamation and Malicious Publications (Scotland) Bill
Google Inc.'s views on the consultation draft

Google responded to the Commission's consultation on Scottish defamation law reform in 2016, and is encouraged by the Commission's progress to date. Google is grateful to the Commission for publishing its draft Bill and accompanying explanatory notes, and for the Commission's latest request for comments.

Google continues to believe that there is a balance to be maintained between the rights of individuals to take action to protect their reputation and the rights of individuals to express themselves freely without being unjustifiably impeded by actual or threatened legal proceedings. This is especially true in relation to online content, and as individuals are increasingly empowered by social media to share and access information, it is vital that relevant stakeholders work together to ensure that the correct balance is struck.

Section 1: Actionability of defamatory statements

Google strongly supports the draft proposal that communication of an allegedly defamatory imputation to a third party becomes a requirement for defamation in Scots law, and that a statutory threshold be introduced requiring a certain level of harm to reputation in order that a defamation action may be brought. Google believes that this requirement should discourage unmeritorious claims, and protects against the unreasonable suppression of legitimate criticism and public debate.

Section 3: No proceedings against secondary publishers

Google also strongly supports the draft proposal that a right to bring defamation proceedings does not accrue against a person who is not the author, editor or publisher of the relevant statement.

Google believes that such an approach will ensure that those who are creating and posting online content remain accountable for it, and will encourage individuals to act as responsible online citizens, with an awareness of the legal consequences of their online actions.

Section 4: Power to specify persons to be treated as publishers

Google is concerned by the draft proposal to allow Scottish Ministers, through delegated legislation, the power to specify persons to be treated as publishers despite not being the author, editor or publisher of the relevant statement.

Firstly, Google considers that it is unnecessary and inappropriate for liability to be imposed on a person who is not the author, editor or publisher of a statement, especially in light of Section 29 of the draft Bill which already provides courts with the power to make an appropriate order against such a person.

Secondly, Google considers that the Section 4 power may significantly undermine the legal certainty and protections provided by Section 3. While Google recognises, and is sympathetic to, the Commission's desire to future-proof the draft Bill, Google considers that this can, and should, be achieved through the normal legislative process. We would suggest that it is important for the development and maintenance of a vibrant digital economy that liability for online content should not be extended to new categories of persons without proper consultation, engagement and scrutiny.

This is particularly the case in the context of online content and internet intermediaries. Allegations of defamation are highly fact dependant and can involve complex legal defences, but the relevant facts will normally be unavailable to an internet intermediary. In this regard, the very possibility that liability may be extended to new parties may incentivise business models that remove content upon receipt of allegations of defamation, even where that content is not obviously unlawful and the business is not the proper party to an action. As such, the adoption of Section 4, even without the introduction of further regulation, may create a chilling-effect which could stifle legitimate public debate and criticism.

Finally, Google notes the wording of Section 4(2) and reiterates its belief that any proposed regulations made under Section 4 should be consistent with existing laws governing e-commerce, particularly those implementing the E-Commerce Directive, Directive 2000/31/EC.

Sections 20 - 22: Verbal injury etc.

Google is concerned that the retention and codification of the Scots law of verbal injury may seriously undermine the reforms made in relation to defamation law. In particular:

- **Against whom can an action be brought?**

  Google strongly supports the draft proposals in Section 3 of the Bill, but considers that they may be undone by the proposals in Sections 20-22. Under the draft proposals, an action for defamation may only be brought against the author, editor or publisher of the relevant statement. As noted above, this ensures that those who are creating and posting online content remain accountable for it. But there appears to be no such requirement in relation to an action for verbal injury. In relation to online content, it is

therefore likely that an aggrieved party will simply choose to pursue an action in verbal injury against an intermediary, rather than bring defamation proceedings against the author, editor or publisher of the relevant statement.

We note the draft wording of Sections 20-22 is typically as follows:

> *"A person (B) may bring proceedings under this section where— (a) another person (A) has— (i) made a false and malicious statement about B's [eg business or business activities], and (ii) published the statement to a person other than B..."*

If it was intended that *B* may only bring the relevant proceedings against *A*, we would urge the Commission to make this explicit.

- **What is the proper threshold for an action?**

Google strongly supports the draft proposals in Section 1 of the Bill, but considers that they may be undone by the proposals in Sections 20-22. Under the draft proposals, an action for defamation may only be brought if the relevant statement has caused (or is likely to cause) serious harm to the reputation of the aggrieved party. As noted by a number of parties in the responses to the Commission's consultation, this important development is very likely to help discourage unmeritorious claims. But there appears to be no such requirement in relation to an action for verbal injury. It is therefore likely that an aggrieved party will simply choose to pursue an action in verbal injury rather than defamation.

- **What is required to demonstrate malice?**

Under Part 2, an action for verbal injury may be brought in relation to a malicious statement and it is sufficient to establish malice to show that the defendant "knew that the imputation was false" or "was indifferent as to the truth of the imputation.". As noted in Google's response to the Commission's consultation, internet intermediaries are often not in a position to determine whether material published on the internet by others is true or not. As such, without the protection provided by Sections 1 and Sections 3 of the Bill (highlighted above), an aggrieved party may find it easier to demonstrate malice in an action against an intermediary, who is neither the author, editor, nor publisher of a statement, and is unable to provide evidence as to the truthfulness of that statement. It is therefore likely that an aggrieved party will simply choose to pursue an action in verbal injury rather than defamation, resulting in a serious and unjustified curtailment of freedom of expression. Accordingly, in our view, the meaning of 'malice' should be appropriately limited to the intention of the maker of a statement to cause harm.

If the Commission were to clarify that, in relation to verbal injury, it was intended that an aggrieved party may only bring proceedings against the relevant author, editor or publisher, then it appears that the only principal difference between verbal injury and defamation would be the requirement to demonstrate malice rather than serious harm. In that case, the Commission's aims may be better addressed by recasting verbal injury as a subset of defamation, with a provision that dispenses with the need for a business to show serious financial loss if it can be proved that the statement was motivated by a malicious intention to cause harm.

Section 27: Power of court to order a summary of its judgment to be published

Google is concerned about the application of Section 27 in relation to internet intermediaries. In its response to the Commission's consultation, Google set out its belief that an intermediary should not be required to publish judgments in the way anticipated by Section 27. Google's comments reflect the fact that internet intermediaries are not usually able to determine whether statements complained of are true, and will therefore be unable to challenge allegations of defamation or verbal injury claims. While Section 3 of the proposed Bill makes it unlikely that an action would be brought against an internet intermediary in relation to a statement posted online, the possibility remains given the uncertainty created by Section 4 and Sections 20-22. We therefore feel strongly that intermediaries should be carved out of Section 27.

Section 29: Power of court to require removal of a statement etc.

Google agrees with the principle that a claimant should be able to obtain a court order against an operator of a website for the removal of online content, in circumstances where the author, editor or publisher of the content refuses to engage with the proceedings brought against them**,** or refuses to comply with any court order made following the conclusion of those proceedings**.**

However, Google is concerned that the proposals under Section 29 of the draft Bill would be open to abuse.

In particular, Section 29 allows an aggrieved party to obtain an interim removal order against a third party web site operator, before a judgement on merits has been made. Google firmly believes that such a 'take down first, ask questions later' approach, without any consideration of the merits of a case is undesirable. In such circumstances, aggrieved parties are likely to apply for such orders and, once obtained, delay proceedings against the person responsible for the relevant statement. In addition, in cases where judgement is eventually given in favour of the defendant, and the content is found to be lawful, it is unlikely from a practical perspective, that the third party website operator will at that stage be made aware of the decision, or be able to reinstate the removed content. Accordingly, an interim injunction against a third party website operator may in reality amount to a permanent injunction for removal.

In this regard Google notes that the position adopted by the Commission in relation to interim

relief against an operator of a website under Section 29 appears to contrast with the approach adopted under Section 13 of the Defamation Act 2013 in England and Wales, in that such an order may only be made where judgement has been given for the claimant.

We believe that it is entirely appropriate in circumstances where: (a) a claimant has secured a final injunction to prevent publication of an online statement by the author; and (b) the author has declined to remove that statement, that there be a statutory provision empowering the court to order the website operator to remove the specific statement complained of from the identified web page. Such an order may of course be unnecessary to the extent that some website operators would voluntarily remove the content on sight of the third party court order. We would note however, that it would be wrong as a matter of principle for a website operator to be ordered to remove material in circumstances where the court either refuses to grant a final injunction against the author of the defamatory material, or lacks the jurisdiction to do so.

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