

News Scotland

Defamation and Malicious Publications (Scotland) Bill Consultation Response on behalf of News UK

We are obliged to the Scottish Law Commission for carrying out this consultation.

The law of defamation in Scotland has remained unchanged for a number of years. In 2013, significant reforms to the law of defamation in England and Wales were made with the passing of the Defamation Act 2013. The 2013 Act was only implemented in Scotland to a very limited extent, creating a material divergence in the law of defamation between north and south of the border.

The consultation indicates a desire for the law in Scotland to be updated, so as to bring it in line with the law of England and Wales. We note that the aim of the proposed changes is to bring an end to “vanity cases”. We welcome the proposed changes as, in our view, the law of defamation ought to be the same in all jurisdictions of the United Kingdom to avoid “forum shopping” by litigants.

There are some specific parts of the Bill which we would like to single out for comment.

Serious Harm Test – Section 1

We are particularly pleased with the proposed introduction of a “serious harm” test. The serious harm test has been in place in England and Wales since 2014 and has operated well within that jurisdiction.

If the serious harm test becomes part of the Scots law of defamation and the Scottish Courts take the same approach as their English counterparts, there will no longer be any presumption of damage to a claimant – the claimant will have to prove at the outset that publication has caused, or will cause, serious harm. The change would be welcome as it would likely deter frivolous or unfounded defamation actions, which would serve the interests of justice far better than the present law permits.

Defences – Sections 5-12

The draft Bill provides a number of defences to a defamation action. Many of the defences are those we are already familiar with as old common law defences are being put into statutory form. The proposed sections of the Bill will be of great assistance as they provide clarity on the defences available in a defamation action.

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From our perspective, the most important section is Section 6. We are pleased that a “public interest” defence is being enshrined in statute and given real clarity. Our only suggestion is for the wording of Section 6(3)(a) to be changed to read “**shall** make allowance for editorial judgement”, rather than “may”.

While this defence is a replacement of the old Reynolds defence, we note how it has been applied in practice by the English Courts. It is clear that the English courts have focused on the question of whether there has been an exercise of responsible journalism, given the importance attached to the work carried out prior to publication and to the tone of the article. In our view, this is a sensible approach and one which we hope would be followed by the Scottish Courts. It removes the “checklist” which tended to be followed when the old Reynolds defence was invoked and takes us into a more flexible realm, where responsible journalism remains key, but does not have to be proved by arbitrary means.

Time Limit for Actions – Section 30

The proposal to reduce the time bar for litigation from three years to one year is welcomed. Damage to reputation is something which will often diminish over time. A one year time limit for proceedings reflects that fact and also that modern digital communication is far faster. If damage to reputation can now occur quickly, it ought to be addressed quickly.

Court Orders to Remove Statements – Section 26

We support the intention of this Section, but feel it should be recognised that material subject to such orders may still be found online even though a publisher has done everything they can to comply with the order. It is notoriously difficult to police the internet and control what appears on any website. If a publisher has done everything within their power to ensure compliance with the order, they should not face sanctions if material nevertheless remains online through no fault of their own.

Conclusion

The changes proposed by the draft Bill are welcomed. In our view, it is appropriate that Scots Law is being brought into line with the law of England and Wales. It is in fact long overdue. We hope that our comments will be of assistance in the final stages of the consultation process.

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