SNS
The voice of Scottish newsbrands

17 Polwarth Grove,
Edinburgh,
EH11 1LY

The Hon Lord Pentland,
Chairman,
The Scottish Law Commission,
140 Causewayside,
Edinburgh,
EH9 1PR.

Tuesday, August 29, 2017.

Defamation and Malicious Publications (Scotland) Bill
Consultation draft response

Dear Lord Pentland,

The SNS is the trade association for the Scottish newspaper and news brands sector and we are very grateful for the opportunity to respond to the proposals for the reform of defamation law in Scotland as contained in the Scottish Law Commission's draft Bill and accompanying papers.

We are also extremely grateful that you have devoted so much of your time to this important, but often misunderstood and overlooked area of law and we are supportive of the majority of the proposed reforms. We are also relieved that the proposed legislation does not include defamation of the dead which would not only present a serious barrier to investigations such as those into the late Jimmy Savile, but would also be legally difficult to implement.

We are delighted that proper account has been taken of the vast changes the publishing world has undergone as a result of the digital technology revolution. Of particular concern to publishers has been the problem of online access to historic defamatory material being regarded as re-publication, and the provisions laid out in Section 30 to establish the principle of single publication in Scots law is perhaps the most important aspect of this proposed legislation from the perspective of news publishers.

Many of the Bill's provisions are long overdue, and in broad terms we welcome the effort to introduce the best elements of the 2013 Defamation Act into Scots law, which will assist publishers in addressing problems and managing risk in a digital environment which cannot by its nature conform to legal jurisdictions.

However, the other side of the same coin is that the homogenisation of defamation law could have the unintended consequence of driving pursuers towards the English court system where costs associated with defamation actions are significantly higher than in Scotland. While we recognise the self-interest of Scottish legal practitioners in this area, it is also in our interest to avoid the potential for higher costs at a time when publishers face ever increasing pressure on their revenues.

The introduction of a serious harm test identical to that for England and Wales contained in the 2013 Act is perhaps presents the greatest danger, and perhaps a modernised version of the Sim v Stretch test could preserve a distinction and help prevent migration of cases to the more expensive English

Director: John McLellan e-mail: info@scotns.org.uk. Tel: 07711 058618

jurisdiction. By contrast, Section 18 on jurisdiction should ensure that libel tourism does not become a feature of the Scottish system

More positively, requiring an offending statement to be published to a third party addresses a historic problem in understanding how reputational damage can be suffered and so too does reducing the time bar for litigation from three years to one year (Section 30) better reflect the speed of modern communication.

The prohibition on public authorities bringing actions (Section 2) establishes an important principle in democratic accountability, and the prevention of proceedings against secondary publishers (Section 3) should curtail unacceptable attempts to intimidate distributors and retailers of published material. Defamation cases which have gone to trial have usually involved prominent individuals and ending the presumption of jury trials (Section 19) addresses the problem of preconceived bias.

However, we do feel that Section 23 is too broad and given the likely passage of time between an offending statement and a court hearing, it should be a requirement for a business to show that actual financial loss had been incurred, otherwise publishers could still be placed under unfair pressure to settle claims at an early juncture on only a possibility of losses.

On defences, we are satisfied that the principles of Truth (Section 5), Public Interest (Section 6) and Honest Opinion (Section 7) have been properly laid out, although we would respectfully suggest Section 6 (3) (a) could be amended to read "should make allowance for editorial judgement" rather than "may".

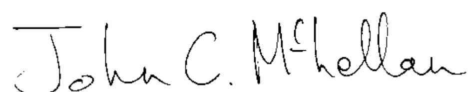
The clarity of Sections 9, 10, 11 and 12 on absolute and qualified privilege should be of great assistance in helping public understanding of what can or cannot be reported and should prevent needlessly prolonged disputes, particularly over reporting of evidence in criminal proceedings. The changes to the offer of amends procedures should also prevent the thankfully rare occasions when cases have been prolonged not in order to restore reputation but to maximise financial advantage.

Finally, on sanctions, giving courts the power to order publication of judgement summaries (Section 27) brings the law into line with the existing non-statutory regulatory system, is something the public expects and is therefore something we can support.

In principle we also support the principle of courts having the power to order the removal of offending statements from websites (Section 29), as long as such orders were specific to the statement not entire articles or series of articles. We would also like to see some recognition of the fact that the subjects of such orders may still be found online even though the publisher has done all in his or her power to comply, and under such circumstances would not face further sanction.

I hope this is of some assistance now you are entering the final stages of the consultation process and we look forward to the Bill taking its place in the Scottish Government's legislative programme.

Yours sincerely,



John McLellan,
Director.