

This document relates to the Defamation and Malicious Publication (Scotland) Bill (SP Bill 61) as introduced in the Scottish Parliament on 2 December 2019

# Defamation and Malicious Publication (Scotland) Bill

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## Policy Memorandum

### Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Defamation and Malicious Publication (Scotland) Bill introduced in the Scottish Parliament on 2 December 2019.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 61–EN);
  - a Financial Memorandum (SP Bill 61–FM);
  - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 61–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

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## Policy objectives of the Bill

4. The existing law of defamation in Scotland is piecemeal in nature, scattered across aged common law rules<sup>1</sup> and several statutes.<sup>2</sup> The last substantive changes to the law were made in 1996<sup>3</sup> and it is clear that the law is no longer fit for modern day purposes. For example, societal changes, such as the increased use of internet communication, means that there is more scope than ever for rapid and potentially unfair damage to reputation.

5. The law of defamation has to strike the right balance between two values that sometimes pull in different directions - the principles of freedom of expression and protection of reputation. Both are fundamental human rights and are of vital importance in a modern democracy. The law of defamation has a central part to play in safeguarding both these rights.

6. The overarching policy objectives of the Bill are therefore to modernise and simplify the law of defamation (and the related action of malicious publication) in Scotland in order to:

- strike a more appropriate balance between freedom of expression and the protection of individual reputation; and
- clarify the law and improve its accessibility.

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<sup>1</sup> For example, *Mackay v M'Cankie* (1883) 10 R 537, one of the leading cases in Scots law, held that defamation can arise if an imputation is communicated merely to the person who is the subject of it; in other words if it is seen, read or heard only by its subject and no one else.

<sup>2</sup> The statutes are the Defamation Act 1952 available at <http://www.legislation.gov.uk/ukpga/Geo6and1Eliz2/15-16/66>; the Defamation Act 1996 available at <http://www.legislation.gov.uk/ukpga/1996/31>; the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) available at <http://www.legislation.gov.uk/uksi/2002/2013/contents/made>; and sections 6, 7(9), 15, 16(5) (in so far as it relates to sections 6 and 7(9)) and 17 of the Defamation Act 2013 available at <http://www.legislation.gov.uk/ukpga/2013/26/contents/enacted>.

<sup>3</sup> The Defamation Act 1996 c.31.

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7. The Bill will place certain key elements of Scots common law on a statutory basis.<sup>4</sup> At the same time, the Bill replaces and restates, in one place, elements of the existing statutory provisions.

## Background

### The Current Legal Framework in Scotland

#### Statutory provisions

8. In 1948, a Committee chaired by Lord Porter published its Report on the Law of Defamation. The Committee examined the scope of the then existing law of defamation and procedures, concluding that defamation law was complicated, costly and liable to stifle discussion of matters of public interest. Legislative effect was given to the Report's recommendations in the Defamation Act 1952 ("the 1952 Act").<sup>5</sup> In Scotland, there remain in force provisions of the 1952 Act principally relating to the defences of veritas and fair comment. The Bill re-states and re-labels these defences as "truth" and "honest opinion" respectively.

9. The Defamation Act 1996 ("the 1996 Act")<sup>6</sup> gives legislative effect to the recommendations of the Neill Report<sup>7</sup> published in 1991. The 1996 Act principally introduces the defence of innocent dissemination, the offer of amends procedure and provides definitions of who is responsible for publication in defamation proceedings.

10. The Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) ("the EC Regulations") introduced three different defences for internet intermediaries who transmit material not created by them. The EC Regulations implemented the Directive on Electronic Commerce (2000/31/EC) on certain legal aspects of information society services, in

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<sup>4</sup> For instance, while variety of common law defences are replaced with a statutory equivalent, the common law "single meaning rule" is not.

<sup>5</sup> Available at <http://www.legislation.gov.uk/ukpga/Geo6and1Eliz2/15-16/66>.

<sup>6</sup> Available at <http://www.legislation.gov.uk/ukpga/1996/31/contents>.

<sup>7</sup> A working group under the chairmanship of Lord Justice Neill in response to the Lord Chancellor's invitation to the Supreme Court Procedure Committee to investigate and propose changes to improve defamation procedure.

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particular electronic commerce<sup>8</sup>. The level of involvement in the transmission, storage and modification of that material determines which defence is available to the internet intermediary.<sup>9</sup>

11. Provision in the Defamation Act 2013 (“the 2013 Act”) extends qualified privilege to certain academic and scientific activities. The first activity to which privilege is extended is where publication in a scientific or academic journal of a statement relating to a scientific or academic matter takes place and it can be shown that the statement has been subject to an independent review of its scientific or academic merit carried out by the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned.<sup>10</sup> The second activity is where publication of a fair and accurate report of proceedings of a scientific or academic conference held anywhere in the world takes place, as well as to copies, extracts from and summaries of material published by such conferences.<sup>11</sup>

## **The common law**

12. The current legal framework of defamation law in Scotland is, however, not comprised solely of these mostly elderly statutory provisions. The common law sets out a range of concepts and principles of defamation law including: what constitutes a defamatory statement; the defences of veritas and honest opinion; and how the multiple publication rule affects liability.

13. During the late 19th and early 20th centuries, a large number of defamation proceedings were raised in the Scottish courts; since then, the number of cases proceeding has declined to very low numbers.<sup>12</sup> This has resulted in a shortage of modern Scottish case law, meaning that in some areas of defamation law there has been limited opportunity for development, particularly when compared with other legal jurisdictions. The

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<sup>8</sup> Directive 2000/31 EC, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&qid=1574347034051&from=EN>

<sup>9</sup> Available at <http://www.legislation.gov.uk/uksi/2002/2013/contents/made>.

<sup>10</sup> See section 6 of the 2013 Act, available at <http://www.legislation.gov.uk/ukpga/2013/26/contents/enacted>.

<sup>11</sup> See section 7(9) of the 2013 Act.

<sup>12</sup> See paragraph 1.12 of the Commission’s Discussion Paper.

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paucity has sometimes given rise to a tendency for Scottish courts and practitioners simply to adopt decisions of the English courts where the volume of defamation cases is higher. Given that the law north and south of the border has different conceptual origins, the English jurisprudence is not always a perfect fit for Scots law.

14. The influence of the European Court of Human Rights (“ECtHR”) and its jurisprudence on the right to respect for private and family life and the right to freedom of expression can also be added to this already disjointed legal framework.

## **England and Wales**

15. The law of defamation in England and Wales was recently the subject of major reform. A Defamation Bill was introduced into the House of Commons on 10 May 2012 and received Royal Assent on 25 April 2013 (i.e. the Defamation Act 2013 referred to above at paragraph 11). For England and Wales, it has restated in statutory form some of the most important principles of defamation law.<sup>13</sup> It has also made a number of significant substantive changes to the law.

## **Northern Ireland**

16. In November 2014, the Northern Ireland Law Commission published a Consultation Paper inviting views on the desirability of reforming defamation law and practice in Northern Ireland.<sup>14</sup> Topics considered included the impact of the 2013 Act in England and Wales, the single meaning rule and the types of remedies available. Building on this, work was taken forward by Dr Andrew Scott whose recommendations were published on 19 July 2016.<sup>15</sup> Dissolution of the Northern Ireland Assembly following the collapse of power-sharing arrangements has meant that

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<sup>13</sup> Sections 6, 7(9), 15, 16(5) (in so far as it relates to sections 6 and 7(9)) and 17 of the 2013 Act also apply to Scotland.

<sup>14</sup> Accessible at [http://www.nilawcommission.gov.uk/final\\_version\\_-\\_defamation\\_law\\_in\\_northern\\_ireland\\_consultation\\_paper\\_-\\_nilc\\_19\\_2014\\_.pdf](http://www.nilawcommission.gov.uk/final_version_-_defamation_law_in_northern_ireland_consultation_paper_-_nilc_19_2014_.pdf).

<sup>15</sup> Accessible at <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/report-on-defamation-law.pdf>.

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giving legislative effect to these recommendations has, to date, not proceeded.

## Overview of bill

17. The Bill implements all the substantive recommendations of the Scottish Law Commission (“the Commission”) made in their Report on Defamation (“the Report”).<sup>16</sup> Greater detail on the legal and practical issues which informed these aspects of the Bill are set out in the Report and also in the preceding Discussion Paper on Defamation (“the Discussion Paper”).<sup>17</sup>

18. The general background to the Commission’s project lies in the recent reforms made to defamation law in England and Wales. The Commission, however, did not only examine whether and to what extent the reforms made there might be suitable for adoption in Scots law. It also considered other aspects of Scots defamation law that it thought may be in need of reform. The Commission concluded that reform was appropriate in several areas – including whether publication to a third party should become a requisite of an action for defamation; the range of available remedies; and the statutory restatement of the Derbyshire principle – which is that public authorities have no right at common law to raise proceedings in defamation as it is of high importance that they be open to uninhibited public criticism.

19. Subsequent to the Report, the Scottish Government published its own consultation – Defamation in Scots Law (“the consultation”).<sup>18</sup> The consultation sought further views on some aspects of reform proposed by the Commission as well as other issues that had not previously been consulted on. In making changes to the law of defamation and the law

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<sup>16</sup> SLC Report on Defamation (No. 248) December 2017 [https://www.scotlawcom.gov.uk/files/7315/1316/5353/Report\\_on\\_Defamation\\_Report\\_No\\_248.pdf](https://www.scotlawcom.gov.uk/files/7315/1316/5353/Report_on_Defamation_Report_No_248.pdf).

<sup>17</sup> Discussion Paper on Defamation, Scottish Law Commission (No. 161) [https://www.scotlawcom.gov.uk/files/5114/5820/6101/Discussion\\_Paper\\_on\\_Defamation\\_DP\\_No\\_161.pdf](https://www.scotlawcom.gov.uk/files/5114/5820/6101/Discussion_Paper_on_Defamation_DP_No_161.pdf).

<sup>18</sup> This was published on 14 January 2019 and is available at <https://www.gov.scot/publications/defamation-scots-law-consultation/>. There were 50 responses received to the consultation.

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relating to verbal injury, the Bill provisions discussed below incorporate the Commission's substantive recommendations and the outcome of the analysis of the consultation.

## Changes to defamation law

### **Actionability and restrictions on bringing defamation proceedings**

20. The Bill clarifies and restricts the circumstances in which proceedings can competently be brought in respect of an allegedly defamatory statement. The policy intention is to alleviate the chill on freedom of expression felt by many publishers in Scotland. It does this by ensuring that defamation law is more singularly focussed on protecting against harm to reputation and by giving courts power to dismiss defamation proceedings where very little damage has been done.

### **Communication of a defamatory statement to a third party**

21. The fundamental purpose of defamation law is to protect reputation. In Scotland, it is possible to raise defamation proceedings without what would typically be regarded as 'publication'. Defamation can arise where a damaging imputation is communicated only to the person who is the subject of it; in other words if it is seen, read or heard only by its subject and by no one else.<sup>19</sup> It is for the pursuer to prove that the words complained of are defamatory. Where, though, a defamatory statement is held to have been made, the law presumes it to be false and made with malice (it must be intended to cause injury). At the core of Scots defamation law is the fact that defamation is not exclusively about protecting reputation; currently, it also encompasses protection against injury to self-esteem.

22. The Scottish Government is not aware of any other jurisdiction in which defamation is taken to arise as a matter of law without an allegedly defamatory imputation being communicated to a third party. Accordingly, in line with the Commission's recommendation on this matter, the Bill provides that it should be competent to bring defamation proceedings in respect of a statement only where the statement has been communicated

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<sup>19</sup> Mackay v McCankie (1883) 10 R 537.

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to a person other than its subject, with that person having seen or heard it and understood its main content or substance.

## **Definition of a defamatory statement**

23. Reputation has been described as an integral and important part of the dignity of the individual and as forming the basis of many decisions in a democratic society which are fundamental to its well-being, for example, whom to employ.<sup>20</sup> This forms the basis of the law of defamation: a person's character, honour and reputation should be protected. A simple statutory definition of what constitutes defamation would define the subject-matter of defamation legislation and the limits in modern terminology. It may also go some way to ensure that Scots law accords with the requirement of the European Convention on Human Rights that any legal restrictions on freedom of expression should be accessible.<sup>21</sup>

24. The Scottish Government's consultation, asked whether defamation should be defined in statute. An overwhelming number of respondents answered that it should. One respondent, for example, stated that "... As one of the major purposes behind such reform as the Bill seeks to bring is enhanced clarity and accessibility of the law, it makes perfect sense that a definition of defamation... be among one of the range of common law principles placed upon a statutory footing". A definition of what constitutes a defamatory statement was not included in the Commission's draft Bill.

25. In some jurisdictions what constitutes a defamatory statement is defined. For example in the Republic of Ireland, a defamatory statement is defined as, "a statement that tends to injure a person's reputation in the eyes of reasonable members of society".<sup>22</sup> A Committee on Defamation was appointed in June 1971, under the Chairmanship of the then Justice Faulks. Its terms of reference, which applied to Scotland as well as to England and Wales, were: "To consider whether, in the light of the working of the Defamation Act 1952, any changes are desirable in the law, practice and procedure relating to actions for defamation". The committee's report

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<sup>20</sup> Reynolds v Times Newspaper Ltd [2001] 2 AC 127 at 201.

<sup>21</sup> See the case of The Sunday Times v. The United Kingdom, (Application no. 6538/17) at paragraph 49 for a summation of this requirement.

<sup>22</sup> Defamation Act 2009. A copy of the Act can be accessed at <http://www.irishstatutebook.ie/eli/2009/act/31/enacted/en/>



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was published in 1975. The Committee recommended that a statutory definition be introduced. In coming to this conclusion, the Committee<sup>23</sup> recommended that a statutory definition should be adapted from the formulation of Lord Atkin in the leading House of Lords case of *Sim v Stretch*.<sup>24</sup>

26. The approach taken in the Bill as now published follows the approach adopted in the Irish Defamation Act 2009. It confirms that a statement is defamatory if it causes harm to a person's reputation. This is a re-statement in modern language of the common law test adopted in *Sim v Stretch*.

### **Threshold test of serious harm**

27. The Bill makes provision that:

- a right to bring defamation proceedings in respect of a defamatory statement accrues only if the publication of the statement has caused (or is likely to cause) serious harm to reputation.

28. In England and Wales, a common law threshold test was developed by the courts in two cases. In *Jameel (Yousef) v Dow Jones & Co Inc*.<sup>25</sup> it was recognised that given certain circumstances, the courts could bring to a stop defamation proceedings that were not properly serving the purpose of protecting the claimant's reputation. The Court acknowledged that, given so little was at stake, it required to stop any abuse of process in defamation proceedings that involved a disproportionate interference with freedom of expression. In *Thornton v Telegraph Media Group Ltd*,<sup>26</sup> the court further developed this threshold test. This time the focus was on determining whether an imputation was defamatory in the first place. The court acknowledged that whatever definition of 'defamatory' is adopted by the court it must include a qualification in relation to substantial harm to reputation. In England and Wales, the 2013 Act introduced a statutory

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<sup>23</sup> Ultimately, the Committee recommended the following: "Defamation shall consist of the publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally."

<sup>24</sup> [1936] 2 All ER 1237.

<sup>25</sup> [2005] EWCA Civ 75.

<sup>26</sup> [2010] EWHC 1414.

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threshold for determination of whether a statement gives rise to an actionable claim in defamation - it must be shown that the statement complained of has caused or is likely to cause serious harm to the claimant's reputation.

29. The Commission took the view that the issues of lack of authority in Scots common law and the inability of Scottish courts to dispose of trivial claims at an early stage where little is at stake can both be addressed by the introduction of a threshold test.

### **Alternative approach – do nothing**

30. The Commission highlight the argument that, taking into account differences between Scots and English law as to what constitutes defamation, it is possible that the Scottish courts would have taken a different view in the Jameel case had it arisen in Scotland. This is a possibility primarily because of the rule that defamation may arise where an imputation is conveyed only to the person who is the subject of it.<sup>27</sup> Yet in making third party communication a requirement to bring proceedings in defamation, the Bill removes that potential obstacle. Courts in Scotland may, therefore, develop a threshold test at common law. In view of the small numbers of defamation actions brought in Scotland, the opportunity for the common law to develop in this way is likely to be limited. Consequently, any such reform could take a long time to occur. In turn, this could create a prolonged period of legal uncertainty. Statutory provision can assist in limiting that uncertainty.

31. The ECtHR has, in a long line of cases, also recognised that in order for Article 8 of the Convention to apply, the attack on personal honour and reputation must attain a certain level of seriousness.<sup>28</sup> Doing nothing would fail to take into account this substantial body of jurisprudence.

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<sup>27</sup> See paragraph 3.9 of the Discussion Paper.

<sup>28</sup> See for instance *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012; *Delfi AS v. Estonia* [GC], no. 64569/09, § 137, ECHR 2015; and *Denisov v. Ukraine* [GC], no. 76639/11, § 112, 25 September 2018.

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### **Serious harm test: Non-natural persons**

32. In Scots law there is currently no express statutory restriction on the ability of sole traders and bodies such as companies, partnerships and unincorporated associations, including any such bodies not formed for the purpose of profit, to bring an action for defamation. Defamation proceedings may competently be brought by such a party, but only where the pursuer has a reputation, an attack on which can give rise to financial loss; there is no scope to recover solatium<sup>29</sup> because there are no feelings to be hurt.<sup>30</sup>

33. The threshold test of serious harm differs where the injured party (B) is a non-natural person. The Bill provides that:

- where B is a non-natural person which has its primary purpose trading for profit, harm to their reputation is not “serious harm” unless it has caused (or is likely to cause) them serious financial loss.

34. The provision in the Bill imposes a restriction on the ability of non-natural persons whose primary purpose is trading for profit to raise defamation proceedings. They can do so only where any such action would relate to alleged defamation in connection with their undertaking of trading activities. In so far as non-profit making activities are concerned, the test to be applied is serious harm only.

35. The effect is to place an additional burden on bodies that trade for profit. Any non-natural person which has its primary purpose trading for profit must have suffered serious financial loss (or be likely to do so) in order to have an actionable claim in defamation.

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<sup>29</sup> Reparation for pain and suffering.

<sup>30</sup> North of Scotland Banking Co v Duncan (1857) 19 D 881 at 885.

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36. The provision mirrors the position in England and Wales for bodies trading for profit.<sup>31</sup> The Commission concluded that, as regards the ability of such bodies to bring defamation actions, there was no reason to set Scotland apart from other jurisdictions of the UK in terms of the requirements for raising an action.

### **Alternative approaches – further restriction on raising proceedings for non-natural persons**

37. The Bill provides that non-natural persons face additional restrictions when raising defamation proceedings.<sup>32</sup> The Scottish Government's consultation asked if non-natural persons should be subject to further restrictions. The question was whether only micro-enterprises should continue to be allowed to raise proceedings<sup>33</sup> on the basis that small, for-profit bodies rely heavily on their reputation and may be disproportionately affected by a defamatory statement and less likely to weather its consequences than, for example, a large multi-national corporation.

38. There appears to be only one major jurisdiction that has made provision to prevent the bringing of defamation claims by bodies existing to make a profit. The Uniform Defamation Laws of Australia provide, usually in section 9 of the relevant statutes, that corporations with ten or more full-time or equivalent employees, formed with the object of obtaining financial gain, have no cause of action in defamation.

39. In Scots law, there currently is no statutory provision that expressly restricts the ability of non-natural persons like a company to bring an action for defamation. If the pursuer has a reputation, damage to which can result in loss,<sup>34</sup> then they can competently raise defamation proceedings.<sup>35</sup> The

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<sup>31</sup> See section 1 of the Defamation Act 2013.

<sup>32</sup> See section 1(3).

<sup>33</sup> A micro-enterprise is a firm that employs fewer than 10 people and has an annual turnover not exceeding £2 million is defined as a micro enterprise - see [http://ec.europa.eu/growth/smes/business-friendlyenvironment/sme-definition\\_nl](http://ec.europa.eu/growth/smes/business-friendlyenvironment/sme-definition_nl).

<sup>34</sup> Non-natural persons cannot recover damages for injury to their feelings, often referred to as solatium.

<sup>35</sup> See *North of Scotland Banking Co v Duncan* (1857) 19 D 881 at 885.

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right of corporations to raise proceedings in defamation has long been recognised by the courts at common law.<sup>36</sup> Lord Hoffman explained the difference between reputation that belongs to an individual and that which attaches to a corporation:

“In the case of an individual, his reputation is a part of his personality, the “immortal part” of himself and it is right that he should be entitled to vindicate his reputation and receive compensation for a slur upon it without proof of financial loss. But a commercial company has no soul and its reputation is no more than a commercial asset, something attached to its trading name which brings in customers.”<sup>37</sup>

40. The ECtHR has accepted that non-natural persons are capable of possessing a reputation:

“The Court further does not consider that the fact that the plaintiff in the present case was a large multinational company should in principle deprive it of a right to defend itself against defamatory allegations... It is true that large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts... However, in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good.”<sup>38</sup>

41. As property belonging to a body that trades primarily for profit, reputation is as valuable as that which belongs to the “immortal part” of the individual. One way of illustrating this is through examples of (non-defamatory) incidents that have damaged the reputation of such bodies and the impact this had on their financial performance. The share value of Group 4 Security (G4S), for example, fell by 2% as a result of its handling of a security contract at the 2012 Olympics.

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<sup>36</sup> Ibid.

<sup>37</sup> *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC at [91].

<sup>38</sup> See *Steel and Morris v The United Kingdom* No. 68416/01, ECHR 2005-II at 94.

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42. Such bodies themselves recognise the value of reputation as an asset. A 2014 study found that 87% of executives rated reputation risk as more important (or much more important) than other strategic risks that their companies were then facing, with the biggest impact of reputational damage felt in loss of revenue and decline in brand value.<sup>39</sup>

43. As the Commission pointed out in its Report, it would be a radical step to strip away the rights currently enjoyed by trading companies and other entities existing for the primary purpose of trading for profit under the existing law.<sup>40</sup> In the words of one respondent to the consultation, there is "... no proper correlation as between the size of a company and the impact of a defamatory statement". The Bill makes no other provision to further restrict the ability of non-natural persons to raise proceedings in defamation.

### **Limitation and a single publication rule**

44. The law of defamation needs to strike a balance between enabling those who have been defamed to protect their reputation and avoiding unjustifiable interference with freedom of expression. Especially in relation to online publication, the law does not currently strike the appropriate balance. It is undesirable that a new right of action and limitation period arises each and every time the same material is accessed. A single publication rule will rebalance the law while also complementing the introduction of the threshold test of serious harm discussed above.

45. The Bill provides that:

- where a person publishes a statement to the public and subsequently publishes the same or substantially the same statement, any right of action in respect of the subsequent publication should be treated as having accrued on the date of the first publication;

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<sup>39</sup>"Reputation@Risk. 2014 global survey on reputation risk" available at <https://www2.deloitte.com/global/en/pages/governance-risk-and-compliance/articles/reputation-at-risk.html>.

<sup>40</sup> See paragraph 2.18 of the Report.

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- this does not apply where the manner of the subsequent publication is materially different from that of the first publication; and,
- the length of the limitation period in actions for defamation should be one year, and commences on the date of first publication of the statement complained of.

## **A single publication rule**

46. Currently, an action for defamation must be commenced within a period of three years after the date on which the right of action accrued (“the limitation period”) and the right of action accrues on the date on which the publication first comes to the notice of the pursuer. Each individual publication of defamatory material gives rise to a separate cause of action, even if the same, or substantially the same, material has been published previously.<sup>41</sup> Each cause of action is subject to its own limitation period. This is the multiple publication rule. The effect is that each time a publication is read by a new reader, sold or otherwise republished, a new limitation period will begin. This exposes the publisher to a risk of litigation without end.

47. The risk caused by the multiple publication rule can discourage publication, thereby contributing to the chilling effect. A “single publication rule” as provided for in the Bill alleviates in part this chilling effect. In the relevant circumstances, each subsequent publication of particular material would not automatically give rise to the running of a new limitation period. There will be a single limitation period and once that period has expired the general position is that no further action can be brought. There are two exceptions to this general rule.

48. First are those circumstances where the manner of the subsequent publication is materially different from that of the original. In such cases, a new limitation period begins on the date of the new and subsequent publication. Without this, a pursuer might, for example, be faced with a plea of limitation based on first publication of the statement complained of in an obscure publication, although the pursuer’s real concern was that the

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<sup>41</sup> This is sometimes referred to as the “Duke of Brunswick rule”. See *Duke of Brunswick v Harmer* 117 ER 75; (1849) 14 QB 185.

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statement had since been republished in a publication with mass circulation. This exception recognises that what matters in defamation proceedings is not necessarily the occasion on which particular material is originally published. What can be of more significance is what happens when the material is read and by whom it is read.

49. Second, an exception to the general rule arises from the fact that section 19A of the Prescription and Limitation (Scotland) Act 1973 will continue to apply to defamation actions. Where it seems equitable to it to do so, the court may exercise its discretion to enable an action to proceed, notwithstanding that the limitation period has expired. This would include any action based on subsequent publication of a statement once the limitation period had expired.

50. A respondent to the Scottish Government's consultation said, "We regard this as the most vital clause in the Bill. Bearing in mind, first, that [the provision] applies only where there has [been] publication "to the public or to a section of the public" ... secondly [the Bill] provide[s] for republication [where there has been a] substantially different impact and thirdly, the discretion given to the court to relax a time bar in the interests of justice, this is fair to all parties against a background where the choice is only to remove material altogether from public use or to accept that it is republished whenever downloaded by a third party".

## **The length of the limitation period**

51. A fundamental feature of most civil law systems is that litigation should, if it is to be initiated at all, be done so promptly as it is conducive to legal certainty. An action for defamation must currently be brought within a period of three years after the date on which the right of action accrues. Currently, this is when the fact of publication of the statement complained of comes to the attention of the pursuer.

52. The Commission took the view that it is difficult to discern a legitimate reason why a pursuer who was aware of harm to their reputation resulting from a publication should delay in bringing action for redress. Closely tied to this is consideration that a person who has suffered harm to reputation such as to satisfy the serious harm threshold might reasonably be expected to become aware of that before a period of three years had expired, and most likely less than a year.



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53. As one respondent said, “In 21<sup>st</sup> century Scotland, a three-year limitation period for defamation claims is too long. On the face of it, any pursuer who has suffered damage to their reputation would be aware of it from a relatively early stage. If their true concern is that there has been such damage to their reputation then they should be expected to act quickly to bring a claim and remedy that damage... A one-year limitation period, subject to the court’s equitable discretion to allow an action to proceed though out of time, would be fair”.

54. The length of a limitation period has been identified as one factor that may influence the occurrence of forum shopping in defamation cases.<sup>42</sup> In England and Wales, the current limitation period is one year. The Commission concluded that over time, if the three-year limitation period continued to apply in Scotland, the difference in the limitation regimes between the two jurisdictions may encourage the bringing of actions which have no substantial connection to Scotland.

55. The Bill makes provision that the cause of action will accrue on the date of original publication of a statement, with the limitation period of one year starting to run on that date.

### **Limitation and alternative dispute resolution**

56. The Scottish Government’s consultation asked, if the limitation period is shortened to one year, whether the length of the limitation period should be capable of being extended to reflect any period of time that parties engage in alternative methods of dispute resolution.

57. Research has suggested that the primary goal for a pursuer bringing defamation proceedings is prompt vindication of their reputation,<sup>43</sup> a result that could be achieved more swiftly and at less cost than raising court proceedings. Yet to limit the time within which such proceedings can be

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<sup>42</sup> See “Liability and Jurisdictional Issues in online defamation cases” available at <https://rm.coe.int/liability-and-jurisdictional-issues-in-online-defamation-cases-en/168097d9c3>.

<sup>43</sup> See Bezanson, ‘Libel Law and the Realities of Litigation: Setting the Record Straight’ (1985) *Iowa Law Review*, 71, 215-233; ‘The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get’ (1986) *California Law Review*, 74, 789-808.

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raised could act as a disincentive to pursue these alternative methods, albeit that courts do have discretion to allow actions to proceed outside of this limitation period.

58. The majority of respondents to the consultation agreed with this proposal and accordingly the provision to extend the limitation period for all parties who engage in alternative means of dispute resolution has been included in the Bill. This provision is an addition to the Commission's draft Bill.

### **Prohibition on public authorities bringing proceedings**

59. In the case of *Derbyshire County Council v Times Newspapers Ltd and Others*<sup>44</sup> the House of Lords held that a public authority has no right at common law to raise proceedings in defamation.<sup>45</sup> This section places that principle (sometimes known as the Derbyshire principle) on a statutory footing, enhancing the clarity and accessibility of the law.

60. The Bill provides that:

- a public authority cannot bring defamation proceedings against any person, natural or non-natural.

61. Giving the essence of the principle, Lord Keith of Kinkel said in his judgment: "It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism".<sup>46</sup> Such criticism should be uninhibited not because a public authority has no reputation (and therefore interest to protect), but because any such reputation should be protected by political action rather than litigious means. The prohibition applies irrespective of the nature of the functions carried out by the public authority and it applies only to the public authority.

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<sup>44</sup> [1993] AC 534.

<sup>45</sup> The common law referred to here is the common law of England and Wales. No similar case has been decided in Scotland that the Scottish Government is aware of.

<sup>46</sup> [1993] AC 534 at page 7.

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62. The principle does not prevent an individual who holds some form of public office from bringing proceedings in a personal capacity, as distinct from their capacity as an office-holder. The Bill provides that an individual who discharges functions of a public nature, in some capacity, will not be deprived of the opportunity to bring proceedings in respect of matters arising in their private life. Similarly, such a person will not be prevented from defending their moral or professional/occupational reputation against allegations relating to their discharge of public functions, insofar as the matter related clearly to their position as an individual, rather than the functions they were required to perform.

63. The Bill defines, in broad terms, what amounts to a public authority to include any person whose functions include functions of a public nature. Whether a person is a public authority for the purposes of defamation will be a matter for the courts to resolve based on the individual facts of each case. It does not, though, cover companies and charitable organisations contracted by Government or local authorities to discharge functions on their behalf only intermittently, and without coming under their ownership or, to a significant degree, their control. Bodies set up to trade for profit and charitable organisations where either exercises public functions from time to time, provided (in both cases) that they are not owned or controlled by a public authority, are excluded from the definition. In one response it was said, “This definition [which connects a public authority with persons that discharge public functions] would enable a greater degree of flexibility when compared with a prescribed list of public bodies, while setting out a definition of a public authority that would not be overly onerous for individuals, public bodies and the courts to understand and apply. It would also establish a flexible framework within which private bodies who exercise public functions can also be situated”.

64. These provisions are supplemented by a regulation-making power which will enable the Scottish Ministers to specify persons or descriptions of persons who are not to be treated as public authorities for the purposes outlined above. Any such regulations are to be subject to the affirmative procedure, meaning that they will undergo a high level of parliamentary scrutiny. They will also be the subject of consultation, among any persons whom the Scottish Ministers consider appropriate, before they are made.

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## **Alternative approaches - extension of the Derbyshire principle**

65. Some respondents to the Commission's reform project were of the view that the principle should not only be stated in statute but also extended to cover private companies performing a public function. The purpose would be to allow criticism of taxpayer funded services, whoever provides them, without fear of defamation threats.

66. In so far as private companies provide identical or complementary services to those offered by local authorities, the Derbyshire principle does not apply. Over the last 20 years or more, the public sector has, to different degrees, delegated delivery of public services to private companies. A private company that runs a prison (which public function accounts only for a fraction of their overall business), for example, would be able to raise an action in defamation to protect their reputation whereas a prison run by the Scottish Prison Service would not.

67. The Commission gave thought to this issue but concluded that to do so would extend the Derbyshire principle significantly beyond its reach under the common law. Moreover, it was felt unlikely to be possible to devise a provision which is close to being comprehensive in describing the functions of companies and other entities and how far they are, or are not, the same or equivalent to those discharged by local authorities.

68. The Scottish Government consulted further on extending the Derbyshire principle and the related matter of whether public authorities should be able to meet the expense of defamation proceedings raised by an individual in their employment. It was said that the ability of public authorities to financially support an individual in their employment to raise proceedings in defamation circumvents the Derbyshire principle, thereby undermining it. It has the potential to create an inequality of arms that can lead to a chilling effect, undermining the public policy for which the principle was decided.

69. Having considered the responses to these two questions the Bill makes no provision to extend the Derbyshire principle. The range of measures already included in the Bill will provide effective protection for consumers and others with limited means to ensure that they are not inhibited from criticising bodies exercising public functions. These

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provisions include the serious harm test, which requires such bodies to show serious financial loss, and the new defence of publication on a matter of public interest. Further, as noted by one respondent to the Scottish Government's consultation: "The use of [this definition] implies that, if the company undertakes more than [just carrying out functions of a public nature "from time to time"], it will be caught by the principle".

70. As to meeting the expenses of defamation proceedings, the Commission explains that, were an individual able to raise an action of this type (which would not be the case in all circumstances), success would vindicate the reputation of the individual and not necessarily the local authority. In addition, any amount of reward recoverable would be attributable to the damage done to the individual's reputation, not that of the local authority.

### **Restriction on proceedings against secondary publishers**

71. The Bill provides that:

- subject to limited exceptions, defamation proceedings cannot be brought against anyone who is not the author, editor or publisher of a given statement. This covers secondary publishers in general and does not make provision relating exclusively to internet intermediaries or directly governing their liability and defences.

72. In modern society, those who are not responsible for the content of a defamatory statement can be held liable. Over time, a complicated array of defences and jurisdictional exclusions for these secondary publishers has arisen. When they are asked to interfere, then effectively they become the judge over others' rights. It could be said that the current law induces them to act as censors, removing content irrespective of its accuracy or importance. Ultimately, it should be for a court to determine rights, not such secondary publishers. The Bill simplifies the law by clarifying the extent of liability against these secondary publishers.

73. The approach taken in the Bill reflects, to an extent, section 10 of the 2013 Act and section 1 of the 1996 Act. Section 1 of the 1996 Act provides a defence to a person who shows that they are not the author, editor or publisher of the statement complained of, provided that the person can show that they also took reasonable care in relation to the publication of the

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statement complained of and that they did not know, and had no reason to believe, that what they did caused or contributed to the publication of the defamatory statement. The Bill, in contrast, provides for a simple, and unqualified, removal of the court's jurisdiction in relation to secondary publishers, other than in respect of the author, editor or publisher of a statement, or in certain other circumstances to be specified in regulations.

74. There is no requirement for the defender to show that they took reasonable care, nor that a reasonable lack of knowledge caused or contributed to the publication of the statement.

75. This provision also resembles the general approach of section 10 of the 2013 Act. Its effect is to prevent proceedings being brought against any person other than the author, editor or publisher of a statement. Importantly, however, unlike section 10, there is no exception to allow persons other than the author, editor or publisher to be sued when it is not possible to bring proceedings against one of those parties.

76. This exclusion, subject to limited exceptions, forms the basis of the regulation-making power given to the Scottish Ministers in the Bill. This power is to specify categories of persons to be treated as authors, editors or publishers for the purposes of defamation proceedings who would not otherwise be classed as such, nor as employees or agents of such persons. The regulations may also specify a defence available to any person who did not know and could not reasonably be expected to have known that the material disseminated contained a defamatory statement. In effect, this replaces the common law defence of innocent dissemination. The regulation-making power is intended to target new categories of intermediaries acting to facilitate the causing of harm. Any regulations will require public consultation before they are made and will be subject to the affirmative resolution procedure.

## **Editorial activity**

77. The Bill:

- narrows the definition of “editor” by adding provision regarding electronic forms of communication so that liability for defamation does not arise in respect of such activity unless certain criteria pertain.

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78. Some respondents to the Commission’s reform project were concerned that the definition of “editor” in the Commission’s draft Bill might catch individual social media users who like, re-tweet or provide links to defamatory material. They would accordingly be liable in defamation proceedings. The Commission made the decision not to narrow the definition of “editor” in the way suggested by these respondents as this would be an exceptionally challenging task.

79. The Scottish Government’s consultation asked whether the definitions of author, editor and publisher were sufficient to achieve their policy aim of generally restricting liability. The majority of respondents disagreed. In the words of one, “We hope that they will, but having had the benefit of seeing [other respondents’] draft submissions ..., we share some of their concerns about ambiguity”.

80. The Bill clarifies that certain activities in the specific context of statements made in electronic form would not place a person in the category of an editor. It would cover, for instance, providing links to content containing an allegedly defamatory statement by way of CD/DVD, removable flash memory card (e.g. USB drive), email, retweeting such a statement or providing a hyperlink to it, “liking” or “disliking” an article containing such a statement, or posting another similar online “reaction” or “emoji” on republishing the statement.

81. In all circumstances, for a person to avoid being considered the editor of the statement, the statement itself must remain unaltered. This is set against the further qualification that the person’s publishing or marking must not materially increase the harm caused by the original statement. Liability for defamation, therefore, could not arise in respect of such activity unless these criteria pertain.

82. This approach takes into account ECtHR jurisprudence<sup>47</sup> while recognising that this area of defamation law in particular is fact-sensitive and courts are best placed to judge individual cases.

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<sup>47</sup> See for instance *Magyar Jeti ZRT v. Hungary* (Application no. 11257/16).

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## **Alternative approach – section 5 of the 2013 Act**

83. The Commission considered whether the introduction of a defence for website operators along the lines of section 5 of the 2013 Act would address sufficiently the liability of internet intermediaries or secondary publishers for publication of defamatory material originating from a third party. Section 5 provides a qualified defence for an operator of a website who can show that it was not the operator who posted the statement on the website. In the view of the Commission, it is doubtful whether section 5 fulfils a useful function over and above regulation 19 of the EC Regulations and section 1 of the 1996 Act.

84. As the Commission understands it, the section 5 defence is seldom used in practice and is regarded as unworkable by most website operators. Further, shortcomings in relation to addressing defamation online seem to arise primarily from lack of clarity and understanding as to which defence or mechanism for limiting liability applies most appropriately to which online activity. Section 5 adds a further defence to the mix and in that sense may be said to compound these problems rather than alleviate them. For these reasons, the Commission did not recommend that a direct equivalent be introduced in Scots law.

## **Remedies**

85. Often what most concerns those whose reputation has been unfairly harmed is not financial compensation but meaningful public vindication that the statement was wrong. Other jurisdictions offer a range of discursive remedies that can be more effective in vindicating the reputation of an individual who has been unfairly defamed.

86. The Bill introduces a wider range of remedies to better protect the reputation of an individual who has been defamed or the subject of a malicious publication. The Bill provides that the court has the power to:

- order the defender to publish a summary of its judgment;
- allow a settlement statement to be read out in open court; and,
- order the operator of a website to remove a defamatory statement, and an author, editor or publisher of such a statement to stop distributing, selling or exhibiting material containing it.



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## **Ordering a defender to publish a summary of a court judgment**

87. In Scotland, the usual remedy for defamation is an award of damages. These new remedies ensure that the courts are empowered with the means to ensure that those unfairly harmed can achieve effective vindication other than by an award of damages.

88. The power to order an unsuccessful defender in defamation proceedings to publish a summary of a judgment could be of particular value in media cases. For an individual who has been defamed, often the priority may be obtaining a public retraction or a correction of the defamatory statement complained of which may often be of greater consequence than any payment of compensation awarded as damages.

## **Making a statement in open court**

89. The reading of a statement in open court has never been part of the procedure governing defamation actions in Scotland. This procedure allows for a settlement statement to be made in open court as part of the settlement of a defamation action. As an alternative to the making of a bilateral or multi-party statement, the claimant is permitted to make a unilateral statement (subject to the court's approval of its wording and being satisfied that the making of a statement is appropriate) at the stage of a settlement.

90. The value of this remedy lies in its mark as an end point to a litigation brought to achieve vindication. It is also a way to provide a means for more publicity to be given to a settlement than would otherwise occur, in particular in those situations where it is held that ordering the publication of a summary of a judgment is not felt to be appropriate in the circumstances.

91. As Scots law currently stands, there is not thought to be anything to prevent the reading out of a statement of this nature, commonly known as a settlement statement, although, unlike in England and Wales, this is not done in practice in Scotland. The provision is intended to clarify the existence of this remedy as an option, potentially also encouraging its use.

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### **Power of court to require removal of a statement etc.**

92. Sometimes, it may not be possible for an author of material that is held to be defamatory to remove the material or prevent its further dissemination. Where a successful action for defamation has been brought by a pursuer, the court will be empowered to order the operator of a website on which a defamatory statement is posted to remove that statement. Alternatively, the court may make an order requiring a person who was not the author, editor or publisher of the statement, but who is distributing, selling or exhibiting material containing it, to stop distributing the material.

93. Use of this remedy will mean that a pursuer, who is successful in the proceedings, does not face any additional difficulties in securing the removal of the material complained of and found to be defamatory. In these circumstances, the pursuer is better able to protect their reputation from any potential threat of future harm.

### **Defences**

94. The Bill makes the following provisions in respect of the main defences in proceedings in defamation:

- puts the common law defence of veritas on a statutory footing, re-naming it “truth”;
- puts the common law defence of fair comment on a statutory footing, re-naming it “honest opinion”;
- introduces a statutory defence of publication on a matter of public interest; and,
- abolishes the common law version of each of these defences.

95. Putting the main common law defences on a statutory footing will help to make the law more accessible and reduce the chill on freedom of expression. It will also put beyond doubt the applicability of the defences in Scots law. There is currently some uncertainty about whether some of these defences apply in Scots law and the scope of them. At the same time, the Bill abolishes the common law versions of these defences which will serve to avoid any potential for inconsistency and uncertainty in the law.

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## Truth

96. Where a defamatory imputation has been found to be made, the law presumes that it is false. If its truth is established, there is a good defence to the action.<sup>48</sup> In Scots law this defence is referred to as *veritas*. The Bill places the defence wholly on a statutory footing and re-labels it “truth”. In so doing it simplifies the law by setting out in one place and in modern language the whole of the main defence to an action for defamation.<sup>49</sup>

97. One minor change is made to the current law. The 1952 Act provides that the defence of *veritas* will not fail so long as the words not proved to be true do not “materially injure” the reputation of the pursuer. This is changed to “seriously harm”. This maintains consistency with the introduction of the threshold test for actionability on bringing proceedings, discussed above at paragraphs 27 to 29.

## Honest opinion

98. The Scots law of defamation recognises a difference between comment and a statement of fact. Comments (which include opinion) can be recognised by readers as a point of view, and as such they can either be agreed or disagreed with. A statement of fact, however, cannot be treated in a similar manner. If a comment is defamatory it is not actionable where the common law defence of fair comment applies. As recently affirmed by the Inner House of the Court of Session, the defence of fair comment is, “[t]he expression of an opinion as to a state of facts truly set forth [which] is not actionable, even when that opinion is couched in vituperative or contumelious language”.<sup>50</sup>

99. The technical complexity of applying the defence means that it is less effective and less frequently invoked than it may otherwise be in protecting freedom of expression. The shortage of modern Scottish case law on the defence adds to the difficulties.

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<sup>48</sup> Defamation proceedings to which the Rehabilitation of Offenders Act 1974 apply are the exception.

<sup>49</sup> Part of the defence is found in the common law and part is found in statute, see section 5 of the 1952 Act.

<sup>50</sup> *Massie v McCaig*, 2013, SC343, as previously explained in *Archer v John Ritchie & Co* 1891 18 R719 at page 729.

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100. At the same time as placing the common law defence in statute, the opportunity has been taken to reform it. One of the features of the common law defence is the requirement that the comment be on a matter of public interest. The new defence of honest opinion has no such requirement. This is for several reasons. First, the concept has not played a significant role in practice for many years, owing to the scope of the notion of “public interest” having been greatly expanded. Second, a person should be equally free to make a comment on a private matter as on a public one. Third, abolition of the requirement for comment to be on a matter of public interest would help to simplify the defence and make it more straightforward to apply in practice. Parties would no longer have to contend with the uncertainty arising from the imprecise boundaries of the concept of public interest.

101. The defence is extended to comments made on the basis of facts which the commentator reasonably believed to be true at the time the statement was made. It is not necessary for the defence to spell out that the facts on which a comment is based. A requirement of this kind is unduly restrictive, would be difficult to apply in practice, and might give rise to uncertainty. At the same time, facts should not be decoupled altogether from comment, to the extent that there would be no need to indicate even in general terms the facts on which a comment is based.

102. Provision is also made to the effect that the defence may be relied upon where an honest person could have held the opinion on the basis of any fact that the defender reasonably believed to be true at (or before) the time the statement complained of was published. It would protect the position, for example, of a commentator on social media who published an opinion on the basis of facts which subsequently turned out to be false; the commentator in this example would not be faced with seeking to prove the validity of privilege, possibly entailing a publication on a matter of public interest defence.

103. The defence is also available in relation to inferences of verifiable fact. An example of an inference of verifiable fact is the contention that because a person has been charged with an offence he must be guilty of it. The result is that such inferences would be treated as comment and covered by the defence of fair comment, rather than as statements of fact which would require to be defended on the ground of truth.

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104. Given that the key features of the defence are that it protects the right to express opinions freely, provided they are honestly held, the name “honest opinion” – which focuses clearly on these key features – is a more appropriate description than “fair comment” in the Scottish Government’s view.

### **Alternative approaches - rhetorical devices**

105. The consultation raised the question of whether the new statutory defence of honest opinion should take account of some rhetorical devices that may be used by authors to express their opinion.

106. Some respondents noted that the Commission’s recommendation of retaining the requirement for honest belief could restrict freedom of expression where an author uses rhetorical devices, like parody or satire. The way the author chooses to express themselves when using these devices is not necessarily a clear indication of their honestly held opinion. In these circumstances, the authors may not be able to rely on the new statutory defence.

107. Ultimately, having taken account of the responses received, the Scottish Government agrees with the view expressed by the Commission. Given that the proper function of the defence is to protect the expression of genuinely held views, where such rhetorical devices are used to illustrate an underlying view which is genuinely held, there would be nothing to prevent the defence from applying. In its response, the Faculty of Advocates pointed out that a statement made in the context of satire or parody, ought not to fall within the definition of defamation in the first place.<sup>51</sup>

### **Publication on a matter of public interest**

108. In the wider public interest there are occasions when people should be able to speak and write freely to a particular audience, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed. In *Reynolds v Times Newspapers Ltd*<sup>52</sup> (“the Reynolds case”)

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<sup>51</sup> See *Macleod v Newsquest* 2007 SCLR 555.

<sup>52</sup> [2001] 2 AC 127 (HL).

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there was introduced a “defence”<sup>53</sup> for the publication in the media of untrue defamatory allegations. This represented a major shift in favour of freedom of expression. At its core is the idea that a publisher may have a defence where they have been found to have published defamatory allegations on a matter of public interest provided that the publication has been “responsible”. Subsequent cases liberalised the law further, emphasising the flexibility of the defence, giving a greater role to editorial discretion, and giving special protection to the neutral reporting of disputes on matters of public interest.<sup>54</sup>

109. In Scots law, the case of *Adams v Guardian Newspapers Ltd*<sup>55</sup> proceeded on the basis that the Reynolds defence was available in Scotland. The same may be said of the more recent case of *Lyons v Chief Constable of Strathclyde*.<sup>56</sup> As noted by the Commission, the accepted position amongst practitioners appears to be that Reynolds privilege is available in Scotland, albeit that this has never been held definitively.<sup>57</sup>

110. The Bill provides publishers with a statutory “public interest” defence, reproducing the essence of the Reynolds defence. The defence will no longer operate on the basis of the responsibility of the journalism, but will instead proceed on the reasonableness, or otherwise, of the belief held by the defender that publication of the statement in question was in the public interest. The defence is applied to statements based on expressions of opinion as well as those based on fact.

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<sup>53</sup> In *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2006] UKHL 44 both Lord Hoffmann and Lady Hale questioned whether Reynolds remained a form of qualified privilege or was instead of a “different jurisprudential creature” such that it was now a stand apart defence. In the view of Lady Hale “[i]t should by now be entirely clear that the Reynolds defence is a “different jurisprudential creature” from the law of privilege although it is a natural development of that law... In truth, it is a defence of publication in the public interest” at [177].

<sup>54</sup> See *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2006] UKHL 44 & *Flood v Times Newspapers Ltd* [2012] UKSC 11.

<sup>55</sup> [2003] SC 425.

<sup>56</sup> [2013] CSIH 46.

<sup>57</sup> See paragraph 6.2 of the Commission’s Discussion Paper.

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111. Given the underlying policy of the law on the matter is essentially the same on both sides of the border, this section replicates the public interest defence of section 4 of the 2013 Act. This will allow Scots law to develop along with the law of England and Wales.

### **Alternative approaches – do nothing**

112. One alternative approach is to do nothing in respect of these three defences. This, however, would leave Scots law of defamation on an unsure footing as the applicability of some of the defences is uncertain and the complexity of others means that they are not utilised as often as they might be. It is uncertain, for instance, whether the Reynolds defence applies in Scotland, although cases have so far proceeded on the basis that it does. The complexity of the fair comment defence means that it is less effective than it otherwise may be.

### **Privilege**

113. The Bill makes provision to:

- restate the absolute defence for contemporaneous publication of a statement which is a fair and accurate report of any court or tribunal proceedings;
- restate the defence for publication in a scientific or academic journal of a statement relating to a scientific or academic matter if it can be shown that the statement has been subject to an independent review of its scientific or academic merit carried out by the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned;
- extend qualified privilege to cover a fair and accurate report of proceedings of a scientific or academic conference held anywhere in the world, and to copies, extracts from and summaries of material published by such conferences.

114. Aided by social media and the internet, information more easily flows across territorial borders than ever before. The Bill modernises the law of privilege to take account of this. It “internationalises” the occasions to which privilege attaches. At the same time, the Bill lists in one statute all the occasions on which privilege can attach, simplifying the law by making it more transparent and accessible, avoiding the need for cross-referencing with different Acts.

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## **Offer to make amends**

115. The Bill provides that where a defender recognises that they have made a mistake, the offer to make amends scheme allows for effective vindication of a pursuer's reputation without the need to launch or defend legal proceedings. Restating the defence allows simplification of the law by bringing together component parts in one statute.

116. The Bill clarifies an ambiguity that affects the practical operation of the scheme: an offer of amends is deemed to have been rejected if not accepted within a reasonable period.

## **Other provisions relating to defamation proceedings**

117. The Bill also contains a number of other provisions relating to defamation proceedings.

## **Removal of presumption that proceedings are to be tried by jury**

118. The Bill:

- removes the presumption in favour of jury trials in defamation actions, allowing the court to appoint the form of inquiry best suited to the circumstances of the case.

119. Courts currently do not have the discretion to choose the form of factual enquiry most appropriate to the circumstances of an individual case. By removing the presumption, the Bill increases the ability of courts to effectively manage defamation claims according to their particular circumstances, thereby reducing the costs of an action for all sides. Where appropriate, courts will retain a discretion to order trial by jury.

## **Jurisdiction**

120. The Bill provides that:

- a court in Scotland does not have jurisdiction to hear and determine defamation proceedings against a person who is not domiciled in the UK, another member State or a state which is a contracting party to the Lugano Convention, unless satisfied that Scotland is clearly the most appropriate place to bring the proceedings.



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121. At present, the rules governing the jurisdiction of the Scottish courts in defamation actions are contained in the Civil Jurisdiction and Judgments Act 1982, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition of enforcement of judgments in civil and commercial matters, as amended (“the Brussels Regulation”) and the Lugano Convention. These rules apply for the purposes of determining whether there is jurisdiction in Scotland against the publisher of allegedly defamatory material. The effect of the rules are that a person may be sued in the courts for the place where they are domiciled, in matters relating to delict in the courts for the place where the harmful event occurred or may occur, and in proceedings for interdict in the courts for the place where the alleged wrong is likely to be committed.

122. Where a statement that is alleged to be defamatory has been published in Scotland, the Scottish courts would have jurisdiction over the publisher wherever they are domiciled. Similarly, if publication is anticipated to take place in Scotland, the Scottish courts would have jurisdiction to pronounce an order for interdict or interim interdict against the publisher even if they are domiciled outside Scotland. In a case governed by the 1982 Act, the defence of forum non conveniens would be available. The essence of this defence is that, although a given court has jurisdiction to hear a case, the interests of justice would be better served if it was heard by a different court, which has concurrent jurisdiction and is considered to provide the most appropriate forum in the whole circumstances of the case.

123. The Bill creates a new threshold test for establishing jurisdiction in defamation actions brought against persons who are not domiciled in the United Kingdom, elsewhere in the European Union or in a Lugano state. Where the defendant is domiciled in the European Union, the EU jurisdiction regime contained in the Brussels Regulation will continue to apply. Similarly, in the case of defendants domiciled in a state party to the European Free Trade Association, the Lugano Convention regime will continue to regulate questions of jurisdiction. In respect of non-domiciled persons, a court does not have jurisdiction unless satisfied that of all the places in the world in which the statement complained of has been published, Scotland is clearly the most appropriate place in which to bring an action in respect of the statement. The effect of the provision is that in cases where a statement has been published in Scotland and elsewhere in the world, the court would have to consider the overall global picture in

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order to decide where it would be most appropriate for a claim to be heard. There would be a range of factors to be taken into account when determining this.

## Changes to the law relating to verbal injury

### **Malicious Publication**

124. Verbal injury is similar to, yet distinct from, defamation. It covers statements that, while not defamatory, are likely to be damaging. One of the main differences between verbal injury and defamation is that the pursuer in a verbal injury action does not enjoy the benefit of any of the presumptions that exist in defamation, such as the presumptions of falsity and of malice.

125. The common law is, at present, both confused and unclear. It is not clear into which of the possible categories of verbal injury a damaging imputation most likely falls. There is also confusion about the scope of verbal injury – and the precise categories into which it can be divided. At the moment, despite this confusion, Scots law seems to recognise five main categories of verbal injury.<sup>58</sup> These are:

- Slander of title;
- Slander of property;
- Falsehood about the pursuer causing business loss;
- Verbal injury to feelings by exposure to public hatred, contempt or ridicule; and,
- Slander on a third party.

126. No matter the category under which the imputation is classed, there are three prerequisites to any cause of action. The onus of proof is on the pursuer to establish each of these prerequisites. These are that:

- there is a false imputation made in respect of the pursuer or, as appropriate, a third party;

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<sup>58</sup> See the Scottish Law Commission's Discussion Paper on Defamation (No. 161), at paragraphs 13.10 to 13.25, for a more detailed outline of what it understands constitutes each of these categories of verbal injury.

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- it was made with malicious intent to injure; and
- there is actual injury to the pursuer consequent on the imputation.

127. The Bill makes changes to the law of verbal injury. It makes provisions that:

- the principles underlying the three categories of verbal injury which relate to economic interests (i.e. falsehood about the pursuer causing business loss, slander of title and slander of property) should be retained; and,
- the principles underlying the other two verbal injuries - to feelings by exposure to public hatred, contempt or ridicule, and slander on a third party - are not restated.

128. Verbal injury as a result of exposure to public hatred, contempt or ridicule has been superseded by other areas of legal protection, partly in relation to privacy and confidentiality, and partly in relation to harassment and the delict of intentional infliction of mental harm. As regards slander on a third party, this appears to be of limited relevance in the modern age. In so far as the essence of this wrong might be of continued relevance, it could be accommodated under the heading of falsehood about the pursuer causing business loss (re-named “statements causing harm to business interests”).

129. The approach taken in the Bill is desirable in the interests of legal certainty and clarity given the confusion about the scope of the different categories and lack of certainty about the categorisation of damaging imputations. If all the categories of verbal injury were removed, leaving defamation as the only actionable form of wrong, this would likely leave gaps in the law.

### **Alternative approach - a threshold test for malicious publication**

130. In its consultation, the Scottish Government asked whether it was necessary to strengthen the threshold test applying to statements amounting to malicious publications. A number of respondents said that the threshold test of serious harm that applies in defamation proceedings should also be applied to malicious publication.

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131. Malicious publication is a delict distinct from defamation. In defamation proceedings, a pursuer benefits from three important presumptions. These are that a defamatory statement is false, has caused the pursuer harm and is made maliciously. This places the pursuer in a strong position. The threshold test of serious harm is adopted in defamation proceedings because the absence of a formal court procedure means that trivial claims can be heard, with a consequent impact on parties' and judicial resources. These same presumptions are not made in proceedings in malicious publication. Accordingly, the Scottish Government makes no recommendation to this effect.

### **Single publication and limitation**

132. The provisions of the Bill applying to defamation proceedings, discussed above at paragraphs 44 to 58, also apply to proceedings relating to malicious publications.

133. As a result:

- where a person publishes a statement to the public and subsequently publishes the same or substantially the same statement, any right of action in respect of the subsequent publication should be treated as having accrued on the date of the first publication (this does not apply where the manner of the subsequent publication is materially different from that of the first publication); and,
- the length of the limitation period is reduced to one year, commencing on the date of first publication of the statement complained of (disregarding any period during which parties are engaged in alternative dispute resolution).

### **Remedies**

134. The provisions of the Bill applying to defamation proceedings, discussed above at paragraphs 85 to 93, also apply to proceedings relating to malicious publications.

135. As a result, in cases where an individual has been the subject of a malicious publication, the court will have the power to:

- order the defender to publish a summary of its judgment;
- allow a settlement statement to be read out in open court; and,

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- order the operator of a website to remove the statement complained of, and an author, editor or publisher of such a statement to stop distributing, selling or exhibiting material containing it.

## Information society services

136. The Bill contains provisions allowing the Scottish Ministers to make regulations on how providers of “information society services” are to be treated both in respect of proceedings for defamation and for malicious publication. This will allow for the implementation of obligations under the E-Commerce Directive (2000/31/EC) requiring the providers of information society services to be exempt from liability, in certain circumstances, in respect of conduit, caching, and hosting services, provided the service is of a mere technical, automatic and passive nature.

137. Information society services are a concept within European e-commerce comprising any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service. For example, the Court of Justice of the European Union (CJEU), in a reference from the High Court in the case of *L’Oreal v eBay*,<sup>59</sup> gave a preliminary ruling that eBay, as the operator of an online marketplace, was an information society service<sup>60</sup>. In another reference, this time from the French Court of Cassation, the CJEU found that Google Search fell within the meaning too.<sup>61</sup>

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<sup>59</sup> [2009] EWHC 1094 (Ch)

<sup>60</sup> Case C-324/09, CJEU, 12 July 2011, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62009CJ0324&qid=1574337521778&from=EN>

<sup>61</sup> Joined Cases C-236/08 to C-238/08, 23 March 2010, *Google France SARL, Google Inc v Louis Vuitton Malletier SA and others*, available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CJ0236:EN:PDF>

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## Alternative approaches – summary

138. Throughout this Memorandum, a number of alternative approaches have been described and rejected for a variety of reasons.

139. One alternative approach is simply to do nothing. For instance, in respect of the threshold test of serious harm, doing nothing could lead to a prolonged period of legal uncertainty as Scottish courts develop (or otherwise) a common law rule (see paragraphs 30 and 31). As already mentioned, the current Scots law of defamation is complex and has difficulty applying old legal principles to the way that modern society now communicates. Doing nothing would not solve these problems.

140. Another alternative approach suggested across several areas of defamation law is to go beyond what has been provided for in the Bill to further protect freedom of expression. For instance, stakeholders have raised the question of further restricting the rights of legal persons (for example, a public company) from raising proceedings. Or, another instance would be, extending the Derbyshire principle beyond its common law boundary. A fundamental purpose of the Bill is to achieve an appropriate balance between two sometimes competing fundamental human rights – freedom of expression and protection of reputation. The Scottish Government has sought carefully to achieve this balance by ensuring that the interests of a defamed person are understood and taken into account too. The Scottish Government is of the view that the Bill as published achieves the correct balance.

## Other matters not included in the Bill

### Unjustified threats

141. In the consultation, the Scottish Government sought views on whether the introduction of a new delict of unjustified threats would help to reduce the chill on freedom of expression identified by a stakeholder. This would operate in a manner similar to that found in intellectual property law.

142. In short, and as applied to defamation law, the position would be that a person who is aggrieved by threats of defamation proceedings could bring an action to demand that the person who made the threat justifies their threat. If that person cannot do so, then the pursuer would be entitled

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to declarator, a stop (interdict) to the threat, and/or damages. For example, where the author of a statement receives a letter threatening legal proceedings from a complainer who believes the statement to be defamatory of them, then the author can raise legal proceedings in terms of an unjustified threat in order to force the complainer to justify their threat.

143. In the context of defamation actions, the cause of action would arise as soon as an unjustified threat of legal action is communicated. In practice, this could be the receipt of a legal letter or correspondence communicating an unjustified threat prior to any court action. This will not restrict communications sent to parties requesting clarifications or reasonable modifications on published statements, but will focus on communications that contain implicit or explicit threats against parties that are deemed to be unjustified.

144. The unjustified threats provisions do not apply to a “primary actor”, such as a manufacturer or importer of an alleged infringing product.<sup>62</sup> Threats to retailers, and stockists in general, are not allowed as such actors in the supply chain are likely to be the most harmed and the least harmful in terms of IP infringement.

145. As applied to defamation, a provision based on the unjustified threats provision in intellectual property law could add to the chilling effect. If, taking the example of a less well-resourced person who believes they are the subject of a defamatory statement, they may be unwilling to challenge a well-resourced person for fear of an action for unjustified threat being brought against them.

146. Furthermore, not only would introducing a provision dealing with unjustified threats add a layer of complexity to defamation proceedings, any such provision is also likely to reduce the incentive to take advantage of other methods of dispute resolution. The courts may see an increase in litigation as a “sue first, ask later” attitude is adopted by complainers. As mentioned in one response to the consultation, “Pre-litigation negotiation often resolves matters... and the prospect of litigation being raised very

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<sup>62</sup> For who might be considered a primary actor in patents, trademarks and registered designs see Sections 1(2), 2(2), and 4(3) of the 2017 Act respectively.

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often serves the useful purpose of concentrating minds and bringing matters to a swift conclusion”.

147. For these reasons, the Scottish Government does not consider it appropriate to introduce a new delict modelled on the unjustified threats provision of intellectual property law into the law of defamation.

**Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.**

### **Equal opportunities**

148. The Bill reforms the law of defamation and the related delict of verbal injury (to become malicious publication). It applies across the board and does not differentially impact on specific groups. The Scottish Government concludes that the Bill will not impact negatively on a person by virtue of their particular religion, belief, age, disability, sex, sexual orientation, gender, gender reassignment, race or ethnicity. As such, the Scottish Government considers that the Bill will not in any way hinder access to equal opportunities. Instead, given the recalibration of the balance between the two fundamental rights of freedom of expression and protection of reputation, and the restatement, in one place, of several of the main principles of defamation law, the Bill will help all persons to engage in public debate without damaging others’ reputation.

### **Human rights**

149. The Scottish Government has considered the effects of the Bill on human rights. Defamation law affects Article 8 of the ECHR - which encompasses protection of reputation – and Article 10 – the right of freedom of expression. Any change to the law of defamation is likely to impact on the balance between these two, sometimes competing, rights.

150. The current law of defamation relies on aged statutes and the common law. Courts in many jurisdictions have struggled to apply old concepts of defamation law to the modern way that members of society now communicate with one another. In looking at the law of defamation, the Scottish Government has sought to more appropriately balance the law of



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defamation to protect reputation and the freedom of expressions without unjustifiably restricting either right.

### **Island communities**

151. No detrimental effects are anticipated.

### **Local government**

152. The Scottish Government does not anticipate any adverse effect on local government. Provisions in relation to the Derbyshire<sup>63</sup> principle maintains the current position and no impact is therefore expected on local authorities as a result of this reform.

### **Sustainable development**

153. No detrimental effects are anticipated. In modernising and simplifying the law of defamation the Bill may encourage greater use of Scots law in this area which may have consequential benefits for the Scottish economy as outlined in the Business and Regulatory Impact Assessment.

154. The proposals in the Bill are in line with the Scottish Government's National Outcomes which form part of the Government's National Performance Framework that:

“We live in a Scotland that is the most attractive place for doing business in Europe.”

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<sup>63</sup> See paragraphs 59 to 70 above in respect of Prohibition on public authorities bringing proceedings

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## Policy Memorandum

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