



Defamation and Malicious Publication (Scotland) Act 2021

2021 asp 10

The Bill for this Act of the Scottish Parliament was passed by the Parliament on 2nd March 2021 and received Royal Assent on 21st April 2021

An Act of the Scottish Parliament to amend the law of defamation; replace the common law delicts of verbal injury with delicts of malicious publication; and for connected purposes.

PROSPECTIVE

PART 1

DEFAMATION

Actionability and restrictions on bringing proceedings

1 Actionability of defamatory statements

- (1) This section applies to a defamatory statement made or published by a person (A) about another person (B).
- (2) A right to bring defamation proceedings in respect of the statement accrues only if—
 - (a) A has published the statement to a person other than B, and
 - (b) the publication of the statement has caused (or is likely to cause) serious harm to the reputation of B.
- (3) For the purposes of subsection (2) (b), where B is a non-natural person which has as its primary purpose trading for profit, harm to B's reputation is not “serious harm” unless it has caused (or is likely to cause) B serious financial loss.
- (4) For the purposes of this Act, unless the context otherwise requires—
 - (a) a statement about a person is defamatory if it causes harm to the person's reputation (that is, if it tends to lower the person's reputation in the estimation of ordinary persons),

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Changes to legislation: There are currently no known outstanding effects for the Defamation and Malicious Publication (Scotland) Act 2021. (See end of Document for details)

- (b) a reference to publishing a statement is a reference to communicating the statement by any means to a person in a manner that the person can access and understand, and
- (c) a statement is published when the recipient has seen or heard it.

(5) Nothing in this section affects a right to bring proceedings which accrued before the commencement of this section.

2 Prohibition on public authorities bringing proceedings

(1) A public authority may not bring defamation proceedings.

(2) For the purpose of subsection (1), a public authority is—

- (a) any institution of central government, including in particular the Scottish Ministers and any non-natural person owned or controlled by them,
- (b) any institution of local government, including in particular each local authority and any non-natural person that such an authority owns or controls,
- (c) a court or tribunal,
- (d) any person or office not falling within paragraphs (a) to (c) whose functions include functions of a public nature (unless excluded by regulations made under subsection (6)).

(3) But, where the person—

- (a) is a non-natural person which—
 - (i) has as its primary purpose trading for profit, or
 - (ii) is a charity or has purposes consisting only of one or more charitable purposes, and
- (b) is not owned or controlled by a public authority,

it is not a public authority by reason only of its carrying out functions of a public nature from time to time.

(4) For the purposes of this section, a non-natural person is owned or controlled by a public authority if the authority—

- (a) holds (directly or indirectly) the majority of shares or voting rights in it,
- (b) has the right (directly or indirectly) to appoint or remove a majority of the board of directors of it, or
- (c) has the right to exercise, or actually exercises, significant influence or control over it.

(5) For the avoidance of doubt, nothing in this section prevents an individual from bringing defamation proceedings in a personal capacity (as distinct from the individual acting in the capacity of an office-holder or employee).

(6) The Scottish Ministers may by regulations make provision specifying persons or descriptions of persons who are or are not to be treated as a public authority for the purpose of subsection (1).

(7) Regulations under subsection (6) are subject to the affirmative procedure.

(8) Before laying a draft of a Scottish statutory instrument containing regulations under subsection (6) before the Scottish Parliament, the Scottish Ministers must consult such persons as they consider appropriate.

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(9) In this section—

- (a) a reference to a charity is a reference to a non-natural person—
 - (i) registered in the Scottish Charity Register, or
 - (ii) managed or controlled wholly or mainly outwith Scotland and which is registered in a register equivalent to the Scottish Charity Register for the purposes of the country in which it operates,
- (b) “charitable purposes” is to be construed in accordance with section 7(2) of the Charities and Trustee Investment (Scotland) Act 2005.

3 Restriction on proceedings against secondary publishers

(1) Except as may be provided for under section 4, a right to bring defamation proceedings in respect of a defamatory statement does not accrue against a person unless the person is—

- (a) the author, editor or publisher of the statement, or
- (b) both—
 - (i) an employee or agent of such a person, and
 - (ii) responsible for the statement's content or the decision to publish it.

(2) In this section, subject to subsections (3) to (5)—

“author” means the person from whom the statement originated, but does not include a person who did not intend the statement to be published,

“editor” means a person with editorial or equivalent responsibility for the content of the statement or the decision to publish it,

“publisher” means a commercial publisher (that is to say, a person whose business is issuing material to the public or to a section of the public) who issues material containing the statement in the course of that business.

(3) Where a statement is in electronic form, a person is not to be considered the editor of the statement or, in the case of an employee or agent of such a person, responsible for its content or the decision to publish it, if—

- (a) the person's involvement with the statement is only—
 - (i) publishing the same statement or providing a means to access the statement (for example a hyperlink) in a manner which does not alter the statement, or
 - (ii) marking the person's interest in, approval of or disapproval of the statement in a manner which does not alter the statement (typically by means of a symbol), and
- (b) that involvement does not materially increase the harm caused by the publication of the statement.

(4) A person is not to be considered the author, editor or publisher of a statement or, in the case of an employee or agent of such a person, responsible for its content or the decision to publish it, if the person's involvement with the statement is only—

- (a) printing, producing, distributing or selling printed material containing the statement,
- (b) processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part 1 of the Copyright, Designs and Patents Act 1988) containing the statement,

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- (c) processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded,
 - (d) operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form,
 - (e) broadcasting a live programme containing the statement in circumstances in which the person has no effective control over the maker of the statement,
 - (f) operating or providing access to a communications system by means of which another person over whom the person has no effective control transmits the statement or makes it available,
 - (g) moderating the statement (for example, by removing obscene language or correcting typographical errors without altering the substance of the statement).
- (5) Where a person does not fall within subsection (3) (a) or (4) (a) to (g), the court may have regard to those paragraphs by way of analogy in determining whether a person is the author, editor or publisher of a statement (or, in the case of an employee or agent of such a person, responsible for its content or the decision to publish it).
- (6) The Scottish Ministers may by regulations modify subsection (3) or (4) to add, amend or remove activities or methods of disseminating or processing material.
- (7) Regulations under subsection (6)—
- (a) may be made only where the Scottish Ministers consider it appropriate to take account of—
 - (i) technological developments (including obsolescence) relating to the dissemination or processing of material, or
 - (ii) changes in how material is disseminated or processed as a result of such developments, and
 - (b) are subject to the affirmative procedure.
- (8) Before laying a draft of a Scottish statutory instrument containing regulations under subsection (6), the Scottish Ministers must consult such persons as they consider appropriate.

4 Power to specify persons to be treated as publishers

- (1) The Scottish Ministers may by regulations specify categories of persons who are to be treated as publishers of a statement for the purpose of defamation proceedings despite not being—
- (a) the author, editor or publisher of the statement as defined in section 3, or
 - (b) an employee or agent of such a person.
- (2) Regulations under subsection (1) may also provide for a defence to defamation proceedings for a person who—
- (a) is treated as a publisher under such regulations,
 - (b) did not know and could not reasonably be expected to have known that the material which the person disseminated contained a defamatory statement, and
 - (c) satisfies any further conditions specified by the regulations.
- (3) Regulations under subsection (1) are subject to the affirmative procedure.

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- (4) Before laying a draft of a Scottish statutory instrument containing regulations under subsection (1), the Scottish Ministers must consult such persons as they consider appropriate.

Defences

5 Defence of truth

- (1) It is a defence to defamation proceedings for the defender to show that the imputation conveyed by the statement complained of is true or is substantially true.
- (2) Where defamation proceedings are brought in respect of a statement conveying two or more distinct imputations, the defence under subsection (1) does not fail if—
- (a) not all of the imputations have been shown to be true or substantially true, and
 - (b) having regard to the imputations that have been shown to be true or substantially true, publication of the remaining imputations has not caused serious harm to the reputation of the pursuer.

6 Defence of publication on a matter of public interest

- (1) It is a defence to defamation proceedings for the defender to show that—
- (a) the statement complained of was, or formed part of, a statement on a matter of public interest, and
 - (b) the defender reasonably believed that publishing the statement complained of was in the public interest.
- (2) Subject to subsections (3) and (4), in determining whether the defender has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
- (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the pursuer was a party, the court must, in determining whether it was reasonable for the defender to believe that publishing the statement was in the public interest, disregard any omission of the defender to take steps to verify the truth of the imputation conveyed by it.
- (4) In determining whether it was reasonable for the defender to believe that publishing the statement was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.
- (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

7 Defence of honest opinion

- (1) Subject to subsections (5) and (6), it is a defence to defamation proceedings for the defender to show that the conditions in subsections (2) to (4) are met.
- (2) The first condition is that the statement complained of was a statement of opinion.
- (3) The second condition is that the statement indicated, either in general or specific terms, the evidence on which it was based.