

## Justice Committee

### Defamation

#### Written submission from the Scottish Law Commission

#### Background

The Scottish Law Commission welcomes the opportunity to provide a briefing to the Justice Committee on this subject. This submission is intended to set the scene for the Committee session on 23 January 2018.

Our [Report on Defamation](#) was published on 14 December 2017. Our review of defamation law was a medium-term project and formed part of our [Ninth Programme of Law Reform](#) which took effect from 1 January 2015. The consultation on our proposed Ninth Programme of Law reform in 2014 elicited a substantial number of submissions suggesting we should examine this area of the law. Amongst those supporting a project in this area were the Law Society of Scotland, the Faculty of Advocates, BBC Scotland, and the Libel Reform Campaign. They and other respondents drew particular attention to the major reforms of the law of England and Wales introduced by the Defamation Act 2013 which was largely not extended to Scotland at the time<sup>1</sup>.

The Report and accompanying draft Bill is the culmination of three years of work on the project. We formed an advisory group to assist us in understanding how the current law works in practice and in developing our ideas for reform of the law. The policy behind our final recommendations has been informed by comparative legal analysis and developed in light of responses to extensive consultations on both our [Discussion Paper on Defamation](#) (Discussion Paper No 161) (published March 2016) and a working draft of the Bill (during August 2017)<sup>2</sup>.

#### Aim of recommendations

The Report makes 49 recommendations and aims to modernise the law of defamation for the age of the internet and social media. The law of defamation has become increasingly antiquated; it is based on a complex landscape of elderly and sometimes inconsistent case law and scattered statutory provisions. We think it is important that the main principles of the law should now be set out in clear and straightforward terms in a modern and accessible statute.

In forming our recommendations, a key consideration was that the law of defamation should strike the right balance between freedom of expression and protection of reputation. We believe our recommendations achieve this.

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<sup>1</sup> See paragraphs 1.3 to 1.5 of our Report for more detailed background to the 2013 Act.

<sup>2</sup> We received 38 responses to the former and 111 responses to the latter. These responses are published on the [project page](#) of our website and can be accessed via links in Appendixes B and C to our Report.

## Draft Bill

The draft Bill attached to our Report constitutes the most substantial proposed reform of defamation law in Scottish legal history. It contains a wide range of proposals to modernise the law of defamation in Scotland. In particular:

- the Bill provides that for a defamatory statement to be actionable it must have been published to someone other than the subject of the statement (section 1(2)(a) of Bill);
- it provides that to be actionable the publication of the statement must have caused (or be likely to cause) serious harm to the reputation of the claimant (section 1(2)(b));
- it provides that, in the case of a non-natural person trading for profit, serious harm means serious financial loss (section 1(2)(b) and (3));
- the Bill places certain key principles of defamation law on a statutory footing for the first time, including the *Derbyshire* principle that defamation actions cannot competently be brought by public authorities (section 2);
- it seeks to remove liability for defamation from “secondary publishers” i.e. people other than authors, editors or publishers of material containing a defamatory statement (section 3);
- it restates in modern terms the main defences available in defamation actions, replacing common law equivalents; these include the defences of truth and honest opinion (sections 5, 7 and 8);
- it introduces a statutory defence of publication on a matter of public interest (section 6);
- it establishes a jurisdictional threshold for the bringing of defamation proceedings in courts in Scotland - a case will only be heard here if Scotland is clearly the most appropriate place for hearing it (section 19);
- it removes the presumption that proceedings are to be tried by jury (section 20);
- it provides for the abolition of common law verbal injury in so far as it relates to injury to feelings, as well as creating statutory equivalents of verbal injury affecting business interests (actionable types of malicious publications) (Part 2, sections 21 to 27);
- it strengthens the powers of the courts in granting remedies in defamation actions; in particular, the courts will be able to order the taking down of defamatory material from websites (sections 28 to 31);

- it makes provision to reduce the limitation period within which defamation actions can be brought from three years to one (section 32);
- it introduces a 'single publication rule' to avoid the time limit being artificially extended by stale publication of the same material (section 32);
- it provides for the repeal and re-enactment of key sets of provisions of relevance to defamation proceedings, namely those relating to absolute and qualified privilege (sections 9 to 12 and the schedule) and those relating to offers to make amends (sections 13 to 18).