Scottish Draft Defamation Bill: Some Key Considerations

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The Scottish Law Commission is to be congratulated for its efforts in producing a clear and comprehensive draft Bill which, if enacted, will provide much useful reform. Overall, it is positive to see that this is a fairly comprehensive draft legislation; it is regrettable that in England and Wales the Defamation Act 2013 was not more comprehensive instead of sitting alongside the 1952 and 1996 Acts. There are, however, modifications which should be made, particularly in relation to dealing with online defamation. I would note also from the outset that my brief comments are limited to Parts 1 and 3 of the Bill, my interest as a media specialist being in libel rather than slander and other forms of verbal injury.

Section 1 provides useful clarification of the law. In particular, I note that Section 1(2) effectively provides a clear, statutory definition of defamation. The inclusion of the "serious harm" test (Section 1(2)(b)),especially the clarification of how this is to apply in relation to non-natural persons (Section 1(3)), is a welcome innovation, placing some reasonable limitations on the power of big business to use a libel writ as an antidote to criticism. The full extent of what exactly qualifies as "serious harm" is rightly left to the courts to decide. Warby J's decision in *Monroe v Hopkins* [2017] EWHC 433 (QB), in which the allegation that the claimant had approved of graffiti defacing a memorial to those who had died in the World Wars was sufficient to meet this test. Although much criticised, the social and cultural politics still surrounding WW2 in England would tend to suggest Warby was correct. It may be worth giving some thought to whether the Bill should clarify the point in time at which the law should consider whether serious harm has been caused: at time of original publication? On the date of a lawsuit being filed? On the date at which the case reaches court? Conceivably, as considered by both Bean J in *Cooke & Midland Heart v MGN* [2014] EMLR 31 and Warby J in *Lachaux v Independent Print, Evening Standard, AOL (UK)* [2015] EWHC 2242 (QB), this can significantly affect the outcome of a case. In *Cooke & Midland Heart*, for instance, the decision that this point in time should be later than on the date of first publication, this meant that the severity of the case against the defendants was somewhat mitigated by an apology and clarification that had been published some days later. While the Court of Appeal appear to have broadly preferred Warby's approach, as seen in their approval of his decision in *Lachaux v Independent* [2017] EWCA Civ 1334, the matter is due to be reviewed, the Supreme Court having, as of 21 March 2018, granted Lachaux leave to appeal denied by the Court of Appeal. It remains to be seen how this will be clarified in England and Wales. Statutory certainty on this particular matter seems desirable.

Section 2 is also to be welcomed for placing the common law positon on a statutory footing; it is regrettable that this has not been done in England and Wales. I would, however, suggest that it is inappropriate to shield private companies from this level of scrutiny when they are acting in a public capacity (Section 2(3)). It is not a difficult matter for a court to determine this, and in an age when the private sector is increasingly involved through Private Finance Initiatives and other such arrangements in the delivery of public sector services, this could become problematic, effectively allowing government departments to evade scrutiny by outsourcing.

I would take a very dim view of Section 3, which, as the draft bill sits, would effectively immunise online hosts and information providers from liability with regards to third party provided content save where Section 4 comes into play. This is an area of law which has long been difficult and a bone of contention. No-one, of course, wishes to make life extremely difficult for online hosts or to cause a chill on freedom of expression via an environment in which distributors, especially online, become over-cautious. The approach taken in the draft bill is, however, unnecessarily complicated. England and Wales dealt with this by providing that persons who are not an author, editor or publisher may only be subject to legal proceedings where the source of the defamatory comment cannot be identified, such that the claimant would otherwise be denied justice (see Section 10 of the Defamation Act 2013). Further, Section 5 (Defamation Act 2013) provides that “website hosts” who comply with a procedure set out in secondary regulation (Defamation (Operators of Websites) Regulations 2013). While I acknowledge that these regulation are of necessity somewhat complicated, the essential procedure is reasonably straightforward and gives a fair degree of certainty to online providers which would seem otherwise lacking where the power to determine which categories of persons will or will not be open to liability in the hands of Scottish Ministers. I might further suggest that this is a matter which should be fully considered and scrutinised by the Scottish Parliament, not left to members of the Scottish Executive alone. I note also that Section 4(2) does seek to provide an awareness-based defence to those determined by Scottish Ministers to be publishers. This mirrors the defence provided in Section 1 of the Defamation Act 1996. This falls some way short of the extra clarity provided to website operators and distributors more generally in England and Wales by Sections 5 and 10 of the Defamation Act 2013.

Section 5 provides a sensible transference of the common law defence of veritas to a statutory footing. I would, however – as I do with Section 1 of the Defamation Act 2013 – take issue with the defence being renamed “Defence of Truth”. Defamation being a civil law matter, where a court will make a decision based upon the lower standard of the balance of probabilities, the use of such definitive language as “truth” seems inappropriate. I would submit that instead this be known as the ‘Defence of provable fact’.

Section 6 is a reasonable transfer of Reynolds’ Privilege into a statutory format; I am of the view that in this draft bill it is set out rather better than in the Defamation Act

2013. As per the latter, I would expect that explanatory notes will make clear that, although *Reynolds* and subsequent case law will be repealed (per Section 8(1)(c) of the draft Bill), it may still be referred to by a court seeking to interpret Section 6.

Sections 7 to 12 are well drafted and seem straightforward. As was the case when the defence of 'Peer-reviewed statement in scientific or academic journal' was included as Section 6 of the Defamation Act 2013, its inclusion here as Section 10 of the draft Bill provokes mixed feelings. In theory, the defence of honest opinion proposed in Section 7 should adequately cover these situations, though in practice the experience of Dr Peter Wilmshurst, among others, suggests that in practice it would be welcomed by academia and academic journals working within the often very tight budgets afforded them by their commercial owners. The defence of "offer to make amends", set out in Sections 13 to 17 is well developed, and more clearly stated than the corresponding defence in the Defamation Act 1996.

Section 18 is particularly well set out. As with Section 9 of the Defamation Act 2013, this adds little to the common law position, bar the requirement in Section 18(2) that the court must consider whether "of all the places where the statement complained of has been published, Scotland is clearly the most appropriate place to bring proceedings in respect of the statement." While previously the courts were not directly required to consider publication outside of Scotland while making such a decision, I am inclined to the view that this is unlikely to make a significant difference in cases where the courts would previously have been in favour of allowing a claim to be heard in Scotland. Nonetheless, this clear summation of the parameters is a welcome development.

Finally in Part I, the removal of juries as the default in libel cases will doubtless be welcomed by the media in Scotland as it has been in England and Wales, allowing for, in particular, certainty of meaning at an early hearing stage and thus increased opportunity for early settlement. This is a positive step.

Part III of the Bill is straightforward and predominantly positive. In particular, I would welcome the following developments. In addition to granting a court the power both to order publication of a summary of its judgment (Section 27) and to require the removal of a statement, particularly in the online context (Section 29), I note that the Bill includes a clause making clear the procedure for 'Making a statement in open court' (Section 28). While this has proven a useful tool in England and Wales in cases such as *Kidman v Associated Newspapers* (2003, unreported), the provisions enabling this have been buried in, initially the England and Wales Ministry of Justice Practice Direction 53, as amended by the 55th Update to the Civil Procedure Rules, which came into force on the 6 April 2011. Presenting it here instead as part of the Bill with a view to its inclusion in primary legislation in Scotland is much preferable, enhancing public awareness of the provision.

Finally, I would welcomed the provisions in Section 30, particularly both the long-overdue reduction of the limitation period for actions in defamation from three years

to twelve months, and especially the introduction of a single-publication rule along the same lines as that set out in Section 8 of the Defamation Act 2013.

Gavin Sutter, June 2018

This note was originally written as a response to an informal consultation on the Working Draft of the Defamation Bill, 31 July – 31 August 2017. It has since been updated to take account of more recent caselaw developments in England and Wales in relation to the "serious harm" test.