Minister for Community Safety
Ash Denham MSP

Scottish Government
Riaghaltas na h-Alba
gov.scot

T: 0300 244 4000
E: scottish.ministers@gov.scot

Convener
Justice Committee
Scottish Parliament

29 October 2020

Dear Convener,

DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) BILL

I would like to thank the Committee for their thorough and considered Stage One Report on the Defamation and Malicious Publication (Scotland) Bill. In particular I am pleased to note the Committee's recommendation that the general principles of the Bill be agreed to and the positive nature of the Report.

I note that the Committee have made a number of recommendations which would require action on the part of the Scottish Government. I thought it would be helpful, ahead of the Stage One Debate to confirm that the Scottish Government is reflecting on the views of the Committee in these areas and I have set out some more detail in an Annex to this letter.

The Committee will appreciate that whilst there is a broad base of support for the Bill and its policy aims there are differing views on the detail of some of the provisions. As the Committee recognised in its Report, it is important to consider the overall impact of the package of measures contained in the Bill as opposed to singling out any particular individual provision.

I hope that the information contained in the Annex is of assistance to the Committee ahead of the Stage One Debate.

ASH DENHAM

St Andrew's House, Regent Road, Edinburgh EH1 3DG
www.gov.scot

DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) BILL

THE SCOTTISH GOVERNMENT'S RESPONSE TO THE JUSTICE COMMITTEE'S STAGE 1 REPORT

1. What follows is the Scottish Government's response to the specific points or recommendations made by the Justice Committee in their Stage 1 Report. For ease of reference, the Committee's points or recommendations are shown separately in boxes and numbered in line with that report. The Scottish Government's response is given directly underneath those boxes.

Definitions

> 85. While the Committee invites the Scottish Government to consider the evidence we have received and review whether any final adjustments are required to the current drafting, the Committee welcomes the inclusion of a statutory definition of defamation in the Bill. We recommend that the Minister sets out her views on this in advance of the Stage 1 debate on the Bill.

2. Section 1(4)(a) of the Bill sets out that a statement is defamatory if it causes harm to a person's reputation (that is, if it tends to lower the person's reputation in the estimation of ordinary persons).

3. Defamation law should be as clear and as accessible as possible. Having a definition of what constitutes a defamatory defamation on the face of the Bill helps to provide this clarity. The definition in the Bill is a restatement of the common-law test in *Sim v Stretch* but, importantly, updated to reflect modern language, not language more relevant to the 1930s when the decision was handed down by the House of Lords.

4. While generally well received by media stakeholders and the legal profession, the Committee heard the concerns of academics, which it sums up at paragraph 78 of its Report.

5. On the use of the phrase "ordinary persons" Drs Bogle and Lindsey suggest that this is not a familiar definition in the present law. The Scottish Law Commission at paragraph 2.8 of their 2016 Discussion Paper on Defamation describe how in modern practice the common law test is sometimes explained to juries as being "whether the words would tend to make ordinary readers think the worse of the pursuer".[1] The use of the phrase "ordinary persons" does then seem to be well known to the courts.

6. On the use of the qualifier "reasonable", this more normally arises in issues of meaning. Dr Bogle referred to the UK Supreme Court decision of *Stocker v Stocker* which was an appeal as to the correct meaning to ascribe to an allegedly defamatory statement complained of. The definition in the Bill is narrowly construed and does not affect other common law aspects of defamation law, such as meaning.

[1] Available at https://www.scotlawcom.gov.uk/files/5114/5820/6101/Discussion_Paper_on_Defamation_DP_No_161.pdf

7. I found it very helpful to hear the views of those who gave evidence and I have given them very careful consideration. On balance I am satisfied that the definition in the Bill reflects the common law test, phrased using modern language that is well known to the courts.

> 86. More generally, we recommend that the Scottish Government considers how it will best ensure that the statutory definition used in the Bill can evolve over time as our courts make relevant judgments and the common-law evolves. This includes consideration of an amendment to Section 1 which explicitly states that the courts can refer to previous case law.

8. As the Committee recognises, the common law definition found in *Sim v Stretch* was laid out over 80 years ago and has been discussed by the courts a number of times. This is clearly important precedent and I recognise the concerns reflected in the Committee's recommendation.

9. However, I am not sure that an amendment to section 1 of the Bill itself is the most appropriate way to achieve this. It is common for a court when looking at a new statutory provision to have in mind the continued relevance of previous case law on the topic, particularly in a situation such as this where there is an explicit attempt to codify the preceding common law.[2] Were we to include a specific amendment instructing them to do so it may, perhaps perversely, create a doubt over whether the court would be able to do so in respect of other parts of the Bill or the wider statute book. That would be undesirable and may lead to unexpected or unintended consequences.

10. Accordingly, I will instead ensure that the Explanatory Notes to the Bill are amended to be clear that we expect courts, when interpreting the new statutory definition, to refer to the case law on the common law definition found in *Sim v Stretch* where it is appropriate to do so. I believe that this is the most appropriate way to signal to the courts and users of the legislation that the statutory definition should be interpreted in line with the common law definition that we have today and, importantly, that the definition will evolve as and when case law develops.

> 87. This issue of the Bill needing to ensure that its provisions can evolve as case law is made in our courts is one that should apply to other provisions, not just the definition of defamation. The Committee wishes to ensure that courts retain the power to develop the law of defamation as the need arises.

11. I recognise the more general concerns of the Committee on this point, and I have tried, where appropriate, to make sure that the courts can develop the law along the broad lines set out by this legislature.

[2] For example, see Serafin v. Malkiewicz and others [2020] UKSC 23 from paragraphs 50 where a full discussion of the cases and parliamentary history behind section 4 the Defamation Act 2013 informed the correct interpretation of that provision.

Serious harm threshold

> 107. In advance of the Stage 1 debate, we recommend that the Scottish Government reviews the evidence we have heard and sets out a clear statement on why the serious harm test is still required.

12. As the Committee recognises, the threshold test of serious harm is the issue in the Bill where the dividing line among stakeholder opinion is most stark. Some opinion has referred to it as an English solution to an English problem. I disagree strongly with this view. The Scottish Law Commission took a broad look at Scots law of defamation, making a number of recommendations for reform, of which the introduction of a threshold test of serious harm was one. I do not believe that the Commission would have made this recommendation if it did not think it an appropriate reform of the current law.

13. I have been clear that if a person says their reputation has been unfairly damaged by a defamatory statement then it is only right that that they should show how it has been damaged. The current law simply presumes that damage has been done. I do not believe that this achieves an appropriate balance between protection of reputation and freedom of expression.

14. Having reviewed the evidence given to the Committee I remain of this opinion. I will be pleased to reiterate this view and the rationale for the serious harm test during the Stage 1 Debate.

Derbyshire principle

> 127. The Committee believes that the Derbyshire principle was designed to ensure that directly-elected members, bodies and their agencies cannot sue for defamation in relation to their public activities. The Committee supports this principle. The Committee therefore recommends that the section is redrafted so that the Scottish Government's intention is clearer and that clarity is provided as to which bodies are covered as well providing examples of those which are exempt.

15. As Lord Keith of Kinkel outlined in his judgement, it is of the highest public importance that a democratically elected governmental body should be open to uninhibited public criticism.[3] On the evidence given to the Committee and on its recommendation section 2 of the Bill is not as clear as stakeholders would like. On the drafting I have tried to come up with a sensible and flexible definition that does not expand the common law. The drafting borrows from section 6 of the Human Rights Act 1998. This has been discussed by courts for over 20 years and will provide practitioners with a good base from which to advise their clients.

16. I recognise the range of views on this matter. That is why I am willing to work with members to ensure that we get a provision that codifies the Derbyshire principle as it exists at the moment. One that is as clear and as flexible as possible.

[3] See *Derbyshire County Council v Times Newspapers Ltd and Other* [1993] AC 534

129. If that is the intent or direction of travel, then it is important that the Scottish Government redrafts this section so that any body delivering a public service (defined as a body delivering a service under the delegated authority of a public body) is covered in relation to their actions in delivering the public service.

17. The Committee heard evidence that all private bodies under contract to provide public services should be inhibited from raising defamation proceedings. I disagree with the policy intention of any such proposal. As a whole, this Bill will strengthen the defences available to those who wish to criticise the private delivery of public services. Along with the threshold test of serious financial harm the reformed statutory defence of honest opinion and the new statutory defence of publication on a matter of public interest will greatly assist those who wish to criticise such private companies. There is simply no need to go further and deprive private companies of the rights they currently have to protect their reputation.

18. Of course, the elected officials themselves, responsible for outsourcing the delivery of those public services, will not be able to use defamation law to protect their reputation as they would be caught under the Derbyshire principle.

130. This is another of the provisions in the Bill where it will be important that developments in the common-law can be incorporated in the future as the Committee is well aware that the means by which public services are now delivered has changed significantly in recent decades.

19. I agree with the Committee that such flexibility must be allowed for. Any Scottish Government amendment brought forward at Stage 2 will have such flexibility.

Secondary publishers

145. The Committee therefore welcomes the exclusion of secondary publishers from liability but recommends that the Scottish Government considers how the process can be improved when a person wishes to request the removal of material. The Committee recommends the Scottish Government provide its written views on this before the Stage 1 debate on the Bill.

20. Over the course of this Parliament, this Government has taken forward work aimed at reducing barriers to access to justice. I would draw the Committee's attention to its previous work on the Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018. It will be aware that the Scottish Government has created a more accessible, affordable and equitable civil justice system for Scotland. The key provisions of that Act make the costs of civil action more predictable and increases the funding options for pursuers of civil actions.

21. A person who has been unfairly defamed, either online or offline, can use the Simple Procedure Rules in the Sheriff court to have the offending statement removed or to claim damages. This procedure is designed specifically for a lay-person, and parties need not instruct a solicitor. If a solicitor is instructed, legal fees are calculated at a reduced rate. The sheriff has significant case-management powers in this Procedure, and can make use of these to determine preliminary issues at an early stage. This would include issues such as

whether the statement is defamatory and what meaning it has. This Procedure can cost as little as £19 to raise. Where the pursuer or their spouse/partner is receiving one of a range of benefits they can claim a fee exemption.

22. I believe that once this Bill comes into force it will be well within the means of the average person to seek and obtain a court order removing a defamatory statement, whether it is posted online or offline.

Defences

> 160. The Committee welcomes the codification of defences in the Bill and recommends that the Scottish Government give consideration to the evidence the Committee heard on the specific wording used.

23. The Committee sums up its evidence on this at paragraphs 152 to 158. Beginning with the defence of truth. Section 5 of the Bill reflects the idea that defamation law should protect a person's *deserved* reputation. This was at the forefront of our thinking when drafting this provision. Our defence will make sure that where there are two or more distinct imputations the defender does not need to prove the truth of each statement complained of. Instead the defender must prove the "sting" of the publication. As the drafting already achieves this aim I do not believe that any change is necessary.

24. I recognise that some stakeholders want to change the wording of section 5. They do so because they wish to avoid the impression that the majority of imputations need to be shown to be true in order for the defence to succeed. I do not share this view. The defence should not be about the number of statements complained of which are found to be true, but rather what the statements mean and their impact.

25. On the matter that honest opinion should assume knowledge of the facts available to the general public - it is important, in my view, that the facts which provide the basis for the opinion should be set out. The approach to honest opinion that I have taken in this Bill reflects what I regard as the proper function of the defence: the defence must protect the expression of genuinely held views.

26. Any qualification along the lines outlined in the Committee's recommendation risks introducing complexity into the law. For example, whether a particular fact or facts were known, or likely to be known, to the general public would be a matter for debate and would be contentious.

27. Notwithstanding this, however, I would point out that section 7(3) provides that evidence may be indicated either in general or specific terms. Where the relevant facts are taken to be known or likely to be known then a general outline would likely be sufficient. In addition, section 7(8)(c) provides that evidence may include anything the defender reasonably believed to be a fact at the time the statement was published, which affords a degree of latitude. This is different from the common law position and it will make it easier to defend those facts.

161. The Committee further recommends that the Bill is amended to make the ability of the courts to refer to previous case law in this area explicit.

28. As with the definition of defamation itself, I can commit to ensuring that the Explanatory Notes are amended in line with the Committee's recommendation. Those Notes will be clear that we expect courts, when interpreting the new statutory defences, to take into account case law on the common law defences, where it is appropriate to do so.

173. The Committee recommends that the Scottish Government reflects on the evidence the Committee has received and make it clear whether courts can take into account the offer to make amends and apply an appropriate discount.

29. The offer of amends scheme avoids the need for legal proceedings and is useful for those publisher defenders who admit they have made an error. As part of the offer of amends scheme an offer of compensation is made alongside an apology/correction. Where the amount of compensation cannot be agreed between parties the Court is asked to decide this including the ability to alter the original compensation amount offered. The Committee has heard conflicting views on whether the Bill changes the existing offer of amends scheme, specifically whether it still allows an offer of compensation to be altered by the Court in appropriate circumstances.

30. In light of the conflicting evidence I am pleased to commit to bringing forward an amendment at Stage 2 that sets out a court's ability to reduce or increase an offer of compensation in appropriate circumstances.

Malicious Publication

201. One area where some 'tidying up' is required is that of the reference to malice. The Committee recommends that the definition of malice is amended to require falseness **and** malice.

31. In order to succeed in a malicious publication action the pursuer must show that the statement complained of was made with malice. The definition in the Bill is the same as that at common law for similar types of action. The pursuer has to show that the defender knew that the imputation was false, or that they were indifferent as to whether it was true. Alternatively, the pursuer must show that the defender's publication of the statement was motivated by a malicious intention either to cause harm to business, to delay or jeopardise a property transaction or to cause financial loss through disparaging assets.

32. I have listened to the Committee's evidence on this point, and in particular the views of Professor Elspeth Reid and Professor John Blackie. I will be happy to bring forward an amendment at Stage 2 to reflect this recommendation.

202. Furthermore, the Committee believes that the defences that apply to malicious publication need to be clearer in the legislation itself. There also needs to be clarity on whether secondary publishers are immune or not from actions taken under this part of the Bill.

33. The Scottish Law Commission considered that an action for malicious publication should be capable of being raised only against the person who made the statement. Accordingly the Bill states that an action for malicious publication is only possible against the person who *made* the statement complained of. In contrast a defamation action can be raised against any person who published the statement complained of.

34. Further, as it is for the pursuer to prove on the balance of probabilities that the statement complained of was made with malice it is unlikely that a secondary publisher – who has little or no control over the content - would be found to have made the statement.

35. Given the Committee's doubt on this issue however I am happy to amend the Explanatory Notes to unequivocally confirm our intention that a malicious publication action cannot be raised against a secondary publisher and setting out clearly what defences could apply in any such action.

Remedies/new remedies

217. The Committee invites the Scottish Government to reflect on the strong evidence we have received that some change is needed.

36. The power of the court to order the operator of a website on which a defamatory statement is posted to remove the statement, even as an interim measure, can only be exercised when court proceedings have been commenced. The court will take that opportunity to hear from both parties where possible.

37. It is important that a court has the flexibility to be able, in suitable cases, to take prompt and effective steps to protect reputation. I expect these cases to be rare but it is all the more important that we make provision here in the Bill.

38. Before granting an interim order the courts will need to carefully evaluate the strength of the applicant's case and the safeguards in section 12 of the Human Rights Act 1998. This says that "No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

39. The courts currently possess this power and as far as we are aware no evidence has been presented that shows it is being abused to chill free expression. It is on this basis that I believe the courts should retain this power. In my view, therefore, there is no need for any further protections to be introduced into this Bill.

Limitation

> 235. On balance, whilst welcoming the provisions in the Bill and notwithstanding the discretion available to the courts, the Committee recommends the Scottish Government reviews the evidence we have taken and reports back to the Committee before stage 2 with a view to making amendments to allay the legitimate concerns we heard about the important rights of individuals to pursue a case even after one year.

40. I believe that where someone suffers damage to their reputation they usually are aware of this at an early stage. One year is enough time to assess the damage and prepare either for litigation or to engage in alternative dispute resolution.

41. The Committee has heard that the length of the limitation period can be used to discourage defender-publishers from further investigating individuals. The fear or threat that defamation proceedings could be raised many years down the road is a real chill on free expression.

42. The Bill makes a number of important changes but at the same time I recognise that these changes may cause difficulties where a statement is not immediately brought to a person's attention. Where this is the case the general law of limitation does makes an important allowance. A principal aim of laws on limitation and prescription is that if litigation should proceed, it so do so promptly, not after a period of many years. The Court has the discretion to allow litigation to proceed outwith the 1 year period of limitation where it considers it equitable to do so. I would suggest that a statement that comes to the attention of an individual after 1 year and then causes serious harm would likely be allowed to proceed by a court.

43. Additionally, the Bill also makes an important allowance for those occasions where someone subsequently publishes a statement that has been previously been published. If there is a material difference between the manner of publication then the time limit of 1 year would begin to run from the later date of the subsequent publication. For example, if more prominence is given to the subsequent publication then this would be considered as a material difference resulting in the restarting of the 1 year clock. The flexible approach we have taken is capable of taking into account a material difference in the manner of any subsequent publication.

44. I have listened very carefully to the Committee's concerns on this matter and hope they are reassured that the Bill makes adequate allowance for the unlikely event when statements are published but are not brought to the attention of an individual until after the 1 year limitation period has expired and where serious harm is then caused.

Access to justice and Court action to protect against unjustified threats

> 258. Nevertheless, the Committee does not wish these important suggestions to be ignored. Whilst ensuring that the provisions in this Bill, if passed into law, are not unduly delayed, the Committee recommends that the Scottish Government gives consideration to a series of improvements that can be made and reports to the Committee.

45. The Scottish Government's Vision is to develop a strong, consistent approach to dispute resolution in the civil justice system in Scotland where methods of dispute resolution are

seen as complementary and supporting each other, rather than acting as competition to each other. What is important is that people are able to make an informed choice about how to resolve their dispute to suit their individual circumstances.

46. The Scottish Government commissioned an independent review of mediation by Scottish Mediation and the Expert Group in 2018, and their report "Bringing Mediation into the Mainstream" was published in June 2019. The independent review considered evidence from the Scottish Parliament Justice Committee report "I won't see you in Court" about ADR and also examined evidence from across Scotland and across five global jurisdictions. From our analysis of the Expert Group Report and the consultation responses to the Margaret Mitchell Bill proposals, the Scottish Government has concluded that the time is right to move towards reform of the civil justice system in Scotland to normalise mediation and other forms of dispute resolution to resolve disputes effectively and efficiently at the earliest opportunity, but that public consultation is required in advance of our proceeding with reform to test key issues such as the financial model as well as how the proposals could work in practice.

47. We are working on proposals in collaboration with key delivery partners aimed at mainstreaming mediation and other forms of dispute resolution within the civil justice system. Our intention is to issue a public consultation seeking views on these proposals by end of March 2021.

> 259. These include looking at the provision of legal aid in this area and whether some form of pre-action protocol can be put in place. We also recommend that an accessible guide to the law in this area is produced.

48. On the issue of legal aid, there are certain proceedings (so-called "excepted proceedings") for which civil legal aid is not available, and defamation is caught by this under Schedule 2 of the Legal Aid (Scotland) Act 1986. However, the Civil Legal Aid for Defamation or Verbal Injury Proceedings (Scotland) Direction 2010 issued by Scottish Ministers, sets out very limited circumstances in which legal aid can be made available. The Direction establishes that, in addition to the statutory merits tests of probable cause and reasonableness, the Scottish Legal Aid Board must also be satisfied that there is both a wider public interest in funding being made available and that an applicant would otherwise be unable to bring or defend the proceedings effectively.

49. I have already mentioned the steps taken by this Government to increase the range of options open to an ordinary person to pursue civil litigation, not just in defamation actions. The Sheriff Court Simple Procedure is designed specifically for a litigant who is not represented by a solicitor. Sheriffs have significant case-management powers and can deal with preliminary issues at an early stage. This procedure can cost as little as £19 and in the relevant circumstances can be fee-exempted. There is also the 2018 Act[4] in respect of civil litigation which creates a more accessible and affordable civil justice system for Scotland, one where the costs of civil action are more predictable and the range of funding options for pursuers are increased.

[4] Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018

50. In the consultation on legal aid reform in Scotland, issued last summer, respondents were invited to comment on the existing scope of legal aid and whether this should be enhanced. The responses to this consultation did not indicate a strong desire to change the current provision with respect to defamation. For completeness, the report can be found here: https://www.gov.scot/publications/legal-aid-reform-scotland-consultation-response/.

51. To enable the legal aid system in Scotland to be sustainable (with a demand led budget covering a wide range of actions) it cannot be universally available. It is our intention to progress with a reform Bill in the next Parliament, and the scope of legal aid will be examined as part of this; however, there would need to be compelling grounds for change with regards to defamation given the competing calls for funding across the justice landscape. Given this I do not believe that it is appropriate to review the current rules for receipt of legal aid in defamation proceedings at this time.

52. As for a pre-action protocol, this would be a matter for the Scottish Civil Justice Council to consider. I can, however, see the value of having a protocol in place, especially in ensuring that preliminary matters can be dealt with. I can commit to writing to the Council and ask if they were willing to consider the introduction of such a procedure.

53. On the issue of an accessible guide, I am sceptical about producing or funding a source of information on defamation law, particularly as a guide can quickly go out of date, but it is something that I will consider further. I know that there are already excellent and accessible guides to defamation law, particularly ones directed towards journalists.