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Defamation and Malicious Publication (Scotland) Bill: consideration prior to Stage 3

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The Bill would reform the law on defamation and verbal injury, which provide legal remedies to those damaged by false statements. This briefing looks at parliamentary consideration of the Bill at Stages 1 and 2.



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Summary

The Bill would reform the law on defamation. The main thrust is to provide greater protection for freedom of expression to tackle the [chilling effect](#) that the current law is argued to have on the media and public debate.

The Bill would also reform the law on verbal injury. It would create a new category of civil wrongs called malicious publication. These would protect certain business interests from false and malicious statements.

The key issues going into Stage 3 are:

- **The serious harm threshold** - which creates a new test a [pursuer](#) must meet to be successful in court action for defamation. It has been argued that this test is not needed in Scotland and sets a standard which may stop legitimate claims.
- **The [Derbyshire principle](#)** - which prevents public authorities from suing for defamation. Concerns are around whether the provisions in the Bill are sufficiently clear and how to treat private bodies which deliver public services.
- **Malicious publication** - it has been argued that this new civil wrong does not contain sufficient protection for freedom of expression, although amendments at Stage 2 addressed the main problems.

Terminology

The following technical terms are used in the briefing:

Case law - where judges develop the law through decisions in individual cases.

The chilling effect - current defamation law is argued to operate in a way which allows pressure to be put on media outlets and campaigners not to publish stories. This is because it is seen as protecting reputation more than it supports freedom of expression. The Bill aims to re-set this balance to provide greater protection for freedom of expression.

Common law - the traditional law as developed by judges' decisions in individual cases. Legal rules may also be created by legislation.

Court of Session - Scotland's most senior civil court. Its decisions can be appealed to the UK Supreme Court.

Defender - the party defending court action. The party bringing court action is the pursuer. The English term for defender is defendant.

Derbyshire principle - the legal rule, developed from case law, that public authorities cannot sue for defamation. Instead, they should defend their reputation using the electoral process.

Internet intermediaries - a term used to describe bodies which facilitate the use of the internet. It covers a wide range of bodies, including those who provide internet connections, payment providers, chatroom hosts and social media platforms. The main area of contention in defamation law is the role of bodies which host user-generated content, such as Facebook, Twitter and Tripadvisor.

Limitation - a time limit for raising legal action. Various types of court action have a limitation period set in legislation. The courts will not consider legal action raised after this time period unless it is "equitable" (i.e. fair considering the interests of both parties) to do so.

Pursuer - the party bringing court action (also known as the "claimant" under Simple Procedure court rules). The party defending court action is known as the defender. The English term for pursuer is claimant (or, more traditionally, plaintiff).

What the Bill does

According to the Policy Memorandum (paragraph 6), the Bill would reform the law on defamation and verbal injury to:

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

The main changes proposed in the Bill are:

- to codify aspects of the [common law](#), including introducing a statutory definition for defamation, and defences of truth, publication in the public interest and honest opinion
- to introduce a “serious harm test”, so that someone can only be successful in court proceedings for defamation if they can demonstrate that they have suffered serious harm
- to prevent public authorities, including some private bodies with public functions, from suing for defamation (referred to as the [Derbyshire principle](#))
- to give secondary publishers – those who are not the author, editor or commercial publisher of defamatory material – protection from legal action
- to replace the law on verbal injury with a new category of civil wrongs called malicious publication, covering material causing harm to certain business interests
- to change the time limits for bringing defamation and malicious publication actions so that court action must usually be raised within one year of the first publication of material.

About the Bill - key dates and documents

The Defamation and Malicious Publication (Scotland) Bill was introduced in the Scottish Parliament on 2 December 2019 by Humza Yousaf, Cabinet Secretary for Justice. It is a Scottish Government bill.

All documents relating to the Bill can be found on the Scottish Parliament's [Defamation and Malicious Publication \(Scotland\) Bill webpage](#). These include

- the Defamation and Malicious Publication (Scotland) Bill
- the Policy Memorandum
- the Financial Memorandum
- the Explanatory Notes.

The [SPICe briefing on the Bill](#) ¹ provides more detailed information on the current law and how the Bill's provisions would change this.

The Justice Committee was designated as lead committee for Stage 1 and Stage 2 scrutiny of the Bill. Details of this work - including the Bill as amended at Stage 2 - can also be found on the Bill webpage.

Stage 1 scrutiny by the Justice Committee

The Justice Committee was designated as the lead committee for Stage 1 scrutiny. Details of its work can be found on the [Committee's webpage on the Defamation Bill](#).

The Committee took oral evidence at the following meetings:

- [17 March 2020](#)² - Scottish Government officials responsible for the development of the Bill
- [25 August 2020](#)³ - representatives of journalists and writers
- [1 September 2020](#)⁴ - legal academics and representatives of lawyers
- [8 September 2020](#)⁵ - online journalists and content creators, plus legal academics
- [15 September 2020](#)⁶ - witnesses with expertise in privacy issues
- [22 September 2020](#)⁷ - Minister for Community Safety.

The Committee also heard informally from MSPs with experience of court action for defamation.

The Committee published its [Stage 1 Report](#)⁸ on 14 October 2020. It supported the general principles of the Bill.

The Scottish Government gave its [response](#)⁹ on 29 October 2020.

The Stage 1 debate

The Stage 1 debate took place on [5 November 2020](#)¹⁰. There was unanimous agreement to the general principles of the Bill.

In the debate, members from all political parties highlighted the role of the Bill in setting the balance between two important human rights - freedom of expression and privacy. Other issues highlighted by members included:

- **the "serious harm" test**, which requires a [pursuer](#) to demonstrate that they have suffered serious harm to their reputation before they can succeed in court action for defamation. Broadly, members agreed that the test was appropriate, although some questioned whether it would serve to protect [defenders](#) from trivial claims.
- **the "Derbyshire principle"**, which prevents public authorities from suing for defamation. There was concern that the Bill's articulation of this principle was not sufficiently clear as well as concern about the position of private bodies delivering public services.
- **the new civil wrong of "malicious publication"**, which would protect certain business interests in situations where a false statement caused damage but was not defamatory. The main issue was that the Bill may have inadvertently lowered the threshold for raising such an action, without building in the same protections which exist in defamation cases.

Stage 2 scrutiny

The Justice Committee considered amendments at Stage 2 at its meeting on [26 January 2021](#) ¹¹.

This part of the briefing looks at the main points of contention on the Bill at Stage 1 and how they were handled at Stage 2. Note that it is not intended to be an exhaustive discussion of all the issues and amendments.

This part of the briefing looks at:

- [the serious harm threshold](#)
- [the prohibition on public authorities suing for defamation \(the Derbyshire principle\)](#)
- [secondary publishers](#)
- [the new civil wrong of malicious publication](#)
- [the power of the court to require the removal of allegedly defamatory material](#)
- [the time limit for raising court action.](#)

The serious harm threshold

The Bill would require a pursuer to show that they had suffered "serious harm" before they could succeed in a defamation claim. This was the most contentious provision in the Bill.

Under the current law, if a statement is proved in court to be defamatory, the law presumes that it has caused damage to the pursuer. This combines with other factors about how the law on defamation operates to create a low threshold for being able to raise court action.

The Bill seeks to address this issue by creating what is referred to as the "serious harm threshold". Essentially, before they can be successful in court action for defamation, a [pursuer](#) would have to show that they had suffered serious harm as a result of defamatory material. In the case of a business, the Bill would define serious harm as serious financial loss.

A serious harm threshold exists in English law as a result of the Defamation Act 2013. In practice, it operates as a procedural hurdle - an additional matter which the court must be satisfied of before it can reach its final decision. It was argued that this added further complexity to the law in England.

This was the most contentious aspect of the Bill. Media stakeholders argued that the threshold would give authors and publishers the confidence to ignore trivial legal claims, thus reducing the [chilling effect](#) of current defamation laws.

Most legal stakeholders saw it as an unnecessary barrier. In their view, the Scottish courts did not have a problem with trivial claims. The test was therefore argued to be an English solution to an English problem.

In its Stage 1 report, the Justice Committee concluded (paragraph 106):

“ We recognise that there are merits in both of these views. On balance, at this stage, and in light of the overall set of provisions set out in this Bill, we favour retention of the serious harm test in the Bill. In our view, the Bill comes as a package which creates an appropriate overall balance between freedom of expression and protection of reputation.”

Table 1: Stage 2 amendments

Purpose of amendment	Result
Amendment 29 , in the name of Andy Wightman MSP, would remove the serious harm test altogether.	This amendment was withdrawn.
Amendments 30, 31 and 36 , in the name of Andy Wightman MSP, would have changed the wording of the threshold test from "serious" to "actual" harm.	Amendments 30 and 36 were disagreed to by division (three to six). Amendment 31 was not moved.
Amendment 32 , in the name of Andy Wightman MSP, would amend the threshold test for businesses from "serious financial harm" to "significant loss".	This amendment was disagreed to by division (three to six).

Prohibition on public authorities suing for defamation (the Derbyshire principle)

The unclear wording of this section in the Bill and the extent to which private bodies delivering public services should be covered were the subject of much discussion during Stage 1.

The [Derbyshire principle](#) is named after an English court case featuring Derbyshire County Council. It prevents public authorities from suing for defamation, in recognition of the important role public scrutiny and criticism plays in the delivery of their functions.

Section 2 of the Bill would put this prohibition on a statutory footing. However, businesses and charities which only exercise public functions "from time to time" would be expressly exempted from the prohibition. This would cover the outsourced delivery of public services in some circumstances.

Stakeholders argued that this left the position in relation to outsourced public services unclear. Media stakeholders argued that what people could say about public services should not be controlled by how the service was delivered. However, some legal commentators noted that the proposal went beyond the current law and may deprive some organisations - such as universities or housing associations - of the right to defend their reputation.

In its Stage 1 report, the Justice Committee stated (paragraph 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 as providing examples of those which are exempt.”

Table 2: Stage 2 amendments

Purpose of amendment	Result
Scottish Government amendment 1 would further define public authority to make it clear that all central and local government bodies were covered. The exception for private bodies which exercise public functions from time to time would remain.	This was agreed to by division (seven to two).
Amendment 33 , in the name of John Finnie MSP, would remove the exceptions and further definitions, so that all bodies with functions of a public nature were covered by the prohibition.	This was disagreed to by division (two to seven).
Scottish Government amendment 3 would clarify that employees of public bodies were not prevented from raising defamation actions in a personal capacity.	This was agreed to by division (eight to one).
Scottish Government amendment 4 would extend the Scottish Ministers' regulation-making powers so that they could specify bodies which were to be treated as public authorities, as well as those which were not.	This was agreed to by division (seven to two).
Amendment 35 , in the name of John Finnie MSP, would prevent Scottish Ministers from using their regulation-making powers to remove private bodies from the ambit of the Derbyshire principle.	This was not moved.

Secondary publishers

The Bill's provisions on [secondary publishers](#) were welcomed as providing protection for [internet intermediaries](#). However it was recognised that, as a result, there was a risk that those who were defamed on services which hosted user-generated content might struggle to get statements removed.

Section 3 of the Bill would exempt all secondary publishers - that is those who were not the author, editor or commercial publisher of a statement - from liability for defamatory material. In particular, this provision would ensure that most [internet intermediaries](#) were protected from liability. Stakeholders argued that this supported the free flow of information.

However, the Bill made no additional provision to support those who had been attacked online. Some stakeholders identified a risk that, if internet intermediaries enjoyed complete immunity, they would have no incentive to remove defamatory content. The Defamation Act 2013 created a "take-down procedure" in England which could be used to request either the identity of an online poster or the removal of the material they had authored.

The Stage 1 Report

The Justice Committee stated (paragraph 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.”

In its [response to the Stage 1 Report](#)⁹, the Scottish Government highlighted the availability of simple procedure court action in the Sheriff Court (paragraphs 20 to 22). Simple procedure is designed to be user-friendly and accessible to ordinary people without the need to consult a solicitor.

However, it did not commit to providing any remedy specifically tailored to the needs of someone who wishes to have potentially defamatory material removed.

Stage 2 amendments

There were no amendments at Stage 2 which dealt with this issue.

Malicious publication

The Bill would reform the law on verbal injury to create a new category of civil wrongs called malicious publication. There was concern that the protections which the Bill would apply to defamation had not been extended to malicious publication.

The law on verbal injury currently encompasses a range of statements which are not defamatory but cause damage. The law in this area is obscure and uncertain.

Part 2 of the Bill would reform the law to allow court action to be taken in relation to statements which damage specific business interests, e.g. allegations that goods are of poor quality. The new form of civil wrong would be called malicious publication.

On the face of it, a [pursuer](#) would have to prove that a statement was both false and made maliciously to be successful in an action for malicious publication. However, some stakeholders suggested that the drafting of the Bill meant that, in practice, all a [pursuer](#) would have to show was that a [defender](#) had been indifferent to the truth of a statement. In addition, there was no serious harm test for malicious publication.

There was speculation that the relatively low threshold for taking action for malicious publication would result in it, rather than defamation, becoming the preferred legal route for protecting business interests.

In its Stage 1 report, the Justice Committee recommended (paragraphs 201 and 202):

“ 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.”

“ 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.”

Table 3: Stage 2 amendments

Purpose of amendment	Result
Amendment 13 , in the name of Liam Kerr MSP, would import the serious harm test and the requirement for publication to a person other than the pursuer from the defamation part of the Bill and apply them to malicious publication.	This amendment was withdrawn.
Amendments 23 and 24 , in the name of Liam Kerr MSP, would give the Court of Session the power to set a minimum threshold of financial loss before an action for malicious publication could be raised.	These amendments were not moved.
Amendment 25 , in the name of Liam Kerr MSP, would apply the defences of truth, publication on a matter of public interest and honest opinion to malicious publication.	This amendment was not moved.
Scottish Government amendments 14 and 16 would require that a statement must be both (rather than either) false and malicious to constitute a malicious publication.	These amendments were agreed to.
Scottish Government amendment 15 would require that a defender must have a "reckless" indifference to the truth to meet the requirement for falseness.	This amendment was agreed to.
Scottish Government amendments 17 to 22 would apply the same requirements for falseness, reckless indifference and malice to the other wrongs of malicious publication created in the Bill.	These amendments were agreed to.

Power of the court to require the removal of allegedly defamatory material

The Bill would enable the Scottish courts to order the removal of defamatory material. There was concern that this power could be used on an interim basis, before the issues and defences had been fully considered by a court.

Section 30 of the Bill would create a new power for courts to order the removal of defamatory material hosted by third parties (for example, on a website not run by the **defender**). This was considered helpful as the **defender** may not be in control of distribution.

However, media stakeholders were concerned that the power was not limited to being used once a final decision had been issued by a court. They argued that it was disproportionate to require removal when the issues and defences had not yet been adjudicated on. Some suggested that the publication of a clear statement that the material was under dispute was a better way of protecting the interests of both sides to the case.

In its Stage 1 report, the Justice Committee stated (paragraph 215):

“ The Committee welcomes the range of views expressed to us. The Committee did give consideration as to whether additional protections should be put in place - such as that the court must seek the views all the parties and the host of the material (who may not be involved in the proceedings) - before making an interim order.”

Table 4: Stage 2 amendments

Purpose of amendment	Result
Amendment 38 , in the name of Fulton MacGregor MSP, would alter the court's power so that it could only order the operator of a website to publish a prominent statement that the material is subject to court action.	This amendment was withdrawn. The Minister for Community Safety agreed to work with the Member to bring forward a Stage 3 amendment that would deliver his purpose.

Time limit for raising court action

The Bill would shorten the time limit for taking court action for defamation. This was generally welcomed, but there was concern that there could be specific circumstances where it was unfair.

Section 32 of the Bill would shorten the time limit for raising court action for defamation (and related actions) from three years to one year. The legal term for this time limit is a [limitation](#) period.

It would also change the point at which the time limit starts running. Currently, this is when the [pursuer](#) first becomes aware of the publication of the material. Under the Bill's provisions, this would change to when the material was first published (in most cases).

Stakeholders generally welcomed the change. The prevailing view was that, with modern communications technology, you would easily be aware of damage to your reputation within one year.

However, some legal stakeholders highlighted specific circumstances where this might not be the case. Examples included where the effects of statements were cumulative, or where a pursuer was not initially aware of the statement (e.g. a job reference).

In its Stage 1 report, the Justice Committee recommended (paragraph 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.”

Table 5: Stage 2 amendments

Purpose of amendment	Result
Amendment 26 , in the name of Liam Kerr MSP, would make it clear that the court could extend the one year time limit if it seemed "equitable to do so".	This amendment was withdrawn. The Minister for Community Safety agreed to discuss this issue further with the member in advance of Stage 3.
Amendment 27 , in the name of Liam Kerr MSP, would allow for the limitation period to be suspended if the parties were engaged in any form of alternative dispute resolution to resolve their issues.	This amendment was not moved. The Minister for Community Safety agreed to work with the member on a Stage 3 amendment that would deliver this purpose.

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