

Society of Editors

www.societyofeditors.org

From the Executive Director

Justice Committee
Scottish Parliament
Edinburgh
EH99 1SP

Thursday 12 March 2020

Dear Ms Mitchell,

Please find attached the Society's response to your committee's call for evidence on the Defamation and Malicious Publications (Scotland Bill).

The Society has been at the forefront of efforts to promote and champion the cause of a free press in the UK and elsewhere in the world for the last two decades and, in particular, we have campaigned widely for defamation reform in the UK. Naturally, we welcomed the introduction of the Defamation Act 2013 in England and Wales in 2014 which implemented sweeping changes to the law of libel and went some way to reversing the chilling effect that previous libel laws had on freedom of expression in the UK.

The Defamation and Malicious Publications (Scotland Bill) is a vast improvement on current defamation law in Scotland. The proposed reforms, while bringing Scots Law more in line with the law in England and Wales, will also strike a fairer balance between the protection of individual reputation and freedom of expression. That said, the Bill does require further amendment. As referenced in more detail in our response, it is essential that further adjustments are made to ensure that the law reflects the modern day and that, if private companies are allowed to sue for libel, those that fulfil a public service are not. It is essential that journalists and the public are able to speak freely, without fear of persecution, on all matters relating to public service provision.

Please find below our response to your questions below. Please do not hesitate to contact us if your committee would like to discuss our response in more detail.

Yours sincerely,



Ian Murray
Executive Director Society of Editors

President
Alison Gow

Chairman
Ian MacGregor

Executive Director
Ian Murray

Board of Directors

Kamal Ahmed
Martin Breen
Paul Clarkson
Peter Clifton
Polly Curtis
Oliver Duff
Charles Garside
Ceri Gould
Jonathan Grun
Donald Martin
Eleanor Mills
Ian Murray
Sue Ryan
Moira Sleight
Caroline Waterston
Sarah Whitehead
Doug Wills
Joy Yates

Past Presidents

Nick Turner
Doug Wills
Ian Murray
Jonathan Grun
Fran Unsworth
Robin Esser
Donald Martin
Nigel Pickover
Simon Bucks
Paul Horrocks
Charles McGhee
Keith Sutton
Neil Benson
Jonathan Grun
Liz Page
Edmund Curran
Neil Fowler
Geoff Elliott

Fellows

Ian Beales
Simon Bucks
Peter Cole
Andrew Colman
Edmund Curran
Geoff Elliott
Maurice Frankel
Phil Harding
David Meara
Bob Pinker
Alan Rusbridger
Richard Tait

University Centre, Granta Place, Cambridge, CB2 1RU

Telephone: 01223 304080 Fax: 01223 304090 Email: info@societyofeditors.org

www.societyofeditors.org

A company limited by guarantee incorporated in England. Registered No. 304 7323. Vat No. 653 5446 28

From the Executive Director

1. Do you think the Bill strikes the right balance between freedom of expression and the protection of individual reputation?

The Society of Editors has welcomed the publication of the Defamation & Malicious Publications (Scotland) Bill which, if enacted, will bring the law of defamation in Scotland more in line with legislation in England and Wales. After years of campaigning, the Society welcomed the long-awaited Defamation Act 2013 which implemented sweeping changes to the law of libel. The reforms in England and Wales have gone some way to reversing the chilling effect that previous libel laws had on freedom of expression and legitimate debate and the Society hopes that the updating of laws in Scotland will have the same effect.

The proposed Scotland Bill is a significant improvement on existing Scots Law which has not been updated since the 1996 Defamation Act. Previously the law has been skewed in favour of pursuers who are bringing an action and has provided outdated and inadequate protections for journalists and other defenders of such actions.

The inclusion of important measures such as a new public interest defence, the introduction of a “serious harm” threshold, a single publication rule, new defences of fair comment and honest opinion, a stronger “offer of amends” system and the shortening of the period in which someone can bring an action after publication will all result in meaningful reform in Scotland. Furthermore, the ending of the anomaly where a statement need not be communicated to a third party to be defamatory will result in only more serious and legitimate cases going to trial.

If enacted, the reforms will result in a more appropriate balance being struck between protecting people’s reputations and safeguarding press freedom and freedom of expression more widely. Such reforms will not only ensure greater protections for journalists but will greatly benefit academics, scientists, authors, campaigners and social media users and the public more widely.

The Society remains concerned however, that there is scope for the Bill to go further in protecting freedom of expression and the protection of individual reputation. Following a similar omission in the 2013 Act in England and Wales, the anomaly whereby private companies performing public functions are still able to use defamation legislation to silence criticism and stifle debate is an ongoing threat to freedom of expression. It is essential that there is a level playing field between public bodies and private companies that fulfil the same public functions. In recent years we have seen an explosion in public services being outsourced to private companies for profit and a situation continues to exist where public bodies cannot sue for defamation but private companies that fulfil the same public functions can. It is vital that the law is updated to reflect the modern day and that, if private companies are allowed to sue for libel, those that fulfil a public service are not. It is essential that journalists and the public are able to speak freely, without fear of persecution, on all matters relating to public service provision.

University Centre, Granta Place, Cambridge, CB2 1RU

Telephone: 01223 304080 Fax: 01223 304090 Email: info@societyofeditors.org

www.societyofeditors.org

A company limited by guarantee incorporated in England. Registered No. 304 7323. Vat No. 653 5446 28

From the Executive Director

The Society supports a suggestion by Scottish PEN that the enacting of a similar model to Australian law that only enables micro-enterprisers (organisations with fewer than 10 employees) to bring defamation actions would allow a much fairer and level-playing field between defenders and pursuers. By limiting the ability of private companies to sue under defamation legislation, this would prevent those with immense financial resources from using the legislation, or threat thereof, as a means to silence scrutiny or debate of its products, services or practices.

2. Do you think the Bill clarifies the law and improves its accessibility?

As recognised in the Bill, the existing law of defamation in Scotland is piecemeal in nature, scattered across aged common law rules and several statutes. The proposal to place more aspects of the law on the face of the Bill will only assist in clarifying the legislation and improving its accessibility.

The introduction of a statutory public interest defence, replacing the current Reynolds test, will also ensure that anyone targeted by a defamation action has an accessible defence for publication in the public interest.

All in all, the above revisions will ensure that the legislation acts as a single point on defamation law in Scotland rather than potential pursuers and defenders navigating judgements, case law and common law as is the case at present.

3. Do you have any views on the proposed definition of defamation and should this be defined in statute?

The Society agrees with the proposed definition of defamation in that a statement about a person should only be considered defamatory if it causes serious harm to the person's reputation (that is, if it tends to lower the person's reputation in the estimation of ordinary persons). The statutory definition of defamation alongside the increased visibility of legal thresholds, defences and definitions in the Bill will ensure that Scots Law is more transparent and accessible and will hopefully provide greater clarity on the scope of the legislation.

The Society also welcomes the inclusion in subsection (2) of section 1 of the Bill that a right to bring defamation proceedings in respect of a statement accrues only if 'A has published the statement to a person other than B'. This marks a change in the position under current Scots law where, as things stand, proceedings for defamation can be brought even if the statement complained of is conveyed only to the person about whom it is made. This is a welcome revision which, as noted above, will end the anomaly where a statement need not be communicated to a third party to be considered defamatory. It is hoped that, moving forward, only serious and legitimate cases will go to trial.

University Centre, Granta Place, Cambridge, CB2 1RU

Telephone: 01223 304080 Fax: 01223 304090 Email: info@societyofeditors.org

www.societyofeditors.org

A company limited by guarantee incorporated in England. Registered No. 304 7323. Vat No. 653 5446 28

From the Executive Director

4. What are your views on the proposed ‘serious harm test’? Should this follow the meaning applied by the UK Supreme Court to the equivalent provision in English law (section 1 of the Defamation Act 2013)?

The inclusion of a serious harm term is essential to ensure that legitimate debate and public discourse is not stifled through attempts to bring trivial and vexatious claims to court. The introduction of such a test in the Defamation Act 2013 in England and Wales went some way to reversing the chilling effect that previous libel laws had on freedom of expression and legitimate debate and had subsequently made Britain attractive to libel tourists.

The Supreme Court judgement in *Lachaux v Independent News* in June 2019, clarified the law around ‘serious harm’ in England and Wales further when Lord Sumption concluded that claimants must show that actual, serious harm has been caused to them, or is likely to be caused by a statement. The *Lachaux* case tested the proper interpretation of the law. The judgment stated that ‘serious harm’ was not to be simply inferred by a judge on the potential harm of the words published, but that a claimant would have to show that their reputation had already sustained ‘serious’ harm in the real world. Delivering the judgment, Lord Sumption said that section 1 of the *Defamation Act* “requires its application to be determined by reference to actual fact about its impact and not just the meaning of the words.” The effect of this judgement raises the threshold of seriousness and highlights the need for actual harm in relation to facts as opposed to inference.

At present, Scottish law does not require someone bringing an action to outline or show evidence for the harm that an alleged defamatory statement has brought to their reputation. The introduction of a serious harm threshold, in line with the law in England and Wales, would place the onus on the pursuer bringing the action to show that harm has been caused and that it was of a serious enough nature to warrant legal action.

5. Do you have views on the Bill in relation to the restrictions on raising defamation actions by public authorities and the Bill’s provisions relating to businesses?

It is a long-established principle of common law in England and Wales that a public authority cannot sue for defamation. Known as the Derbyshire Principle, it is widely recognised that allowing public authorities the ability to sue for defamation could have a chilling effect on legitimate scrutiny and criticism of those performing public functions. It is vital that this long-standing principle remains in any new legislation. Given the importance of the principle and the concerns behind it, the Society is concerned that any new law must reflect how public services function today. At present there remains an unequal playing field in both English and Scottish defamation law whereby public bodies are rightly prevented from bringing defamation actions but private companies performing public services are not. It has become much more common in recent years for public services to be outsourced to private companies and these companies can and do often perform identical services to those carried out by public bodies elsewhere in the country. The fact that

University Centre, Granta Place, Cambridge, CB2 1RU

Telephone: 01223 304080 Fax: 01223 304090 Email: info@societyofeditors.org

www.societyofeditors.org

A company limited by guarantee incorporated in England. Registered No. 304 7323. Vat No. 653 5446 28

From the Executive Director

private companies are still able to use defamation law in England, Wales and Scotland to stifle criticism and prevent scrutiny when they are performing public functions is a loophole that needs closing. Ahead of the passage of the Defamation Act 2013, the Society campaigned strongly for the inclusion of an amendment preventing private companies from being able to sue for defamation in England and Wales but this was not included. The Scottish government should go further in ensuring that public services performed by such companies in Scotland are not allowed to use the law of libel to silence their critics.

The Society also remains concerned that, while unable to bring a defamation action itself, another loophole remains whereby public authorities are still able to contribute both financial and organisational resources to an individual action that could be brought by an employee or representative. Enabling public authorities the ability to provide financial resources to an individual action significantly weakens the Derbyshire principle and could see a scenario where by individual proceedings are used as proxies for organisational actions. Public bodies should not be able to financially support any action brought by someone in their employment and greater transparency is needed as to the origins of funding in private defamation cases.

6. Do you have views on the Bills provisions covering a single publication rule and secondary publishers?

The Society welcomes the introduction of a single publication rule which would end the anomaly whereby each time an article is republished, a new cause of action could be triggered. The proposal will, once again, bring Scottish law more in line with that of England and Wales and by removing the multiple publication rule, updated legislation would do more to protect people who use online platforms to express themselves.

In respect of secondary publishers, we support attempts to define ‘publisher’ ‘editor’ and ‘author’ to ensure that only they can be liable in defamation cases. In the current draft the definition of editor is too broad. If left in its current form, this definition could incorporate secondary publishers and online communicators, thus removing the protections intended in this section.

7. What are your views on the proposed reduction of the limitation period for actions from three years to one year, and the other provisions covering limitation periods?

The Society supports proposals to limit the period a pursuer initiates an action from three years to one year. Three years is an extremely long time to allow a defamation action to be brought. A period of twelve months still provides the pursuer with ample time in which to bring an action but also works to ensure that they act promptly once a perceived defamatory statement has been published.

University Centre, Granta Place, Cambridge, CB2 1RU

Telephone: 01223 304080 Fax: 01223 304090 Email: info@societyofeditors.org

www.societyofeditors.org

A company limited by guarantee incorporated in England. Registered No. 304 7323. Vat No. 653 5446 28

From the Executive Director

8. Do you think the range of remedies suggested in the Bill for defamation and malicious publication are sufficient or should they be improved?

The Society is concerned that s.30 allows the court, during proceedings, to order the removal of a statement in advance of any rulings. While this is understandable, the court could instead request that the defender publishes a statement highlighting ongoing legal action affixed to the statement in question rather than ordering such a statement's removal. This alternative option would prevent a scenario where the court orders a punishment prior to any ruling.

9. What are your views on the proposed defences (truth, honest opinion etc.) in relation to actions on defamation and malicious publication?

The Society strongly supports the proposals outlined to replace the existing defences with ones of honest opinion, public interest and truth. As outlined above, the introduction of a public interest defence will greatly clarify the law and strike a fairer balance between freedom of expression and the protection of individual reputation.

While the Society supports the introduction of the proposed defences, we believe that each requires amendment to improve and simplify the law. In cases where defamation proceedings are brought in respect of a statement conveying two or more distinct imputations, we need to ensure that the truth defence under s.5 is not defeated on a balance of probability between the number of imputations which are true. Section 5 (2) (a) should be amended to read "one or more" rather than "not all" to avoid any issues of preponderance that obscures the truth of any one imputation.

In respect of an honest opinion defence, s.7 (3) requires clarification as it states that it is a requirement for the statement in question to include or refer to the facts or evidence upon which it is based. Accessing this right should not be based on satisfying it in situations where the evidence is known or is likely to be known by ordinary persons. Without amendment this is an excessively onerous condition that could restrict publication on a subject that is explicitly known (or likely to be known) by the readership.

In addition to the above, greater clarity is needed in respect of the wording in s.7 (5) to ensure that defences are not lost by the use of rhetorical devices such as satire and hyperbole.

10. Do you have views on the provision in the Bill relating to absolute and qualified privilege?

While s.10 of the bill grants privileged status to peer-reviewed content in academic or scientific journals, S.10 (4) (a) & (b) disproportionately limits the privilege intended in this section. Subsection (a) prevents reviews being authored by the broader academic community which is an essential means by which academic research is scrutinised. Subsection (b) is also overly onerous in

University Centre, Granta Place, Cambridge, CB2 1RU

Telephone: 01223 304080 Fax: 01223 304090 Email: info@societyofeditors.org

www.societyofeditors.org

A company limited by guarantee incorporated in England. Registered No. 304 7323. Vat No. 653 5446 28

From the Executive Director

that the writing of an assessment is measured against the timeframe of writing the original statement. It is not clear why a requirement of simultaneous publication is necessary to access the privilege, especially if both are published in the same issue of the journal.

11. What is your opinion on the proposal that there will be a presumption against a jury trial in defamation actions?

Due to lengths and costs associated with defamation actions we are opposed to the presumption of a jury trial.

12. The Bill does not deal specifically with issues created by the ease of internet publication (although a lot of its provisions will be relevant to such cases). Are you content with this approach?

As outlined in Q6, the Society supports the removal of the multiple publication rule in favour of a single publication rule and the measures outlined to protect secondary publishers of content. As outlined in our response to question 8, amendment is required to ensure that online free expression is not threatened by the court ordering takedown of any published online content ahead of any ruling as to its legality.

13. Are there other provisions you would have liked to have seen in the Bill or other improvements that should have been made to the law on defamation and malicious publication?

As referenced in our response to Question 1, it is essential that there is a level playing field between public authorities and private companies that fulfil the same public functions. Following a similar omission in the 2013 Act in England and Wales, the anomaly whereby private companies performing public functions are still able to use defamation legislation to silence criticism and stifle debate is an ongoing threat to freedom of expression. It is essential that journalists and the public are able to speak freely, without fear of persecution, on all matters relating to public service provision and the Bill should be amended to reflect the increased role that public companies have in fulfilling public functions.