

POLICY NOTE

THE DEFAMATION ACT 2013 (COMMENCEMENT) (SCOTLAND) ORDER 2013

SSI 2013/339 (C. 26)

1. The instrument was made in exercise of the power conferred on Scottish Ministers by section 17(5) of the Defamation Act 2013 (the 2013 Act).

Policy Objectives

2. The Bill for the 2013 Act received Royal Assent on 25th April 2013. The main purpose of the 2013 Act is to reform aspects of the law of defamation in England and Wales to address a range of concerns which had been raised by the detrimental effects caused by the law on libel in England and Wales. Defamation is devolved to the Scottish Parliament as regards Scotland.

3. Five provisions of the 2013 Act (sections 6, 7(9), 16, 16(5) and 17) extend to Scotland. The Scottish Parliament passed on 4th October 2012 a legislative consent motion in respect of these provisions. Sections 6 and 7(9) relate to academic or scientific publications and conferences. Extension of these provisions to Scotland ensures parity of protection in the field as much academic and scientific work is done collaboratively across borders, and conferences are held throughout the UK with delegates attending from across the UK. Section 15 defines two terms (“publish” and “statement”) which are relevant to the interpretation of sections 6 and 7(9). Sections 16(5) and 17 make provision which enables Scottish Ministers to commence sections 6 and 7(9) by order in so far as those sections extend to Scotland.

4. Section 6 of the 2013 Act creates a new defence of qualified privilege relating to peer reviewed material in scientific or academic journals (whether published in electronic form or otherwise). The privilege will apply where two conditions are met. These are that the statement relates to a scientific or academic matter; and that before the statement was published in the journal an independent review of the statement’s scientific or academic merit was carried out by the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned.

5. The defence extends to publications in the same journal of any assessment of the scientific or academic merit of a peer-reviewed statement, provided the assessment was written by one or more of the persons who carried out the independent review of the statement, and the assessment was written in the course of that review. The qualified privilege is lost if the publication is shown to have been made with malice.

6. Section 7(9) of the 2013 Act inserts a new paragraph into Schedule 1 of the Defamation Act 1996 to extend the defence of qualified privilege under that Act to fair and accurate reports of proceedings of a scientific or academic conference, and to copies, extracts and summaries of matters published by such conferences.

Consultation

7. The provisions in the 2013 Act were drafted in light of a detailed UK Government consultation process (*Draft Defamation Bill Consultation*) following widespread and sustained concern about defamation law in England and Wales, in large part driven by particular concern about London being a magnet for 'libel tourism' and its alleged "chilling effect" on free speech and open debate across the globe, together with concern about the costs of libel actions.

8. There was no pre-introduction consultation by the UK Government on the proposed new defence for peer reviewed articles. Instead, the recommendation that a provision be added to the draft Bill extending privilege to peer-reviewed articles in scientific or academic journals was made by the Parliamentary Joint Committee in their report on the draft Bill. The Ministry of Justice, in their response to that report advised that: *"we are sympathetic to the need to provide clear protection for peer-reviewed articles published in scientific and academic journals and will consider further whether this can best be achieved through qualified privilege or other means, and how key elements of the peer-review process can be defined to ensure that the scope of any provision is clear."*

9. There was also no consultation on defamation law in Scotland before the Bill was introduced. However, the Scottish Law Commission did undertake a consultation exercise before undertaking its current law reform programme and defamation law was not seen as a priority. Scots law on defamation is considered robust enough for present purposes and the law on defamation (and the related area of privacy) has generally attracted little interest, with calls for review/reform being few and far between.

10. The Scottish Parliament Justice Committee considered the legislative consent motion in relation to the Bill which became the 2013 Act. The Committee concluded that parity of protection across the UK was desirable given that much scientific and academic research is done collaboratively and without reference to national borders. Limiting these provisions to England and Wales only could potentially inhibit constructive and robust scientific and academic exchange.

11. This Order will commence sections 6 (peer-reviewed statement in scientific or academic journal) and 7(9) (reports etc. protected by privilege) of the Defamation Act 2013, in so far as those sections extend to Scotland.

12. The UK Government intends to bring the other provisions of the 2013 Act, and sections 6 and 7(9) so far as they extend to England and Wales, into force on 1st January 2014. To ensure parity of protection of Scottish interests, the provisions relating to Scotland require to be brought into force at the same time. The laying of this instrument has therefore been co-ordinated with the UK Government's Commencement Order to ensure that the 2013 Act will be implemented in England, Wales and Scotland on the same date.

Impact Assessment

13. Link - <http://services.parliament.uk/bills/2012-13/defamation/documents.html>

Financial Effects

14. No additional costs are envisaged as a result of extending these limited provisions to Scotland.

Scottish Government
Justice Directorate
November 2013