These notes relate to the Defamation and Malicious Publication (Scotland) Act 2021 (asp 10) which received Royal Assent on 21 April 2021

DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) ACT 2021

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Defamation

Defences

Section 5: Defence of truth

40. Section 5 replaces the common law defence of veritas (truth) with a statutory equivalent, known simply as the defence of truth. The section is intended broadly to reflect the current law while simplifying and clarifying certain elements.

41. Subsection (1) sets out the basis on which the defence operates. It applies where the defender can show that the imputation conveyed by the statement complained of is true or substantially true. "Imputation" means a slur impinging in some way on a person's reputation. There is a long-standing common law rule that it is no defence to an action for defamation for the defender to prove that they were only repeating what someone else had said (known as the "repetition rule"). Subsection (1) focuses on the imputation conveyed by the statement in order to incorporate this rule.

42. In any case where the defence of truth is raised, there will be two issues: (i) what imputation (or imputations) are actually conveyed by the statement; and (ii) whether the imputation (or imputations) conveyed are true or substantially true. The defence will apply where the imputation is one of fact.

43. Subsection (2) deals with a case where defamation proceedings are brought in relation to a statement which conveys two or more distinct imputations. It replaces section 5 of the Defamation Act 1952 ("the 1952 Act") (the only significant element of the defence of veritas which is currently in statute). It makes clear that the defence does not fail if not all of the imputations are shown to be true or substantially true. Rather, the defence can still be relied upon if the defender can show that, having regard to the imputations that are shown to be true or substantially true, the publication of the remaining imputations has not caused serious harm to the reputation of the pursuer. The phrase "materially injure" used in the 1952 Act is replaced by "seriously harm" to ensure consistency with the test in section 1(2)(b) of the Act. This subsection gives statutory effect to the rule laid down for England and Wales in Polly Peck (Holdings) plc v Trelford[1], and thought also to apply in Scotland.

Section 6: Defence of publication on a matter of public interest

44. Section 6 creates a new defence on the basis that the statement in relation to which proceedings were brought related to a matter of public interest. It is based on the

1 [1986] QB 1000.

common law defence established in England and Wales by the leading case of Reynolds v Times Newspapers Ltd[2] (and generally accepted in Scotland). The House of Lords held in Reynolds that a publisher may have a defence in defamation proceedings if it published defamatory allegations on a matter of public interest, provided that the publication was "responsible". Section 6 is intended to reflect the principles developed in that case and subsequent case law. It may therefore be regarded simply as a statutory incarnation of the common law position, albeit with a change of focus. The test to be applied is now reasonableness of the belief that publication of the statement complained of was in the public interest, rather than the responsibility of the journalism behind the statement.

45. Subsection (1) sets out the components of the defence. The defender must show that the statement complained of was, or formed part of, a statement on a matter of public interest. The defender must also have reasonably believed that it was in the public interest for the statement to be published. The intention in this provision is to reflect the existing common law in England and Wales as most recently set out in Flood v Times Newspapers.[3] It reflects the fact that the common law test contained both a subjective element – what the defendant believed was in the public interest at the time of publication – and an objective element – whether the belief was a reasonable one for the defendant to hold in all the circumstances.

46. Subsection (1) does not attempt to define what is meant by "the public interest". However, this is a concept which is well-established in the common law. It is made clear that the defence applies if the statement complained of "was, or formed part of, a statement on a matter of public interest" to ensure that either the words complained of may be on a matter of public interest, or that a holistic view may be taken of the statement in the wider context of the document or article in which it is contained in order to decide if overall this is on a matter of public interest.

47. Subsection (2) provides that, subject to subsections (3) and (4), the court must have regard to all the circumstances of the case in determining whether the defender has shown the matters mentioned in subsection (1).

48. Subsection (3) provides for one consideration that is not to be taken into account, namely any failure by the defender to verify the truth of an imputation conveyed by a statement which forms part of an accurate and neutral report of a dispute to which the pursuer was a party. In instances where this doctrine applies, the defendant does not need to have verified the information reported before publication because the way that the report is presented gives a balanced picture. In effect, this places on a statutory footing the common law defence of "reportage". It is intended to reflect the fact that reportage has been recognised by the Supreme Court as a special form of Reynolds privilege, namely in the case of Flood mentioned above. In cases other than those involving reportage, the general position will be that steps should be taken by the defender to verify the truth of the imputation complained of. The Act does not, however, lay down an express requirement of verification. It will, therefore, accommodate any situation in which the public interest in publication is so strong and urgent as to justify publication without steps towards verification.

49. Subsection (4) provides that, in determining whether it was reasonable for the defender to believe that publishing the statement was in the public interest, the court must make such allowance for editorial judgment as it considers appropriate. This expressly recognises the discretion given to editors in judgments such as that of Flood, but is not intended to be limited to the judgement of editors in a media context.

50. Subsection (5) makes clear that the defence can be relied upon regardless of whether the statement which has been complained about is one of fact or opinion.

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2 [2001] 2 AC 127.
3 [2012] 2 AC 273.

Section 7: Defence of honest opinion

51. Section 7 replaces the common law defence of fair comment with a statutory equivalent, known as honest opinion. The section broadly reflects the current law while simplifying and clarifying certain elements, but does not include the current requirement for the opinion to be on a matter of public interest.

52. Subsection (1) sets out the parameters of the defence – subject to limited qualifications, discussed below, it applies only if the defender shows that each one of the conditions set out in subsections (2) to (4) are met.

53. Subsection (2) lays down the first condition, namely that the statement complained of was one of opinion (as opposed to one of fact).

54. Subsection (3) sets out the second condition, namely that the statement complained of must have indicated, either in general or specific terms, the evidence on which it was based.

55. Subsection (4) sets out the third condition, namely that an honest person could have held the opinion conveyed by the statement complained of, on the basis of any part of that evidence. This requirement will be judged with reference to whether the view expressed can be said, objectively, to be sufficiently linked to the evidence underpinning it.

56. Condition 2 (in subsection (3)), reflects the test approved by the Supreme Court in Joseph v Spiller[4] that "the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based". Taken together, condition 2 and condition 3 (in subsection (4)) aim to simplify the law by providing a clear and straightforward test. This is intended to retain the broad principles of the current common law defence as to the necessary basis for the opinion expressed but avoid the complexities which have arisen in case law, in particular over the extent to which the opinion must be based on facts which are sufficiently true and as to the extent to which the statement must explicitly or implicitly indicate the facts on which the opinion is based. These are areas where the common law has become increasingly complicated and technical, and where case law has sometimes struggled to articulate with clarity how the law should apply in particular circumstances.

57. Subsection (5) provides that the defence fails if the pursuer shows that the defender did not genuinely hold the opinion conveyed by the statement.

58. Subsection (6) caters for the situation where the defender published the statement complained of but is not the author of the statement. This may apply, for example, where proceedings are brought against the editor of a newspaper, rather than the journalist who wrote the article containing the statement in question. In this scenario, the defence fails if the pursuer shows that the defender knew, or ought to have known, that the author did not genuinely hold the opinion conveyed by the statement.

59. Subsection (7) provides, for the purposes of subsection (2), that a "statement of opinion" includes a statement which draws an inference of fact. An example of an inference of fact would be a contention that because a person has been charged with a criminal offence, he or she must be guilty of it.

60. Subsection (8) provides, for the purposes of subsections (3) and (4), that "evidence" may take three possible forms. It may take the form of any fact which existed at the time the statement was published; anything presented as a fact in a privileged statement, made available before, or on the same occasion as, the statement complained of; or anything that the defender reasonably believed to be a fact at the time the statement was published.

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4 [2011] 1 AC 852.

61. Subsection (9) defines what a "privileged statement" is for the purpose of subsection (8)(b).

Section 8: Abolition of common law defences and transitional provision

62. Section 8 provides for the abolition of a number of common law defences, for which statutory equivalents are introduced, in some form, by the Act (see section 4(2) and sections 5 to 7). These are the defences of innocent dissemination, veritas (i.e. truth), the Reynolds defence (which, as noted above, includes reportage) and the defence of fair comment. While abolishing the common law defences means that the courts would be required to apply the words used in the statute, the current case law would constitute a helpful (albeit not binding) guide to interpreting how the statutory defences should be applied. A court may, when interpreting the new statutory defences in sections 5 - 7, take into account case law on the common law defences where it considers it appropriate to do so.

63. Subsection (2) is a transitional provision to make clear that nothing in sections 5 to 7 (i.e. the new statutory defences) or subsection (1) (i.e. the abolition of common law defences) has effect in relation to defamation proceedings if the right to bring the proceedings accrued before the commencement of the provision in question.