

DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) ACT 2021

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Defamation

Offers to make amends

82. Subject to a limited number of departures of approach, sections 13 to 17 of the Act replace sections 2 to 4 of the Defamation Act 1996 insofar as they apply to Scotland, relating to offers to make amends. Section 18 makes transitional provision in relation to those sections of the Act.
83. In essence, the offer of amends procedure provides a route by which a person against whom proceedings for defamation are brought may seek to make amends as an alternative to defending the proceedings. The offer may relate to the statement in general (i.e. an “unqualified offer”), or only to a specific defamatory meaning conveyed by the statement (i.e. a “qualified offer”). In making an offer of amends, be it qualified or unqualified, the person making the offer is conceding, as appropriate, that the statement in general or the specific meaning to which the offer relates is defamatory.

Section 13: Offers to make amends

84. Section 13 sets out the components of a valid offer to make amends. Under subsection (1), it must comprise a suitable correction, either of the statement in general or, in the case of a qualified offer, of a specific defamatory meaning conveyed by the statement. There must also be a sufficient apology, with both this and the correction being published in a manner that is reasonable and appropriate in all the circumstances. The person receiving the offer may, for example, wish no more than a privately communicated retraction, without an apology being made known more widely. The offer must include, too, details of the compensation and expenses which are to be paid by the person making the offer, assuming expenses and compensation are to be paid (which is at the defamed party’s discretion), and insofar as the parties have succeeded in agreeing on the sums payable. If they have not so agreed, the level of compensation and expenses will be determined by the court (see section 14(3) to (7)). The offer may also include an undertaking to take such other steps as the person making the offer proposes; this might, for example, include a payment to charity.
85. Subsection (2) deals with the requisites of making a valid offer to make amends. Paragraph (a) makes clear that the opportunity to make an offer of amends is lost in the event that the person making the offer has lodged defences in relation to defamation proceedings brought by the party to whom the offer is made. The offer must also be made in writing, and state expressly that it is an offer or, as appropriate, a qualified offer under this section. If it is a qualified offer in relation to a specific defamatory meaning, it must set out the meaning in relation to which it is made.

86. Subsection (3) makes provision in relation to withdrawal and deemed rejection of offers. An offer of amends may be withdrawn before it is accepted. If it is withdrawn, or in appropriate cases, even if it has not been withdrawn, it may subsequently be renewed (with such renewal being treated as a new offer). Provision is also made, in paragraph (c), for an offer to be deemed to have been rejected, by force of law, if not accepted within a reasonable period. In the event of dispute as to whether deemed rejection has taken place, it will be for the court to determine what amounts to a reasonable period in the circumstances of any given case.

Section 14: Acceptance and enforcement of offer to make amends

87. Section 14 makes provision for enforcement in the situation where an offer to make amends has been accepted.
88. Subsection (1) sets out the parameters of the section. It applies only where an offer to make amends made under section 13 has been accepted by the person to whom it is made.
89. Subsection (2) makes clear that a person who has accepted an offer to make amends may not bring or continue defamation proceedings against the person who made the offer. In the case of a qualified offer, the bar on bringing or continuing proceedings will apply only in relation to the specific defamatory meaning set out in the offer. It will not apply to any other meanings that could be drawn from the statement. In the case of any other offer, the bar on bringing or continuing proceedings is in respect of the statement complained of as a whole.
90. Subsection (3) empowers the person who has accepted the offer to apply to the court for an order requiring the person who made the offer to take the steps agreed between the parties in fulfilment of the offer. It is not, however, compulsory that an order be obtained. The person accepting the offer may rely simply on the fact that agreement has been reached.
91. Subsection (4) deals with the situation where the offer of amends is accepted in principle but the parties cannot reach agreement as to the steps to be taken by way of correction, apology, and publication. A possible example may be lack of consensus as to where exactly in a newspaper the correction and apology should appear. In that event, it is open to the person making the offer to take such steps as they consider appropriate towards its implementation. In particular, they may make the correction and apology in open court, in such terms as are approved by the court and give an undertaking to the court as to the manner in which the correction and apology will be published subsequently. In effect, the person making the offer is, in this situation, asking the court to fill gaps left in the offer of amends process by lack of consensus between the parties.
92. Subsections (5) and (6) provide for the scenario where the parties do not agree on the amount to be paid by way of compensation, as part of the offer of amends. As mentioned above, it then falls to the court to determine the amount of compensation payable. This is to be done, in terms of subsection (5), by applying the same principles as apply in determining the level of damages payable in defamation proceedings. Subsection (6) sets out practical factors to be taken into account in determining the amount of compensation payable. These include any steps taken to fulfil the offer and, so far as these matters have not been agreed between the parties, the suitability of the correction, sufficiency of the apology and whether the manner of the publication of the correction and apology was reasonable in the circumstances. A court may reduce or increase the amount paid by way of compensation from that offered (if any) accordingly.
93. Subsection (7) requires the court to determine the amount of expenses payable, in the event that the parties do not reach agreement, on the same principles as expenses are awarded in court proceedings.

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94. Subsection (8) makes clear that there is to be no jury involvement in proceedings relating to offers to make amends.
95. Subsection (9) provides a definition of “qualified offer” for the purposes of the section. It is an offer to make amends, made under section 13, relating only to a specific defamatory meaning which the person making the offer accepts that the statement conveys.

Section 15: Offer to make amends: multiple persons responsible for statement

96. Section 15 of the Act provides for what happens when there is an offer to make amends and there are multiple persons responsible for the allegedly defamatory statement.
97. Subsection (1) sets out the parameters of the section. It provides that the section applies where a person has a right to bring defamation proceedings against more than one person in respect of an allegedly defamatory statement and that person has accepted an offer of amends under section 13 made by one of those persons.
98. Subsection (2) provides that the acceptance of an offer of amends made by one of the people responsible for the statement does not affect the right of the person accepting the offer to bring defamation proceedings against another person.
99. Subsections (3) and (4) make provision as to the level of compensation payable by the person making the offer to make amends in a situation where several people are jointly responsible for the statement. Section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 is applied in relation to compensation paid under an offer to make amends. The effect of this is that a person (“A”) who has paid compensation under an offer of amends is entitled to recover from any other person against whom defamation proceedings could have been taken in respect of the statement, and who might also have been held liable to pay damages, such contribution, if any, as the court may deem just. Under subsection (4), where a person other than A is liable in respect of the same damage (whether jointly or otherwise), A is not required to pay to that person, by virtue of any contribution under section 3(2) of the 1940 Act, an amount greater than the amount of compensation payable under the offer made by A.

Section 16: Rejection of unqualified offer to make amends

100. Section 16 applies where an offer of amends has been made covering the whole of a statement which is alleged to be defamatory, and that offer has been rejected. It may have been rejected expressly or deemed to have been rejected as a result of the passage of time.
101. Subsection (1) sets out the parameters of the section. It applies where a person has rejected an offer to make amends relating to the whole of a statement which is alleged to be defamatory, or is deemed to have done so. It does not, however, apply to the rejection or deemed rejection of a qualified offer (which is dealt with in section 17).
102. Subsections (2) to (5) deal with the effect of the making of an offer which is rejected, from the point of view of the person making the offer. In general, that person can rely on the fact of rejection of the offer as a defence to any defamation proceedings which subsequently go ahead. This applies whether the rejection is actual or deemed. Such a course does, however, exclude the opportunity to rely on any other defence (see subsection (4)). Also, the rejection does not operate as a defence if the person making the offer knew or had cause to believe that the statement referred, or was likely to be understood as referring, to the recipient of the offer and that it was both false and defamatory of them. The key consideration is the state of knowledge at the time the statement which is alleged to be defamatory was made (see subsection (3)). It is, however, presumed that the person making the offer did not know of these matters, meaning that the burden falls on the recipient of the offer to prove otherwise. Under subsection (5), the fact that the offer has been made and rejected, or deemed to have been

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rejected, may be relied upon in mitigation of the level of damages payable, regardless of whether it has been relied upon as a defence.

103. Subsection (6) provides a definition of “qualified offer” for the purposes of the section. It is an offer to make amends made under section 13 relating only to a specific defamatory meaning which the person making the offer accepts that the statement which is the subject of the proceedings conveys.

Section 17: Rejection of qualified offer to make amends

104. Section 17 makes provision equivalent to that of section 16, but in relation to a situation where an offer is made only in relation to one particular defamatory meaning conveyed by a statement. In other words, it relates to rejection of qualified offers to make amends rather than unqualified ones.

Section 18: Offers to make amends: transitional provision

105. Section 18 is a transitional provision to make clear that nothing in sections 13 to 17 (i.e. the offers to make amends provisions) has effect in relation to defamation proceedings if the right to bring the proceedings accrued before the relevant provision comes into force.