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

Actionability and restrictions on bringing proceedings

Section 1: Actionability of defamatory statements

6. Section 1 restricts the circumstances in which proceedings can competently be brought in respect of a statement that is alleged by the person bringing the proceedings to be defamatory.

7. The use of the word "proceedings" is intended to cover court actions relating to an alleged defamation raised by summons or initial writ (which will cover the vast majority of cases) and cases where a petition is presented to the Court of Session, for example, where all that is sought is an interdict against publication and not damages.

8. Subsection (1) confirms that section 1 applies where one person makes a defamatory statement about another person. Applying the definition of "person" in the Interpretation and Legislative Reform (Scotland) Act 2010 to the Act, that subject may be a natural person or an entity, including a corporate body, an unincorporated association, or a partnership.

9. Subsection (2) identifies the circumstances in which proceedings in relation to defamation can competently be brought.

10. First, the statement complained about must have been published to a person other than the one who is the subject of the statement. This marks a change in the position under current Scots law; 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.

11. Second, the publication of the statement must have caused, or be likely to cause, serious harm to the reputation of the subject of the statement; only then will the court allow the proceedings to go ahead. The provision extends to situations where publication is likely to cause serious harm, in order to cover situations where the harm has not yet occurred at the time the action for defamation is commenced. The UK Supreme Court has recently ruled on the meaning of the equivalent provision in English law (section 1 of the Defamation Act 2013), holding in Lachaux v Independent Print Ltd and another [2019 UKSC 27] that there is a need to show evidence of actual harm caused to reputation, or evidence that there is a likelihood of future harm. It is anticipated that the Scottish courts will treat Lachaux as persuasive authority and follow a similar approach.

12. Subsection (3) further limits the circumstances in which proceedings for defamation may competently be brought where the party seeking to do so is a non-natural person whose primary purpose is to trade for profit. In this scenario, for the purpose of

subsection (2)(b), the harm to the entity is not "serious harm" unless it has caused, or is likely to cause, serious financial loss. This reflects the fact that bodies trading for profit are already prevented from claiming damages for certain types of harm such as injury to feelings, and are in practice likely to have to show actual or likely financial loss. The requirement that this be serious is consistent with the new serious harm test in subsection (2)(b).

13. Subsection (4) sets out what is meant by a defamatory statement and its effect, and what is meant by "publishing" and related terms for the purposes of the Act. Reading this in conjunction with section 36, these definitions apply throughout the whole of the Act, unless the context in which the words are used dictates otherwise.

14. Subsection (4)(a) clarifies that a defamatory statement is one that causes harm to a person's reputation and that its effect is to tend to lower the person's reputation in the estimation of ordinary persons. This follows closely the common law test adopted in Sim v Stretch[1] as regards the nature of a defamatory statement, thus leaving the additional elements (e.g. the onus of proof and presumptions as to falsity/malice) to be dealt with by the common law. This is a similar approach to that adopted at section 2 of the Irish Defamation Act 2009. A court, when interpreting the new statutory definition at subsection (4)(a), may refer to case law on the common law definition found in Sim v Stretch, and indeed any other relevant case, where it considers it appropriate to do so.

15. Subsection (5) is a transitional provision which makes clear that the changes brought about by section 1 do not affect a right to bring proceedings which accrued before the section comes into force.

Section 2: Prohibition on public authorities bringing proceedings

16. Section 2 places on a statutory footing the principle laid down by the case of Derbyshire County Council v Times Newspapers Ltd[2] that a public authority has no right at common law to bring proceedings for defamation. Although a principle of English common law, it is thought to represent Scots common law also.

17. Subsection (1) sets out the basic principle laid down in Derbyshire that a public authority may not bring proceedings for defamation.

18. Subsection (2) sets out what is meant by a public authority in this context. The first two limbs relate to central and local government (and any non-natural persons that are owned or controlled by them). This therefore, will include:

- the Scottish Ministers and other offices in the Scottish Administration, the agencies and other bodies (however described) that are part of central government,
- each local authority, both in its capacity as a local authority and as education authority, roads authority, etc.
- companies and charitable bodies that are owned or controlled by the Scottish Ministers or a local authority to discharge particular functions of a public nature e.g. the Scottish National Investment Bank as well as government agencies and other public bodies.

19. The third limb confirms that courts and tribunals are public authorities for the purposes of this provision. This includes judges in their capacity as holders of judicial office (but not as individuals, by virtue of subsection (5)).

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1 [1936] 2 All ER 1237.

2 [1993] AC 534. At page 547, Lord Keith of Kinkel said: "There are, however, features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading. The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech."

20. Subsection (2)(d) provides that other persons or offices whose functions include functions of a public nature are also public authorities for these purposes. This general provision covers a range of bodies and offices.

21. A list of Scottish public bodies can be found at the following website: National public bodies: directory.[3] It is important to note that this list is not exhaustive and that some of the bodies on this list may not constitute a public authority for the purposes of this section. What constitutes a public authority for the purposes of this section may develop over time.

22. The power to make regulations in subsection (6) may supplement subsection (2) in order to address any bodies or types of body which should or should not be considered a public body for the purposes of this provision. This may arise where, for example, there is a question over whether a type of body should be a public authority.

23. Subsection (3) sets out a default position which excludes from the category of public authorities both bodies set up to trade for profit and charitable organisations where either exercises public functions from time to time, provided (in both cases) that they are not owned or controlled by a public authority. Typical examples may include companies and charitable organisations contracted by Government or local authorities to discharge functions on their behalf at certain times. Use of the words "from time to time" is intended to reflect the fact that such entities may operate on a contractual basis, discharging public functions sporadically. It seeks to ensure that they will not be deemed to fall into the category of public authorities by reason only of such periodic discharging of public functions. The provision does not preclude the possibility of them being found to be public authorities, but that finding may not be made solely on the basis of their carrying out functions of a public nature occasionally. The reference to their not being under the ownership or control of a public authority is designed to distinguish bodies covered by the exception from corporate vehicles set up or taken over by central or local government.

24. Subsection (4) elaborates what is meant by a non-natural person being under the ownership or control of a public authority. This includes situations where a public authority holds the majority of shares in it or has the right to appoint or remove a majority of the board of directors.

25. Subsection (5) puts beyond doubt that an individual who discharges public functions in the capacity of an office-holder or an employee is not prevented from bringing defamation proceedings in their personal capacity. Such proceedings may, for example, relate to the individual's professional/occupational position and reputation. This option will be available insofar as the matter concerned relates to the position of the individual, rather than the public functions.

26. Subsections (6) to (8) provide Scottish Ministers with the power to make regulations to specify persons or descriptions of persons who are or are not to be treated as public authorities for the purposes of subsection (1). The regulations are to be the subject of consultation by the Scottish Ministers, and are to be subject to the affirmative procedure of the Scottish Parliament. As noted above, it is expected that this power could be used to provide clarity in relation to any description of body which has aspects of a public authority, but which is not to be prevented from raising proceedings. It is not intended to be used to provide an exhaustive list.

27. Subsection (9) provides definitions of the terms "charity" and "charitable purposes".

Section 3: Restriction on proceedings against secondary publishers

28. Section 3 limits the circumstances in which an action for defamation can be brought against someone who is not the primary publisher of an allegedly defamatory statement.

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29. Subsection (1) lays down the general principle that, except as may be provided for in regulations made under section 4, no defamation proceedings may be brought against a person unless that person is the author, editor or publisher of the statement which is complained about or is an employee or agent of that person and is responsible for the content of the statement or the decision to publish it.

30. Subsection (2) sets out definitions of the terms "author", "editor" and "publisher", subject to subsections (3) to (5).

31. Subsection (3) sets out certain activities that are not to be taken to place a person in the category of an editor in the specific context of statements in electronic form. Paragraph (a) would cover, for instance, providing links to content containing an allegedly defamatory statement by way of CD/DVD, removable flash memory card (e.g. USB drive), email, retweeting such a statement or a hyperlink to it, "liking" or "disliking" an article containing such a statement, or posting another similar online "reaction" or "emoji" on republishing the statement. In all circumstances, for a person to avoid being considered the editor of the statement, the statement itself must remain unaltered. Paragraph (b) sets out the further qualification that the person's publishing or marking interaction must not materially increase the harm caused by the original statement.

32. Subsection (4) sets out a list of functions that are not to be taken to place a person in the category of an author, editor, or publisher. These include moderating and processing the material in relation to which proceedings are brought, making copies, and operating equipment. "Moderating" may involve performing functions offline, such as in relation to letters to the editor in hard copy newspapers and magazines, as well as online functions.

33. Subsection (5) provides for the use of the examples in subsection (3) and (4) by analogy, where appropriate, to determine whether a person is the author, editor, or publisher of a statement.

34. Subsection (6) enables the Scottish Ministers to make regulations modifying subsections (3) or (4) to add, alter or remove activities or methods of disseminating or processing material.

35. Subsection (7) states that any such regulations may be made only where Scottish Ministers consider it appropriate to take account of two different situations. The first situation reflects technological developments (including where certain technologies cease to be used) relating to the dissemination or processing of materials. The second reflects changes in how material is disseminated or processed as a result of such developments. Under subsections (7) to (8) any such regulations are to be the subject of consultation by the Scottish Ministers, and are to be subject to the affirmative procedure.

Section 4: Power to specify persons to be treated as publishers

36. Section 4 effectively qualifies section 3, discussed above.

37. Subsection (1) gives the Scottish Ministers power to make regulations specifying categories of persons who are to be treated as publishers of a statement, for the purposes of the bringing of defamation proceedings, despite not being persons who would be classed as authors, editors or publishers by virtue of section 3. In other words, the provision is concerned with people who neither fall within the definition of author, editor, or publisher under section 3, nor are an employee or agent of such a person. This is designed to cater, in particular, for a scenario in which a new category of publisher emerges and is actively facilitating the causing of harm.

38. Subsection (2) enables the Scottish Ministers to make provision in regulations under subsection (1) for a defence to defamation proceedings for persons who are treated as publishers under those regulations, who did not know, and could not reasonably be expected to have known, that the material which they disseminated contained

a defamatory statement and who satisfy any further conditions specified by the regulations.

39. Subsections (3) to (4) provide that regulations under subsection (1) are to be the subject of consultation by the Scottish Ministers, and are to be subject to the affirmative procedure of the Scottish Parliament.

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[4], 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 common law defence established in England and Wales by the leading case of Reynolds v Times Newspapers Ltd[5] (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.

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4 [1986] QB 1000.
5 [2001] 2 AC 127.

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.[6] 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.

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.

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6 [2012] 2 AC 273.

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[7] 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.

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

7 [2011] 1 AC 852.

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.

Absolute and qualified privilege

64. Sections 9 to 12, along with the schedule of the Act, make provision in relation to absolute and qualified privilege. The overall effect is to provide for a consolidation of the existing provisions relating to privilege in Scots defamation law. The relevant existing provisions of the Defamation Act 1996 ("the 1996 Act") relating to privilege are repealed and re-enacted, as are the relevant provisions of the Defamation Act 2013 ("the 2013 Act"), in so far as they apply to Scotland (see also section 35 in relation to repeals).

65. The effect of privilege is to exclude or at least restrict the bringing of proceedings in relation to defamation. Where a statement is subject to absolute privilege, no proceedings in defamation can be brought in relation to it, even if there is evidence of malice. Examples of statements falling under this category include those made in the course of proceedings in the Parliament and by certain persons involved in court proceedings, including judges, lawyers and witnesses. Where a statement is subject to qualified privilege, no proceedings can be brought unless the pursuer can prove that it was made with malice. This applies, for example, to reports of certain types of meetings, including meetings of local authority committees and general meetings of companies. It applies, also, when a journalist or blogger produces a summary of material which has been published by or on the authority of the Parliament. In effect, qualified privilege is privilege which is only removed by proof of malice.

66. Sections 9 to 11 and the schedule of the Act re-enact sections 14, 15 and schedule 1 of the 1996 Act, along with sections 6 and 7(9) of the 2013 Act, insofar as they apply to Scotland.

67. The provisions of the 1996 Act are subject to certain adjustments in their re-enactment in the Act. As an example, the phrase "public concern" is substituted for "public interest". This is intended to prevent any confusion arising from the use of two different terms with equivalent meaning in the Act and in the 1996 Act. This reflects equivalent adjustments made to those provisions, insofar as they apply to England and Wales, by section 7 of the 2013 Act. A common theme among the adjustments is in the expansion of the geographical reach of the provisions. Several of the provisions now confer privilege on material produced by particular types of bodies located anywhere in the world, rather than in a more restricted locus as was previously the case. By way of example, section 9 of the Act, in re-enacting section 14 of the 1996 Act, expands its application such that the provision now covers the contemporaneous publication of reports by courts anywhere in the world. Section 14 of the 1996 Act applied only to publication by certain courts, in the United Kingdom or Europe.

Absolute privilege

Section 9: Contemporaneous reports of court proceedings

68. Section 9 of the Act re-enacts section 14 of the 1996 Act and extends the circumstances in which the defence can be used.

69. Subsection (1) provides that the contemporaneous publication of a statement which is a fair and accurate report of proceedings in public before a court (defined in subsections (3) and (4)) is absolutely privileged.

70. Subsection (2) provides that where publication of a report of proceedings is required to be postponed (either by an order of the court or as a consequence of a statutory provision) it is to be treated as contemporaneously published if it is published as soon as practicable after that is permitted. Non-contemporaneous reports of court proceedings are only subject to qualified privilege (see paragraphs 3 and 4 of the schedule).

71. Subsections (3) and (4), taken together, extend the current scope of the defence so that it also covers proceedings in any court established under the law of a country or territory outside the United Kingdom, and any international court or tribunal established by the Security Council of the United Nations or by an international agreement. Currently, subsection (3) of section 14 provides for absolute privilege to apply only to fair and accurate reports of proceedings in public before any court in the UK; the European Court of Justice or any court attached to that court; the European Court of Human Rights; and any international criminal tribunal established by the Security Council of the United Nations or by an international agreement to which the UK is a party.

Qualified privilege

Section 10: Peer-reviewed statement in scientific or academic journal etc.

72. Section 10 of the Act re-enacts section 6 of the 2013 Act, conferring qualified privilege on the publication of material in a scientific or academic journal (whether published in electronic form or otherwise), provided that certain conditions are met. The term "scientific journal" would include e.g. medical and engineering journals.

73. Subsections (2) and (3) set out the conditions to be met. These are condition 1: that the statement relates to a scientific or academic matter; and condition 2: 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. The requirements in condition 2 are intended to reflect the core aspects of a responsible peer-review process.

74. Subsection (8) provides that the reference to "the editor of the journal" in subsection (3)(a) is to be read, in the case of a journal with more than one editor, as a reference to the editor or editors who were responsible for deciding to publish the statement concerned. This may be relevant where a board of editors is responsible for decision-making.

75. Subsection (4) extends the protection offered by the defence 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. This is intended to ensure that the privilege is available not only to the author of the peer-reviewed statement, but also to those who have conducted the independent review who will need to assess, for example, the papers originally submitted by the author, and may need to comment.

76. Subsection (5) provides that the privilege given by the section to peer-reviewed statements and related assessments also extends to the publication of a fair and accurate copy of, extract from or summary of the statement or assessment concerned.

77. Subsection (6) clarifies that the privilege given by the section will not apply if the publication is shown to be made with malice. This reflects the condition attaching to other forms of qualified privilege.

78. Subsection (7) ensures that the new section is not read as preventing a person who publishes a statement in a scientific or academic journal from relying on other forms of privilege, such as the privilege conferred under paragraph 16 of the schedule to fair and accurate reports etc. of proceedings at a scientific or academic conference.

Section 11: Other statements protected by qualified privilege

79. Section 11 and the schedule of the Act re-enact section 15 and schedule 1 of the 1996 Act. They make provision for other types of statements protected by qualified privilege. For example, paragraph 16 of the schedule re-enacts paragraph 14A of schedule 1 of the 1996 Act, as inserted by the 2013 Act, conferring qualified privilege upon a report of a scientific or academic conference held anywhere in the world, or an extract, summary etc. of such a report.

80. Part 2 of the schedule deals with statements which attract qualified privilege unless the defender, having been requested by the pursuer to publish a reasonable letter or statement by way of explanation or contradiction of the statement which is the subject of the proceedings, has not done so or has not done so in a suitable manner. These include copies of or extracts from information for the public published by government or authorities performing governmental functions (such as the police) or by courts; reports of proceedings at a range of public meetings (e.g. of local authorities) general meetings of UK public companies; and reports of findings or decisions by a range of associations formed in the UK or the European Union (such as associations relating to art, science, religion or learning, trade associations, sports associations and charitable associations). By contrast, the statements described in Part 1 enjoy qualified privilege regardless of whether a request is made by a pursuer to provide an opportunity for explanation or contradiction.

Section 12: Privilege: transitional provision

81. Section 12 of the Act is a transitional provision to make clear that nothing in the changes to the application of privilege brought about by sections 9 to 11 (or the schedule) of the Act will have effect in relation to defamation proceedings if the right to bring the proceedings accrued before the relevant provision comes into force.

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.

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 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.

Jurisdiction

Section 19: Actions against a person not domiciled in the UK

106. Section 19 lays down a jurisdictional threshold limiting the circumstances in which an action for defamation may competently be brought in a court in Scotland.

107. Subsections (1) and (2) set out the precise limitation of the jurisdiction of the Scottish courts. Subsection (1) provides that the section applies where defamation proceedings are brought in a Scottish court against a person who is not domiciled in the UK.

108. Subsection (2) makes clear that a court in Scotland has jurisdiction to hear and determine such proceedings only if satisfied that, of all the places in which the statement complained about has been published, Scotland is clearly the most appropriate one in which to bring proceedings. The result is that where a statement has been published in Scotland and in other jurisdictions, the court will have to look at the overall global picture. It is intended that this will overcome the problem of courts readily accepting jurisdiction simply because a claimant frames their claim so as to focus on damage which has occurred in this jurisdiction only. This would mean that, for example, if a statement was published 100,000 times in Australia and only 5,000 times in Scotland that would be a good basis on which to conclude that the most appropriate jurisdiction in which to bring an action in respect of the statement was Australia rather than Scotland. There will however be a range of factors which the court may wish to take into account including, for example, the amount of damage to the claimant's reputation in this jurisdiction compared to elsewhere, the extent to which the publication was targeted at a readership in this jurisdiction compared to elsewhere, and whether there is reason to think that the claimant would not receive a fair hearing elsewhere.

109. Subsection (3) provides that references in subsection (2) to the statement complained of are to be taken to include any statement conveying the same, or substantially the same, imputation as the particular statement complained of. This is intended to prevent attempts to circumvent the effect of the section by drawing distinctions between different incarnations of the statement appearing in different jurisdictions, in circumstances where no meaningful distinctions exist.

110. Subsection (4) makes clear that the provision does not affect the opportunity of a defender to take a plea of forum non conveniens. The essence of such a plea is that, although a given court has jurisdiction to determine proceedings, the interests of all the parties involved would be better served if they were determined by a different court, which has concurrent jurisdiction.

111. Subsection (5) sets out the circumstances in which a person will be taken to be domiciled in the UK.

112. Subsection (6) is a transitional provision to make clear that nothing in subsections (1) to (5) have effect in relation to defamation proceedings that have begun before section 19 comes into force.

Removal of presumption that proceedings are to be tried by jury

Section 20: Removal of presumption that proceedings are to be tried by jury

113. Section 20 removes the presumption that proceedings in defamation are to be tried by jury. The effect is that defamation cases are to be tried without a jury unless a court orders otherwise.

114. Subsection (1) provides for the repeal of paragraph (b) of section 11 of the Court of Session Act 1988. The effect of this is not to prevent a defamation action being dealt with by means of a trial by jury. Rather, it gives the courts a power to order the form of factual inquiry which they consider to be most appropriate to the circumstances of any given case. As an alternative to a trial by jury there may be a proof or (more usually) a proof before answer. Given the operation of section 63 of the Courts Reform (Scotland) Act 2014, the removal of a presumption of trial by jury would apply also to defamation actions in the sheriff court, if an order were to be made under section 41(1) of the 2014 Act to allow defamation trials by jury in the sheriff court.

115. Subsection (2) is a transitional provision that makes clear that the removal of the presumption does not have effect in relation to defamation proceedings that have begun before section 20 comes into force.