

DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) ACT 2021

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: General

Remedies

Section 28: Power of court to order a summary of its judgment to be published

127. Section 28 empowers the court to order an unsuccessful defender in defamation proceedings, or proceedings under Part 2 for a malicious publication, to publish a summary of the court's judgment.
128. Subsection (1) sets out the parameters of the power. It is exercisable only where the court has found in favour of the pursuer in defamation proceedings or proceedings under Part 2.
129. Subsection (2) makes clear that it is for the parties to agree (a) the wording of the summary and (b) the time, manner, form and place of its publication. Where, however, the parties cannot reach agreement on the wording of the summary, the court must determine it (see subsection (3)(a)). This may include, for example, substituting its own wording for that put forward by the parties. Where the parties cannot agree on a matter (or matters) identified in subsection (2)(b), the court may give such directions as it considers appropriate (see subsection (3)(b)).

Section 29: Making a statement in open court

130. Section 29 allows a statement to be made in open court at the point where settlement is reached in defamation proceedings or proceedings under Part 2 for a malicious publication. This may be either a bilateral statement, as agreed between the parties to the proceedings, or a unilateral statement made only by the pursuer. As Scots law currently stands there is not thought to be anything to prevent the reading out of a statement of this nature, commonly known as a settlement statement, although this is not done in practice in Scotland, unlike in England and Wales. The provision is intended to clarify the existence of this remedy as an option.
131. Subsection (1) sets out the basic power for the court to allow a statement to be made in open court.
132. Subsection (2) makes clear that it is for the parties to agree the wording of the statement and all other aspects of its terms. Failing such agreement, the wording may be determined by the pursuer. In terms of subsection (3) the court must, however, give its approval to the wording of a statement before it may be read out in open court. It cannot substitute new terms to replace any with which it does not agree. Its only power is to reject those terms. The parties may then propose alternative wording.

Section 30: Power of court to order display of notice or removal of statement etc.

133. Section 30 is intended to provide for the fact that it may not always be appropriate or possible for the author of material which is the subject of defamation proceedings or proceedings under Part 2 for a malicious publication to prevent further distribution of the material or orchestrate its removal.
134. Subsection (1) sets out two express powers of the court where a statement which is the subject of defamation or Part 2 proceedings is hosted on a website.
135. First, the court is empowered to order that a prominent notice is affixed to a statement on any website on which it appears. Subsection (2) requires this notice to be in a place or form that ensures that a person accessing the statement is made aware of the notice every time that they access the statement.
136. Second, the court is empowered to order the removal of material from any website on which it appears, as well as to order a person who was not the author, editor, or publisher of the material to stop distributing, selling, or exhibiting material containing the statement.
137. The exercise of these two powers is not confined to circumstances in which the final outcome of the proceedings has already been determined by the court. Accordingly, the court would be entitled in an appropriate case to grant an order for the display of a notice or the removal or cessation of distribution on an interim basis, before the final outcome of the proceedings is known.
138. Subsection (3) makes clear that the powers to make such an order do not constrain the court's exercise of other powers that are available to it. This may include the granting of an interdict or interim interdict.
139. Subsection (4) makes clear that the terms "author", "editor" and "publisher" have the same definition, for the purposes of section 30, as they have in section 3 (on secondary publishers).

Section 31: Remedies: transitional provision

140. Section 31 is a transitional provision which makes clear that nothing in sections 28 to 30 (i.e. the provisions on remedies) has effect in relation to defamation proceedings that have begun before the relevant section comes into force.

Limitation

Section 32: Limitation of actions

141. Section 32 provides for three things: (1) it brings forward the date on which a right of action accrues in relation to defamation and conduct falling within Part 2 for a malicious publication; (2) it reduces the period, starting from the accrual of the right of action, within which an action must be brought; and (3) it restricts the limitation period applying to subsequent publications of the same or substantially the same material by the same publisher, so that any right of action based on such publications attracts the same limitation period as the first publication. Instead of multiple different limitation periods, there is, in cases involving subsequent publication, a single limitation period, running from the date on which the statement complained of was first published to the public or a section of the public. This means that it will have been made available to the public in general, or at least a cross-section of the public, and without restriction according to membership of, for example, a particular club, profession or similar. It is only within the one-year period that any action based on subsequent publication of the same or substantially the same material can be brought.
142. Subsection (1) sets out the operation of the provision. It amends section 18A of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act").

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

143. Subsection (2) provides for reduction of the limitation period for the bringing of defamation actions and actions under Part 2 from 3 years to 1 year. The result is that any action for defamation must be brought within 1 year of the date on which the right to bring an action accrues.
144. Subsection (3) inserts new subsections (1A) – (1C) into section 18A of the 1973 Act. Inserted subsection (1A) imposes a restriction, in certain circumstances, on the bringing of actions in respect of subsequent publication of material that has been published previously. It is intended to address a potential risk of perpetual liability for defamation, owing in particular to the increasing prevalence of online publication. As matters currently stand, each accessing of an article, image etc. by a new reader/viewer/listener would trigger a new cause of action and, therefore, a new limitation period. The effect of subsection (1A) is that, where material has been published to the public or a section of the public, any right of action based on subsequent publications of the same (or substantially the same) material by the same publisher is taken to have accrued on the date on which the statement was first seen or heard and understood by the public or a section of the public. The member of the public on whom the start of the limitation period is based must be a person other than the subject of the statement – in other words, a third party.
145. As a result, there will, in general, be a single limitation period of 1 year, during which any actions in respect of the subsequent publication can competently be brought. The court will, though, retain its discretion, in terms of section 19A of the 1973 Act, to allow an action to be brought notwithstanding that it would ordinarily be excluded by limitation in terms of section 18A. This exercise of discretion could extend to disregarding the 1 year limitation period which will ordinarily be applicable to subsequent publication of a statement which is the same or substantially the same as that published previously.
146. Inserted subsection (1B) makes clear that the restriction outlined above does not apply if the court determines that the manner of the subsequent publication is materially different to that of the original publication.
147. Inserted subsection (1C) provides guidance as to how the question of whether there is a material difference in publication should be determined. Two specific factors are identified which may be taken into account, as appropriate: the level of prominence of the statement the subsequent publication of which is complained of, and the extent of the subsequent publication. These matters are to be judged relative to the prominence and extent of publication when first published to the public. So, for example, the court may look at whether it has been transferred from a relatively obscure position on a website to somewhere more obvious and easier to access. This may speak of a material difference in the level of both publication and prominence. Beyond this, the court may take account of any other circumstances it considers relevant to the particular case.
148. Subsection (5) provides for the insertion of new subsections (3A) and (3B) into section 18A of the 1973 Act. Inserted subsection (3A) makes clear that the alteration to the dates on which rights of action accrue has no effect in relation to a statement published before the coming into force of this section of the Act. Inserted subsection (3B) provides refinement as to how the application, or otherwise, of subsection (3A) is to be determined.
149. Subsection (6) provides for consequential amendments to section 18A(4) of the 1973 Act. Most substantively, it alters the date on which the right of action accrues in relation to defamation actions and actions under Part 2. In terms of the amendment made by subsection (6)(b)(iv), this will happen when the statement is published for the first time. Reading this provision together with section 32(3), the effect will be that the accrual from first publication will apply in all cases, regardless of whether the statement is communicated to the public at large or to one individual, or any level of communication in between. It will be necessary only that the statement should be seen or heard by at least one person who understands its substance.

Section 33: Interruption of limitation period: mediation

150. Section 33 inserts a new section 19CB into the 1973 Act. It specifies, in subsection (1), that in any computation of the limitation period, any period of mediation in relation to a relevant matter is to be disregarded. This is similar to provision in the 1973 Act in cases where the parties are engaged in arbitration or cross-border mediation.
151. Subsection (2) includes provision specifying the start and end point of any period of mediation. The approach adopted is based on section 19CA of the 1973 Act. In cases where parties are involved in an ongoing arbitration, the duration of the arbitration is disregarded when calculating the limitation period (i.e. the limitation period is effectively ‘frozen’ for the duration of the arbitration). This gives all sets of parties who engage in mediation the benefit of an automatic interruption of the limitation period whenever parties engage in “mediation” as defined.
152. Subsection (3) broadly defines the term “mediation” so that it will catch mediation and similar forms of alternative dispute resolution, for example, cases involving conciliation.

Section 34: Interruption of limitation period: media complaints and expert determination

153. Section 34 inserts a new section 19CC into the 1973 Act. It specifies, in subsection (1), that in any computation of the limitation period, any relevant period in relation to a relevant matter is to be disregarded. This is similar to provision in the 1973 Act in cases where the parties are engaged in arbitration or mediation.
154. Subsection (2) includes provision specifying the start and end point of any relevant matter. The approach adopted is based on section 19CA of the 1973 Act. In cases where parties are involved in an ongoing arbitration, the duration of the arbitration is disregarded when calculating the limitation period (i.e. the limitation period is effectively ‘frozen’ for the duration of the arbitration). This gives all sets of parties who engage in a relevant matter the benefit of an automatic interruption of the limitation period whenever parties engage in such a relevant matter, being a “complaints process” or “expert determination” as defined in subsection (4).
155. Subsection (5) grants Scottish Ministers power to amend those definitions by way of regulations which are to be subject to the affirmative procedure under subsection (6).

Miscellaneous

Section 35: Consequential modifications

156. Section 35 makes amendments to other enactments in consequence of provisions made in the Act.
157. Subsection (1) provides for the repeal of a number of provisions of the 1952 Act, to reflect the placing on a statutory footing of the common law defences of veritas and fair comment, along with such equivalents of verbal injury as are to be provided for.
158. Subsection (2) makes consequential amendments to section 8 of the Rehabilitation of Offenders Act 1974. This reflects the new statutory defences of truth and honest opinion. Section 8 of the 1974 Act applies to actions for defamation brought by rehabilitated persons based on statements made about offences which are the subject of a spent conviction.
159. Subsections (3) and (4) provide for repeal of the provisions relating to privilege which are re-enacted by sections 9 to 11 and the schedule of the Act, together with other minor consequential repeals.

Section 36: Interpretation

160. Section 36 provides definitions for key terms used throughout the Act.

Section 37: Regulations

161. Section 37 allows regulations under the Act to include the ancillary provision listed, and to make different provision for different purposes.

Section 38: Ancillary provision

162. Section 38 allows the Scottish Ministers, by regulations, to make standalone ancillary provision in relation to the Act, once enacted, or any provision made under it. Any ancillary provision amending primary legislation will be subject to the affirmative procedure; otherwise ancillary provision will be subject to the negative procedure.

Section 39: Commencement

163. Section 39 makes provision in relation to the commencement of the Act. The sections on interpretation, regulations, commencement and the short title came into force automatically on 22 April 2021, being the day after the Act received Royal Assent. The other substantive provisions will come into force in accordance with regulations made by the Scottish Ministers.

164. Section 32(5) provides for the insertion of new subsection (3A) into section 18A of the Prescription and Limitation (Scotland) Act 1973, which makes saving provision in relation to existing rights of action. Section 39(4) would allow this provision to be clarified at the point of commencement so that, rather than a general reference to the day on which section 32 of this Act comes into the force, section 18A(3A) would contain a reference to a specific calendar date.

Section 40: Short title

165. Section 40 provides that the Act may be referred to as the Defamation and Malicious Publication (Scotland) Act 2021.