



# Defamation and Malicious Publication (Scotland) Act 2021

2021 asp 10

## PART 1 **S**

### DEFAMATION

#### *Actionability and restrictions on bringing proceedings*

#### **1** Actionability of defamatory statements **S**

- (1) This section applies to a defamatory statement made or published by a person (A) about another person (B).
- (2) A right to bring defamation proceedings in respect of the statement accrues only if—
  - (a) A has published the statement to a person other than B, and
  - (b) the publication of the statement has caused (or is likely to cause) serious harm to the reputation of B.
- (3) For the purposes of subsection (2) (b), where B is a non-natural person which has as its primary purpose trading for profit, harm to B's reputation is not “serious harm” unless it has caused (or is likely to cause) B serious financial loss.
- (4) For the purposes of this Act, unless the context otherwise requires—
  - (a) a statement about a person is defamatory if it causes harm to the person's reputation (that is, if it tends to lower the person's reputation in the estimation of ordinary persons),
  - (b) a reference to publishing a statement is a reference to communicating the statement by any means to a person in a manner that the person can access and understand, and
  - (c) a statement is published when the recipient has seen or heard it.
- (5) Nothing in this section affects a right to bring proceedings which accrued before the commencement of this section.

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*Changes to legislation: There are currently no known outstanding effects for the Defamation and Malicious Publication (Scotland) Act 2021, PART 1. (See end of Document for details)*

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### Commencement Information

**II** S. 1 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

## 2 Prohibition on public authorities bringing proceedings **S**

- (1) A public authority may not bring defamation proceedings.
- (2) For the purpose of subsection (1), a public authority is—
  - (a) any institution of central government, including in particular the Scottish Ministers and any non-natural person owned or controlled by them,
  - (b) any institution of local government, including in particular each local authority and any non-natural person that such an authority owns or controls,
  - (c) a court or tribunal,
  - (d) any person or office not falling within paragraphs (a) to (c) whose functions include functions of a public nature (unless excluded by regulations made under subsection (6)).
- (3) But, where the person—
  - (a) is a non-natural person which—
    - (i) has as its primary purpose trading for profit, or
    - (ii) is a charity or has purposes consisting only of one or more charitable purposes, and
  - (b) is not owned or controlled by a public authority,
 it is not a public authority by reason only of its carrying out functions of a public nature from time to time.
- (4) For the purposes of this section, a non-natural person is owned or controlled by a public authority if the authority—
  - (a) holds (directly or indirectly) the majority of shares or voting rights in it,
  - (b) has the right (directly or indirectly) to appoint or remove a majority of the board of directors of it, or
  - (c) has the right to exercise, or actually exercises, significant influence or control over it.
- (5) For the avoidance of doubt, nothing in this section prevents an individual from bringing defamation proceedings in a personal capacity (as distinct from the individual acting in the capacity of an office-holder or employee).
- (6) The Scottish Ministers may by regulations make provision specifying persons or descriptions of persons who are or are not to be treated as a public authority for the purpose of subsection (1).
- (7) Regulations under subsection (6) are subject to the affirmative procedure.
- (8) Before laying a draft of a Scottish statutory instrument containing regulations under subsection (6) before the Scottish Parliament, the Scottish Ministers must consult such persons as they consider appropriate.
- (9) In this section—
  - (a) a reference to a charity is a reference to a non-natural person—
    - (i) registered in the Scottish Charity Register, or

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- (ii) managed or controlled wholly or mainly outwith Scotland and which is registered in a register equivalent to the Scottish Charity Register for the purposes of the country in which it operates,
- (b) “charitable purposes” is to be construed in accordance with section 7(2) of the Charities and Trustee Investment (Scotland) Act 2005.

#### Commencement Information

**I2** S. 2 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2 (with reg. 4(1))

### 3 Restriction on proceedings against secondary publishers **S**

- (1) Except as may be provided for under section 4, a right to bring defamation proceedings in respect of a defamatory statement does not accrue against a person unless the person is—
- (a) the author, editor or publisher of the statement, or
  - (b) both—
    - (i) an employee or agent of such a person, and
    - (ii) responsible for the statement's content or the decision to publish it.
- (2) In this section, subject to subsections (3) to (5)—
- “author” means the person from whom the statement originated, but does not include a person who did not intend the statement to be published,
  - “editor” means a person with editorial or equivalent responsibility for the content of the statement or the decision to publish it,
  - “publisher” means a commercial publisher (that is to say, a person whose business is issuing material to the public or to a section of the public) who issues material containing the statement in the course of that business.
- (3) Where a statement is in electronic form, a person is not to be considered the editor of the statement or, in the case of an employee or agent of such a person, responsible for its content or the decision to publish it, if—
- (a) the person's involvement with the statement is only—
    - (i) publishing the same statement or providing a means to access the statement (for example a hyperlink) in a manner which does not alter the statement, or
    - (ii) marking the person's interest in, approval of or disapproval of the statement in a manner which does not alter the statement (typically by means of a symbol), and
  - (b) that involvement does not materially increase the harm caused by the publication of the statement.
- (4) A person is not to be considered the author, editor or publisher of a statement or, in the case of an employee or agent of such a person, responsible for its content or the decision to publish it, if the person's involvement with the statement is only—
- (a) printing, producing, distributing or selling printed material containing the statement,
  - (b) processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part 1 of the Copyright, Designs and Patents Act 1988) containing the statement,

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- (c) processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded,
  - (d) operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form,
  - (e) broadcasting a live programme containing the statement in circumstances in which the person has no effective control over the maker of the statement,
  - (f) operating or providing access to a communications system by means of which another person over whom the person has no effective control transmits the statement or makes it available,
  - (g) moderating the statement (for example, by removing obscene language or correcting typographical errors without altering the substance of the statement).
- (5) Where a person does not fall within subsection (3) (a) or (4) (a) to (g), the court may have regard to those paragraphs by way of analogy in determining whether a person is the author, editor or publisher of a statement (or, in the case of an employee or agent of such a person, responsible for its content or the decision to publish it).
- (6) The Scottish Ministers may by regulations modify subsection (3) or (4) to add, amend or remove activities or methods of disseminating or processing material.
- (7) Regulations under subsection (6)—
- (a) may be made only where the Scottish Ministers consider it appropriate to take account of—
    - (i) technological developments (including obsolescence) relating to the dissemination or processing of material, or
    - (ii) changes in how material is disseminated or processed as a result of such developments, and
  - (b) are subject to the affirmative procedure.
- (8) Before laying a draft of a Scottish statutory instrument containing regulations under subsection (6), the Scottish Ministers must consult such persons as they consider appropriate.

#### Commencement Information

**I3** S. 3 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2 (with reg. 4(1))

#### 4 Power to specify persons to be treated as publishers **S**

- (1) The Scottish Ministers may by regulations specify categories of persons who are to be treated as publishers of a statement for the purpose of defamation proceedings despite not being—
- (a) the author, editor or publisher of the statement as defined in section 3, or
  - (b) an employee or agent of such a person.
- (2) Regulations under subsection (1) may also provide for a defence to defamation proceedings for a person who—
- (a) is treated as a publisher under such regulations,

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- (b) did not know and could not reasonably be expected to have known that the material which the person disseminated contained a defamatory statement, and
  - (c) satisfies any further conditions specified by the regulations.
- (3) Regulations under subsection (1) are subject to the affirmative procedure.
- (4) Before laying a draft of a Scottish statutory instrument containing regulations under subsection (1), the Scottish Ministers must consult such persons as they consider appropriate.

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#### Commencement Information

**I4** S. 4 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

### Defences

#### 5 Defence of truth **S**

- (1) It is a defence to defamation proceedings for the defender to show that the imputation conveyed by the statement complained of is true or is substantially true.
- (2) Where defamation proceedings are brought in respect of a statement conveying two or more distinct imputations, the defence under subsection (1) does not fail if—
- (a) not all of the imputations have been shown to be true or substantially true, and
  - (b) having regard to the imputations that have been shown to be true or substantially true, publication of the remaining imputations has not caused serious harm to the reputation of the pursuer.

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#### Commencement Information

**I5** S. 5 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

#### 6 Defence of publication on a matter of public interest **S**

- (1) It is a defence to defamation proceedings for the defender to show that—
- (a) the statement complained of was, or formed part of, a statement on a matter of public interest, and
  - (b) the defender reasonably believed that publishing the statement complained of was in the public interest.
- (2) Subject to subsections (3) and (4), in determining whether the defender has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
- (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the pursuer was a party, the court must, in determining whether it was reasonable for the defender to believe that publishing the statement was in the public interest, disregard any omission of the defender to take steps to verify the truth of the imputation conveyed by it.

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- (4) 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 judgement as it considers appropriate.
- (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

#### Commencement Information

**I6** S. 6 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

### 7 Defence of honest opinion **S**

- (1) Subject to subsections (5) and (6), it is a defence to defamation proceedings for the defender to show that the conditions in subsections (2) to (4) are met.
- (2) The first condition is that the statement complained of was a statement of opinion.
- (3) The second condition is that the statement indicated, either in general or specific terms, the evidence on which it was based.
- (4) The third condition is that an honest person could have held the opinion conveyed by the statement on the basis of any part of that evidence.
- (5) The defence fails if the pursuer shows that the defender did not genuinely hold the opinion conveyed by the statement.
- (6) Where the statement complained of was published by the defender but made by another person (“the author”)—
  - (a) subsection (5) does not apply, but
  - (b) 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.
- (7) For the purpose of subsection (2), a “statement of opinion” includes a statement which draws an inference of fact.
- (8) For the purpose of subsections (3) and (4), “evidence” means—
  - (a) any fact which existed at the time the statement was published,
  - (b) anything asserted to be a fact in a privileged statement made available before, or on the same occasion as, the statement complained of, or
  - (c) anything that the defender reasonably believed to be a fact at the time the statement was published.
- (9) For the purpose of subsection (8) (b), a statement is a “privileged statement” if the person responsible for its publication would have one or more of the following defences if defamation proceedings were to be brought in respect of it—
  - (a) the defence of publication on a matter of public interest under section 6,
  - (b) the defence of absolute privilege under section 9, or
  - (c) the defence of qualified privilege under section 10 or 11.

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#### Commencement Information

**17** S. 7 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

### 8 Abolition of common law defences and transitional provision **S**

- (1) Any rules of law providing for—
  - (a) the defence of innocent dissemination,
  - (b) the defence of veritas,
  - (c) the defence known as the Reynolds defence,
  - (d) the defence of fair comment,cease to have effect.
- (2) Nothing in sections 5 to 7 or subsection (1) of this section has effect in relation to defamation proceedings if the right to bring the proceedings accrued before the commencement of the section or subsection in question.

#### Commencement Information

**18** S. 8 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

#### *Absolute privilege*

### 9 Contemporaneous reports of court proceedings **S**

- (1) The contemporaneous publication of a statement which is a fair and accurate report of proceedings in public before a court to which this section applies is absolutely privileged.
- (2) Where the publication of a report of proceedings is required to be postponed—
  - (a) by an order of the court, or
  - (b) as a consequence of a statutory provision,it is to be treated as being contemporaneously published if it is published as soon as practicable after that is permitted.
- (3) This section applies to—
  - (a) any court in the United Kingdom,
  - (b) any court established under the law of a country or territory outside the United Kingdom, and
  - (c) any international court or tribunal established by the Security Council of the United Nations or by an international agreement.
- (4) For the purposes of subsection (3) (a) and (b), “court” includes any tribunal or body exercising the judicial power of the State.

#### Commencement Information

**19** S. 9 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

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### *Qualified privilege*

#### **10 Peer-reviewed statement in scientific or academic journal etc. S**

- (1) The publication of a statement in a scientific or academic journal is privileged if the conditions in subsections (2) and (3) are met.
- (2) The first condition is that the statement relates to a scientific or academic matter.
- (3) The second condition is that before the statement was published an independent review of the statement's scientific or academic merit was carried out by—
  - (a) the editor of the journal, and
  - (b) one or more persons with expertise in the scientific or academic matter concerned.
- (4) Where the publication of a statement in a scientific or academic journal is privileged by virtue of subsection (1), the publication in the same journal of any assessment of the statement's scientific or academic merit is also privileged if—
  - (a) the assessment was written by one or more of the persons who carried out the independent review of the statement, and
  - (b) the assessment was written in the course of that review.
- (5) Where the publication of a statement or assessment is privileged by virtue of this section, the publication of a fair and accurate copy of, extract from or summary of the statement or assessment is also privileged.
- (6) The publication of a statement is not privileged by virtue of this section if it is shown to have been made with malice.
- (7) Nothing in this section is to be construed as—
  - (a) protecting the publication of matter the publication of which is prohibited by law, or
  - (b) limiting any privilege subsisting apart from this section.
- (8) The reference in subsection (3) (a) to “the editor of the journal” 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.

#### **Commencement Information**

**I10** S. 10 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

#### **11 Other statements protected by qualified privilege S**

- (1) Other than as provided in this section, the publication of any statement mentioned in the schedule (however described) is privileged.
- (2) The publication of a statement is not privileged by virtue of this section if it is shown to have been made with malice.
- (3) Subsection (4) applies to defamation proceedings brought in respect of the publication of a statement mentioned in Part 2 of the schedule.
- (4) If the pursuer shows that the defender—



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- (a) was requested by the pursuer to publish, in a suitable manner, a reasonable statement by way of explanation or contradiction, and
  - (b) refused or neglected to do so,
- the publication of the statement complained of is not privileged by virtue of this section.
- (5) For the purpose of subsection (4) (a), “in a suitable manner” means—
    - (a) in the same manner as the statement complained of, or
    - (b) in a manner that is adequate and reasonable in the circumstances.
  - (6) This section does not apply to the publication of matter which is not of public interest and the publication of which is not for the public benefit.
  - (7) Nothing in this section is to be construed as—
    - (a) protecting the publication of matter the publication of which is prohibited by law, or
    - (b) limiting any privilege subsisting apart from this section.

**Commencement Information**

**I11** S. 11 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

**12 Privilege: transitional provision** **S**

Nothing in sections 9 to 11 (or the schedule) has effect in relation to defamation proceedings if the right to bring the proceedings accrued before the commencement of the section in question.

**Commencement Information**

**I12** S. 12 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

*Offers to make amends*

**13 Offer to make amends** **S**

- (1) An offer to make amends is an offer made by a person (A) who has published a statement which another person (B) alleges is defamatory to make amends to B by—
  - (a) making a suitable correction of—
    - (i) the statement generally, or
    - (ii) a specific defamatory meaning conveyed by the statement,
  - (b) giving a sufficient apology,
  - (c) publishing the correction and apology in a manner that is reasonable and practicable in the circumstances,
  - (d) paying to B such compensation and expenses as may be agreed or determined to be payable (if any), and
  - (e) taking such other steps (if any) as A may propose.
- (2) The offer must—

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- (a) be made before A lodges defences in any defamation proceedings brought by B in relation to the statement,
  - (b) be in writing,
  - (c) state that it is an offer to make amends under this section, and
  - (d) if made in relation to a specific defamatory meaning only, state that it is a qualified offer and set out the meaning in relation to which it is made.
- (3) An offer made under this section—
- (a) may be withdrawn before it is accepted,
  - (b) may be renewed (such renewal being treated as a new offer),
  - (c) is deemed to have been rejected if not accepted within a reasonable period.

#### Commencement Information

**I13** S. 13 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

## 14 Acceptance and enforcement of offer to make amends **S**

- (1) This section applies where a person (B) accepts an offer to make amends made under section 13.
- (2) B may not bring or continue defamation proceedings against the person who made the offer (A) in respect of—
  - (a) in the case of a qualified offer, the specific defamatory meaning set out in the offer, or
  - (b) in any other case, the statement,
 but may enforce the offer in accordance with this section.
- (3) If A and B agree on the steps to be taken in fulfilment of the offer, B may apply to the court for an order requiring A to take the agreed steps.
- (4) If A and B do not agree on the steps to be taken by way of correction, apology and publication, A may take such steps as A considers appropriate, and may in particular—
  - (a) make the correction and apology in open court in terms approved by the court, and
  - (b) give an undertaking to the court as to the manner in which A will publish the correction and apology.
- (5) If A and B do not agree on the amount to be paid by way of compensation, the court must determine the appropriate amount on the same principles as damages in defamation proceedings.
- (6) In determining the appropriate amount to be paid under subsection (5), the court must take account of—
  - (a) any steps taken in fulfilment of the offer, and
  - (b) so far as not agreed between A and B—
    - (i) the suitability of the correction,
    - (ii) the sufficiency of the apology, and
    - (iii) whether the manner of the publication of the correction and apology was reasonable in the circumstances,

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and may reduce or increase the amount to be paid from that offered (if any) accordingly.

- (7) If A and B do not agree on the amount to be paid by way of expenses, the court must determine the appropriate amount on the same principles as expenses awarded in court proceedings.
- (8) Proceedings under this section are to be heard and determined without a jury.
- (9) In this section, a “qualified offer” is an offer to make amends made under section 13 that is made only in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys.

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**Commencement Information**

**I14** S. 14 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

**15 Offer to make amends: multiple persons responsible for statement** **S**

- (1) This section applies where a person (B)—
  - (a) has a right to bring defamation proceedings against more than one person in respect of an allegedly defamatory statement, and
  - (b) has accepted an offer to make amends under section 13 made by one of the persons (A) in respect of the statement.
- (2) B's acceptance of the offer made by A does not affect any right to bring defamation proceedings that B has against another person in respect of the statement.
- (3) Section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (“the 1940 Act”) (right of one joint wrongdoer as respects another to recover contribution towards damages) applies in relation to compensation paid under an offer to make amends as it applies in relation to damages in an action to which that section applies.
- (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 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.

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**Commencement Information**

**I15** S. 15 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

**16 Rejection of unqualified offer to make amends** **S**

- (1) This section—
  - (a) applies where a person (B) rejects or is deemed to have rejected an offer to make amends made under section 13, but
  - (b) does not apply to the rejection or deemed rejection of a qualified offer (see section 17).
- (2) It is a defence to defamation proceedings brought by B against the person who made the offer (A) that B rejected the offer (or is deemed to have rejected it).

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*Changes to legislation: There are currently no known outstanding effects for the Defamation and Malicious Publication (Scotland) Act 2021, PART 1. (See end of Document for details)*

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- (3) The defence is not available if (at the time of making the statement complained of) A knew or had reason to believe that the statement—
- (a) referred to B or was likely to be understood as referring to B, and
  - (b) was both false and defamatory of B,
- but it is to be presumed, unless the contrary is shown, that A did not know and had no reason to believe that this was the case.
- (4) Where A relies on the defence under this section, A may not rely on any other defence.
- (5) The offer may be relied on in mitigation of damages whether or not it was relied on as a defence.
- (6) In this section, a “qualified offer” is an offer to make amends made under section 13 that is made only in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys.

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**Commencement Information**

**I16** S. 16 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

**17**      **Rejection of qualified offer to make amends** **S**

- (1) This section applies where a person (B) rejects or is deemed to have rejected a qualified offer.
- (2) In so far as relating to the specific defamatory meaning set out in the offer, it is a defence to defamation proceedings brought by B against the person who made the qualified offer (A) that B rejected the offer (or is deemed to have rejected it).
- (3) The defence is not available if (at the time of making the statement complained of) A knew or had reason to believe that the meaning that A accepts the statement conveys—
- (a) referred to B or was likely to be understood as referring to B, and
  - (b) was both false and defamatory of B,
- but it is to be presumed, unless the contrary is shown, that A did not know and had no reason to believe that this was the case.
- (4) Where A relies on the defence under this section, A may not rely on any other defence in respect of the accepted meaning.
- (5) The qualified offer may be relied on in mitigation of damages whether or not it was relied on as a defence.
- (6) In this section, a “qualified offer” is an offer to make amends made under section 13 that is made only in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys.

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**Commencement Information**

**I17** S. 17 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

**Changes to legislation:** There are currently no known outstanding effects for the Defamation and Malicious Publication (Scotland) Act 2021, PART 1. (See end of Document for details)

## 18 Offers to make amends: transitional provision **S**

Nothing in sections 13 to 17 has effect in relation to defamation proceedings if the right to bring the proceedings accrued before the commencement of the section in question.

### Commencement Information

**I18** S. 18 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

### *Jurisdiction*

## 19 Actions against a person not domiciled in the UK **S**

- (1) This section applies to defamation proceedings brought in Scotland against a person who is not domiciled in the United Kingdom.
- (2) A court does not have jurisdiction to hear and determine proceedings to which this section applies unless the court is satisfied that, of all the places where the statement complained of has been published, Scotland is clearly the most appropriate place to bring proceedings in respect of the statement.
- (3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of.
- (4) Nothing in this section limits the availability of, or otherwise affects, any plea of forum non conveniens in respect of proceedings to which this section applies.
- (5) Sections 41 and 42 of the Civil Jurisdiction and Judgments Act 1982 apply for the purpose of determining whether an individual, corporation or association is regarded as domiciled in the United Kingdom.
- (6) Nothing in subsections (1) to (5) has effect in relation to defamation proceedings begun before the commencement of this section.

### Commencement Information

**I19** S. 19 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

### *Removal of presumption that proceedings are to be tried by jury*

## 20 Removal of presumption that proceedings are to be tried by jury **S**

- (1) In section 11 of the Court of Session Act 1988 (jury actions), paragraph (b) is repealed.
- (2) Subsection (1) does not have effect in relation to defamation proceedings begun before the commencement of this section.

### Commencement Information

**I20** S. 20 in force at 8.8.2022 by S.S.I. 2022/154, regs. 1(2), 2

**Changes to legislation:**

There are currently no known outstanding effects for the Defamation and Malicious Publication (Scotland) Act 2021, PART 1.