

DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) ACT 2021

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Defamation

Actionability and restrictions on bringing proceedings

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.
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.

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

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.