



# Defamation and Malicious Publication (Scotland) Act 2021

2021 asp 10

## PART 1

### DEFAMATION

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

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

- (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.

*Changes to legislation: There are currently no known outstanding effects for the Defamation and Malicious Publication (Scotland) Act 2021, Cross Heading: Actionability and restrictions on bringing proceedings. (See end of Document for details)*

### 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

- (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

- (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

- (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

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