Defamation Consultation Response Guide

ScottishPEN
defending the freedom of writers and readers

Scottish PEN

This guide will help you complete the Scottish Government Public Consultation on defamation reform to help protect free expression in Scotland

WHO ARE SCOTTISH PEN

Scottish PEN is the Scottish Centre of PEN International and was founded in 1927 as a not-for-profit organisation that champions freedom of speech and literature across borders. Scottish PEN campaigns on behalf of writers and readers both at home and abroad, ensuring writers can fully express themselves free from the threats of violence, censorship, intimidation and interference. We have vocally opposed the silencing of writers across the world and have campaigned on behalf of writers including Raif Badawi, Anna Politkovskaya, Liu Xiaobo, Ragip Zarakolu and Lydia Cacho, as well as leading campaigns in Scotland to reform defamation law, oppose pervasive surveillance and champion Scottish writing in all its languages.

Scottish PEN is a registered Scottish Charity with the charity number SC008772. Scottish PEN is a SCIO (Scottish Charitable Incorporated Organisation).

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INTRODUCTION

Defamation in Scots Law was last meaningfully reformed in 1996. In the 23 years that have passed, the internet has revolutionised how we communicate with others, source information and publish our work. It has also enabled everyone to have their voice heard, whether they are writers, journalists, academics, scientists, activists, bloggers or everyday social media users. But the laws have not moved as fast. As a result, defamation law in Scotland offers too few protections for the people of Scotland to express themselves free from the threats of legal action aimed at silencing criticism and stifling debate.

Over the last two years, Scottish PEN has been campaigning to bring forward reform that would address these issues and bring our laws into the digital age. At the end of 2017, the Scottish Law Commission (SLC) published their final report alongside a draft of the Defamation and Malicious Publications (Scotland) Bill. This was a radical departure from the laws that proceeded it and offered a strong foundation upon which to reform the law. Nicola Sturgeon has committed to bring forward legislation "later in this parliament." We have never been closer to meaningful reform.

This guide will help you navigate the Scottish Government consultation announced on Monday 14th January and aid you in having your voice heard in support of reform. We hope as many people from across Scotland take part and call for reform.

If you have any questions not answered in this guide please contact Nik Williams, the Scottish PEN Project Manager on info@scottishpen.org

WHAT IS DEFAMATION?

Defamation in Scotland is a civil wrong giving rise to an action for damages, not a criminal prosecution. Defamation law is largely found in case law and the Defamation Acts of 1952 & 1996. According to the Scottish Government's consultation document: "Where a statement is made about a person which is false, derogatory in nature and is made maliciously, then the person concerned may be entitled to damages for solatium and patrimonial loss." The definition of defamation in Scots Law is not fixed in a statute and is developed through case law. The definition that has been accepted as representing the law of Scotland comes from *Sim v Stretch (1936)*:

> "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"

According to Rosalind McInnes, BBC Scotland's Principle Solicitor and author of *Scots Law for Journalists* "there is no clear rule on what is and what is not defamatory. Generally speaking, however, a defamatory statement involves some imputation against character or reputation, including business or financial reputation."

While there is no current threshold requiring a certain level of *harm* to be caused by the defamatory statement, previous cases have established that an action needs to be based on more than mere personal objection to a statement.[1]

At the heart of this is the tension between the right to free expression (Article 10 of the European Convention of Human Rights) and the right to respect for private and family life, home and correspondence (Article 8), which incorporates protection for your reputation. When expressions, (like speech or writing), result in the lowering of someone's standing or reputation, through the sharing of false information, the potential of

[1] "It is nothing to the point…to aver that an allegation is disparaging in the section of society to which [the pursuer] belongs if it is not also disparaging in the view of society as a whole" *Bell v Jackson* (2001).

defamation action arises. False allegations of a range of kinds have given rise to defamation actions in Scotland, though what counts as defamation has evolved along with society. Examples of defamatory speech include the following false imputations:

- Committed a crime;
- Used violence;
- Impecuniosity (financial mismanagement or embarrassment);
- Hypocrisy;
- Immoral sexual behaviour;
- Improper discharge of professional skills and responsibilities; and
- Dishonesty.

To bring a defamation action, the pursuer must establish the words complained of are capable of having a defamatory reading. This meaning should be a "reasonable, natural or necessary interpretation" of the words published or said.

To understand who may be liable for a defamation action, it is important to understand who is responsible for the publication or utterance. Oftentimes this goes beyond the person who uttered or wrote the statement in question. In broad terms, responsibility extends to anyone with an active role in publishing or sharing the comment. In *Wright v Grieg (1908)*, Lord Kyllachy held that "a person circulating a slander is answerable equally with the author of the slander." The author of a statement, or their publisher or editor are all potentially liable for the publication of a defamatory statement. However, the Defamation Act 1996 makes it clear, for example, that newsagents stocking newspapers containing defamatory statements are not directly liable for defamation – but in the internet age, we believe these restrictions are too limited.

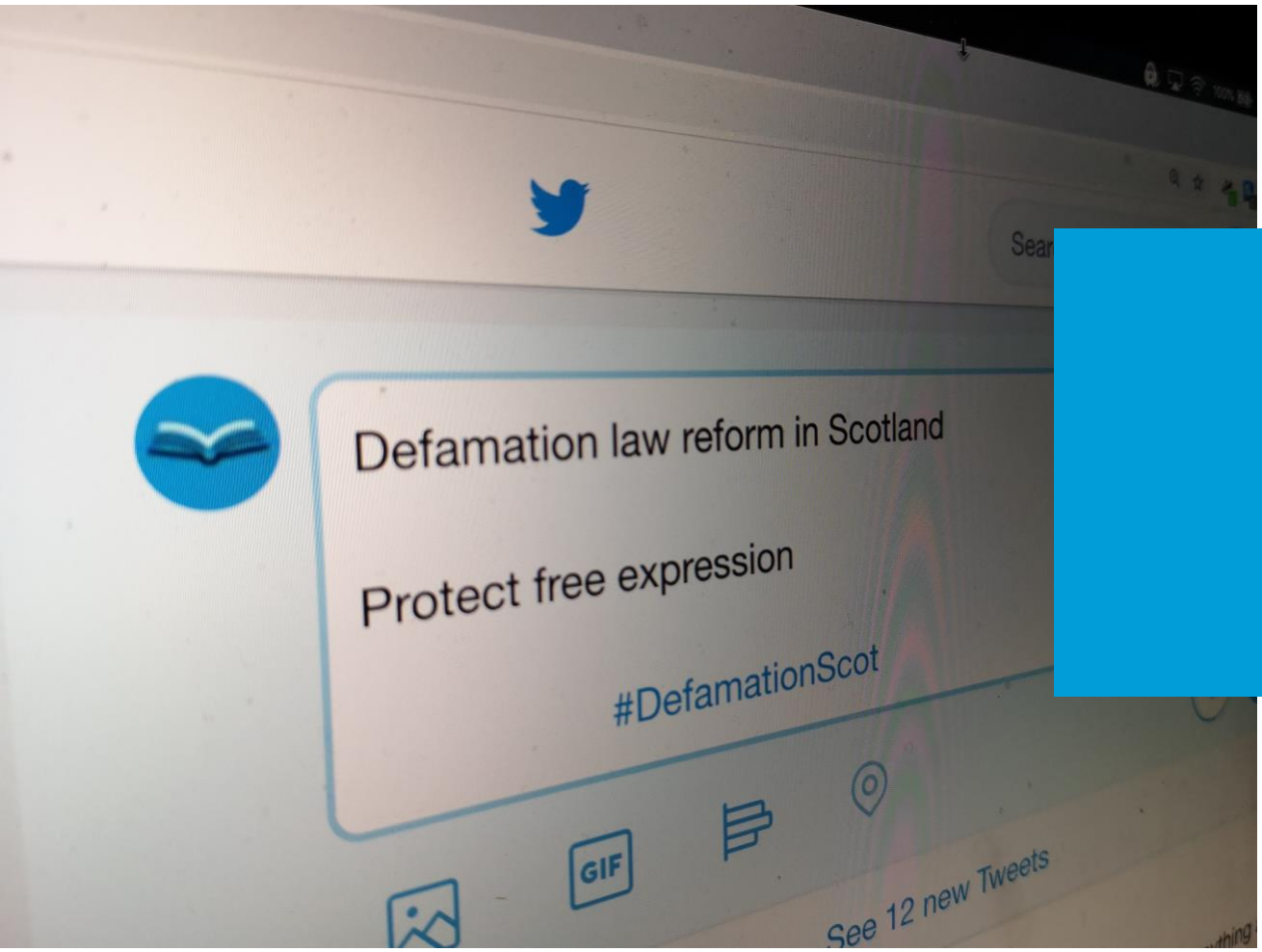
Why does the law need reform?

Defamation law has not kept pace with changes in how we communicate, source information and publish materials to other people -- most notably the advent of online communication platforms. As a result, the law offers few protections for people who use social media and other online means of publishing and communicating.

As well as this, Scots Law has not kept up with important legislative changes in England and Wales. In 2013, England and Wales reformed defamation to include a "serious harm" threshold, a statutory public interest defence, a single publication rule, and a number of other reforms to counter the widespread use of

defamation actions to stifle legitimate criticism. Barring a few technical sections dealing with peer-reviewed scientific journals and qualified privilege, these reforms do not apply in Scotland. As a result, Scots Law is now inadequate and out-of-date.

Experience has shown us that the threats of unreformed defamation law are not felt solely in court. As a result of the low legal bar for threatening a defamation action in Scotland, many writers, journalists and activists choose to leave stories unpublished. Under threat of legal letters, others have taken down, deleted or dramatically edited legitimate content. This process is never subject to public oversight or scrutiny. Reform is now necessary to protect legitimate criticism and to ensure Scots Law accurately reflects how Scots communicate in the modern age.



HOW TO USE THIS CONSULTATION GUIDE

This guide will help you navigate the consultation and offer background information and details to help support you filling in and sending your response to the consultation.

Key Details:

- The consultation closes at: **17:00 on Friday 5th April 2019.**
- The consultation response form can be found here: **https://consult.gov.scot/justice/defamation-in-scots-law**
- Consultation responses can only be received via this form or via post through a form found on the consultation brief found here: **https://www.gov.scot/publications/defamation-scots-law-consultation/**
- You are not required to complete every question and individuals and organisations are able to contribute to the consultation

Alongside offering you basic template responses to the questions outlined in the consultation, this guide outlines key issues and concepts to give you enough information to enable you to respond accordingly.

The answers included in this guide are only basic responses but please feel free to copy, amend and paste content found in this guide to support your submission. This guide is structured around the key consultation questions. Each section will highlight the page number and question number(s) which correspond to the section in the consultation paper. This will help you navigate through the guide and structure your response accordingly.

Each section is structured as follows:

Pages – The page (or range of pages) the section is found in the consultation paper.

Paragraphs – Each paragraph in the consultation paper are numbered and this will highlight which paragraphs in the paper correspond to the sections in this guide.

Question(s) – This will list the questions found in the consultation paper that relate to this section. This will also correspond to the questions asked in the final consultation form.

Recommended Answer(s) – This is the answer recommended by Scottish PEN to bring about reform that prioritises free expression.

Background – This offers detail, context and background information that explains the recommended answers and offers extended description that can aid you adding detail to your answers to the consultation.

Please note: This guide is produced by Scottish PEN. We have been campaigning for years for the reform of defamation law in Scotland. Our guidance in this document will prioritise reforms we believe are necessary to protect free expression and secure the objective of meaningful reform. You are not bound by the content of the guide, or to submit in favour or against any individual reform ideas identified by Scottish PEN.

Key Links

- Scottish Law Commission (SLC) - Defamation Reform Final Report - https://www.scotlawcom.gov.uk/index.php/download_file/view/2001/821/
- Defamation and Malicious Publication (Scotland) Bill (authored by the SLC) - https://www.scotlawcom.gov.uk/files/5715/0123/0435/Defamation_and_Malicious_Publications_Scotland_Bill_-_consultation_draft_-_Bill.pdf
- Defamation and Malicious Publication (Scotland) Bill Business and Regulatory Impact Assessment (BRIA) - https://www.scotlawcom.gov.uk/files/2415/1316/5437/BRIA_-_Report_on_Defamation_Report_No_248.pdf
- Scottish PEN / Libel Reform Campaign 1st Submission to the SLC - https://drive.google.com/file/d/1LL07N7-sMghq3V7QWLxjRxVoAGF2FkP9/view?usp=sharing
- Scottish PEN / Libel Reform Campaign Submission to the SLC and the Defamation and Malicious Publication (Scotland) draft bill - https://drive.google.com/file/d/1y4nyofXIZ29gsMoQodUfhSlaDGZclMJ9/view?usp=sharing

IMPACT ASSESSMENT

Pages: 12

Paragraphs: 30 – 33

Questions: 1. Do you agree with the analysis contained in the Commission's Business and Regulatory Impact Assessment (BRIA)? If not, please explain your reasons for disagreement.

Recommended Answer: 1. Yes, I do agree with the analysis contained in the BRIA. The associated costs connected to reform demonstrates broadly reduced costs for bringing action, both to the parties involved in the case and the broader judicial system. According to the BRIA: "The increased clarity and legal certainty which the implementation of Option 2 [implementation] would bring should, overall, reduce costs, particularly those associated with bringing defamation actions in court." Further to this, the BRIA highlights the Serious Harm Threshold, the 'offer to make amends' mechanism and increased clarity, as reasons why court costs would be reduced by reforming the law in comparison with maintaining the existing law. While there are persuasive reasons to bring forward reform, there are few reasons associated to the cost of implementation and day-to-day utilisation of reformed law to oppose new legislation.

Background: A Business and Regulatory Impact Assessment (BRIA) assesses the practical, logistical and financial impact of bringing forward new or reformed legislation. This includes costs related to implementing any change, but also costs to other public or judicial services such as court costs and required developments to infrastructure or established practices. The BRIA, authored by Lord Pentland of the SLC, outlines two potential options for defamation reform. The first is to refuse to reform the law so the existing laws remain in force and the second is to implement the bill, either as drafted by the SLC or the draft that is arrived at after

the Scottish Government consultation and parliament debates. As outlined in the BRIA, the benefits of implementing reform are:

a) Ensures defamation law is modernised and made fit-for-purpose in the age of social media;
b) Brings key elements of defamation law into one place;
c) Clarifies the key purpose of defamation law – to protect reputation – and will result in the reduction of "vanity cases";
d) Achieves a re-balancing of competing interests–right to privacy v freedom of expression;
e) Makes defamation law apply more easily to cross-border publications;
f) The Bill is broadly supported by stakeholders.

DEFINITION OF DEFAMATION

Page: 17 - 18

Paragraphs: 39 – 47

Question: 2. Do you consider defamation should be defined in statute?

Recommended Answer: 2. Yes. Defamation should be defined in statute as it ensures the law is accessible to everyone, as it will contain all necessary and relevant information. The increased visibility of legal thresholds, definitions and defences will help address confusion and vagueness and limits the need to source information from other sources outwith the legislation. This is in line with the principles of the European Convention of Human Rights that states that restrictions on freedom of expression should be accessible.

Background: Currently Scots Laws depends on a definition of defamation derived by common law, most notably the definition found in *Sim v Stretch (1936)*: "would the words tends to lower the plaintiff in the estimation of right-thinking members of society generally?" The consultation paper highlights a number of compelling reasons for the definition to be found on the face of the act. This includes:

- Ensuring the law is accessible to all. If the act contains all pertinent information, it will enable anyone in need of information or legal protections to receive all necessary information from one place, as opposed to requiring individuals to seek out different rulings or pieces of case law.
- Increased visibility of protections, thresholds and restrictions will enable people to inform themselves of their rights prior to publishing any content.
- While there is no single definition of defamation there is little confusion and the term is widely understood across society so defining it in statute should not foster any more confusion.

While flexibility is necessary to ensure different cases do not fall through the cracks, defining the term in statute goes a significant way towards increasing accessibility without restricting the ability of the courts to interrogate the details of each individual case.

SERIOUS HARM THRESHOLD

Page: 18 - 25

Paragraphs: 48 - 74

Questions:

3. Should a statutory threshold test of serious harm like section 1(1) of the Defamation Act 2013 be introduced?
4. If a statutory test is adopted, should we define what constitutes 'serious harm'?
5. Do you have any suggestions about what should constitute 'serious harm'?
6. Legal persons which have as its primary purpose trading for profit may have a reputation that they wish to protect. Do you agree that such bodies should be able to raise actions in defamation?
7. Damage to the reputation of such legal persons may not take the form of financial loss. If the Scottish Government were to take forward (and the Scottish Parliament agreed to) the Commission's recommendation that such bodies are allowed to continue to raise proceedings in defamation, do you agree that these types of legal persons should face a threshold test of showing that serious harm to their reputation has caused (or is likely to cause) financial loss?
8. If legal persons were allowed to continue to raise proceedings in defamation subject to a threshold test, should this be further limited to allow only microenterprises to continue to raise proceedings?

Recommended Answers:

3. Yes. As the law currently stands, there is no threshold test any party needs to meet to bring an action, short of the statement complained is capable of bearing a defamatory meaning. The lack of a serious harm threshold also enables the mere threat of a defamation action to chill freedom of expression. Without a serious harm threshold, trivial cases or those brought to stifle criticism are actionable in Scottish courts. The problem of trivial cases, where actual reputational harm was unclear and limited, was one of the central reasons for the reform of the law in England & Wales. S. 1(1) of the Defamation Act 2013 incorporated a serious harm threshold: "unless its publication has caused or is likely to cause serious harm to the reputation of the claimant". Prior to reform, the lack of a threshold test was a key enabler of legal threats in the name of 'reputation management'. It was the basis for many of the most bizarre and disturbing defamation cases, such as the case of *Johnny Come Home*, a novel by Jake Arnott that was the subject of a defamation claim because the name of a character in the book was the same as the stage name of someone who had been active in the entertainment industry a quarter of a century prior to publication.

4. No. Due to complexities and unique details of each case, I believe it is up to the courts to define what constitutes serious harm based on the facts and circumstances of specific cases.

5. No. Due to complexities and unique details of each case, I believe it is up to the courts to define what constitutes serious harm based on the facts and circumstances of specific cases.

6. No. In European human rights law, the right to a reputation is derived from the human right to a private and family life. Defamation is considered a violation of the right to a private life because it impacts on "personal identity and psychological integrity." Corporate bodies do not enjoy a private life and have no personal identity or psychological integrity. Because corporations cannot suffer psychological damage, I do not believe that for-profit companies (or any non-natural person) should be able to sue for defamation especially when they can use other measures such as anti-competitive practices legislation and other economic delicts.

A number of high-profile defamation cases in England and Wales have been brought by private companies to attempt to limit criticism of services, products or business practices. This has resulted in defamation cases pitching multinational corporations with millions of pounds to contribute to legal representation against activists or individuals who will not have the same resources to defend their case. This inequity of arms continues to skew the legal landscape in favour of the pursuers, making it hard for others to defend threats of

defamation, further dissuading individuals to attempt to hold corporations to account. This tension was highlighted by the UK Government during the reform of defamation law in England and Wales, stating: "It is unacceptable that corporations are able to silence critical reporting by threatening or starting libel claims, which they know the publisher cannot afford to defend and where there is no realistic prospect of serious financial loss."

7. Yes. Short of outlawing private companies from bringing defamation actions, it is important that in any case brought by a corporation, the pursuer is required to demonstrate *serious financial loss.* This mechanism is deployed in the 2013 reform of defamation law in England and Wales, where s.1 (2) states: "harm to the reputation of a body that trades for profit is not 'serious harm' unless it has caused or is likely to cause the body serious financial loss." It is my position that if private organisations are able to bring defamation actions, they must be required to demonstrate serious financial loss.

8. Yes. As outlined in paragraph 72 of the consultation document, Australian law prohibits the bringing of defamation actions by private organisations with more than ten employees. This would enable "micro enterprises" to protect their reputations, while restricting larger companies. This would go some way towards addressing the inequality of arms issues raised in the previous answer, while offering protections for smaller companies. This is a significant compromise related to my position that companies which trade for profit should not be able to bring defamation actions.

Background: The courts should be the last resort for responding to allegedly defamatory statements, and establishing a serious harm threshold reinforces this principle, while ensuring that hurt feelings or embarrassment are insufficient grounds for legal action. Without a threshold test, pursuers will continue to be able to use defamation law solely to stifle legitimate criticism or limit public discussion. The ability of the public to engage with others, private companies and the state is the bedrock of modern democracy and establishing a serious harm threshold is a significant step towards protecting free expression.

Another important aspect of a serious harm threshold is that it incentivises prompt correction. When a publication, such as a newspaper, promptly publishes a correction, or removes an online version of the statement it can be shown to limit the harm caused by the statement making it more likely that the serious

harm threshold has not been met. This would encourage dialogue between the defender and pursuer and increases the potential for agreement to be made prior to any formal court hearing.

While the inclusion of a serious harm threshold will require the development of pre-trial hearings to establish whether the statement meets the new threshold, it will not interfere with cases where the harm is significant enough to meet the new threshold beyond doubt. As it will not affect these cases, enabling them to proceed at no increased cost, the serious harm threshold will ensure increased scrutiny at the borderline cases where the level of harm is unclear and in need of more in-depth analysis.

Serious Harm and Private Companies

Private companies have oftentimes used defamation law to stifle criticism of their services, products or business practices by customers, users and the general public. While defamation is underpinned by the potential of statements to cause psychological damage, a form of damage that cannot occur for non-natural persons, corporations have been able to use their economic power to bring actions against individuals who do not have access to the same resources. This results in defamation actions that are too costly to defend, enabling private companies to stifle criticism. This economic disparity will not only be felt in court, as individuals may restrict what they say or engage with prior to a proceeding due to the receipt of legal letters or other notices.

There is significant evidence that defamation law has been used across the UK to restrict public scrutiny of corporations and their actions. For many years the discussion of toxic waste dumping in Pontypool, Wales by ReChem International was suppressed because of defamation threats. And when cardiologist Dr Peter Wilmshurst criticised one of NMT Medical's heart implant products, they responded by suing for defamation (it later transpired that two other doctors had been similarly targeted).

The draft bill is split into two sections, the first being defamation and the second is malicious publication. This latter section replaces verbal injury and includes the requirement of malice being present when the statement was shared and the burden of proof being placed on the pursuer. With these higher thresholds – it can be further improved by establishing a serious harm threshold (see answer to question 19) – this is a far more suitable legal remedy for private corporations. It can be further improved by ensuring that companies that trade for profit must be required to demonstrate serious financial loss (again see answer to question 19).

Outwith the draft bill, there are a range of "economic delicts" recognised by Scots Law that can be used by private companies to respond to criticism that requires legal redress. For example, proceedings can be taken

were someone encourages others to break business contracts, as well as the law of confidence, which would cover and give remedies for the publication of private information about business activities. Further to this private companies can also use their own free expression to counter criticism and engage with other stakeholders.

PUBLIC AUTHORITIES

Page: 25 - 26

Paragraphs: 75 - 81

Questions:

9. While the intention to state the Derbyshire principle in statute was widely welcomed, a number of responses questioned the definition of 'public authority' used in the Commission's draft Bill, with some uncertainty about whether a charity or even a doctor could be caught by the definition. Is there anything captured by the definition that is not by the Derbyshire principle?
10. Conversely, is there anything not captured by the definition that is caught by the Derbyshire principle?
11. Should the Derbyshire principle be recast so that private companies delivering public functions are not able to raise an action in defamation?
12. Public authorities are barred from raising proceedings in defamation under the Derbyshire principle, but are able to fund proceedings brought by an individual in their employment. Do you agree that public authorities should continue to be able to meet the expense of defamation proceedings in this situation?

Recommended Answers:

9. Yes. The definition of public authority should be connected to individuals and organisations who discharge public functions.

10. Yes. Existing case law has established the precedent that organisations such as political parties, local authorities, councils, housing authorities and government departments should be classified as public bodies,

and therefore unable to bring defamation actions. S.2(5) of the proposed Defamation and Malicious Publication (Scotland) Bill outlines a process by which Scottish Ministers can specify certain legal persons to be treated as public authorities. This adds flexibility to definition deployed by the Derbyshire Principle, which potentially addresses the concern of this question and question nine. However, to ensure this process is open to public scrutiny and parliamentary processes, we believe that the affirmative Parliamentary procedure, as opposed to the negative procedure as outlined in S. 2(6) would be more appropriate.

11. Yes. Increasingly, public services are being delivered by private companies who have been contracted to deliver different services. The Derbyshire Principle and recommendations made by the SLC place no restrictions on companies who trade for profit, even when delivering a public service, to bring defamation actions. While it is my position that these organisations should not be able to bring actions (see answer to previous section), if they deliver public services, this risks creating a legal landscape where an individual's ability to criticise public service provision is predicated on who delivers the service -- something largely out of their control. In principle, this gives different people different protections when interacting with and criticising public service provision. To ensure everyone is protected, with protection not tied to their location and structure of the public authorities in question, companies that trade for profit should not be able to bring action when delivering public services.

12. No. By enabling public authorities to financially support individuals in their employ to bring defamation actions, the Derbyshire Principle is weakened by the backdoor. If this was to continue, it would be very hard to ensure the restrictions against public authorities is being adhered to consistently. This could further dissuade individuals from speaking out and criticising public service provision.

Background: The Derbyshire principle enshrines the idea that public authorities should not be able to bring defamation actions. The consultation proposes to put this principle on a statutory basis – but we believe the definition which has been advanced by the Law Commission can be improved. We believe that including as much detail as possible on the face of the legislation will increase the accessibility and utility of the law, ensuring everyone is able to source relevant information from one location. Scottish PEN supports the recommendation to place the *Derbyshire Principle* on statutory footing. This is an important step to ensure that people are free to criticise, raise concerns, ask questions and interact with public authorities across Scotland, however forcibly without the threat of costly legal action. Defining a public authority is not without challenges. Existing cases such as *Goldsmith v Bhoyrul* (1998) have established a range of authorities that

would fall within the restriction contained in the Derbyshire Principle including political parties, local authorities, councils and government departments.

However there remains a lack of clarity as to which public authorities are contained in the principle, including for example, universities, publicly funded utilities, housing authorities, charities receiving public funding and a range of other organisations, who relationship with public bodies or funding may mean they should fall within the remit of the Derbyshire Principle. The bill should make clear that criticism of how public functions are discharged by individuals or organisations should not be actionable. However, it is important to reiterate where a defamatory statement singles out an individual (and that individual is recognisable by anyone reading the statement) for criticism, they may be able to bring individual actions without invalidating the Derbyshire Principle. This existing protection should offer support for individuals who carry out public functions. Being able to differentiate between personal and public functions (even within an individual, such as a doctor or MSP) is a process courts are already able to manoeuvre through.

The Derbyshire Principle should stop public authorities from bringing defamation actions. However, as seen across the UK, public authorities have been able to participate in ongoing actions by funding actions brought by individuals. South Tyneside council and Carmarthenshire county council have both spent tax-payer money on defamation cases related to employees of the councils. While we believe it is appropriate that individuals who are identifiable in a defamatory statement are able to bring action, public authorities being able to fund these actions significantly undermines the Derbyshire Principle and again establishes an inequality of arms between parties involved in an action.

UNJUSTIFIED THREATS

Page: 27 - 28

Paragraphs: 82 - 93

Questions:

13. Do you agree that a new action of unjustified threats is necessary over and above the recommendations made by the Commission in their Report?

Recommended Answers:

13. Yes. The inclusion of a mechanism to dissuade the sending of unjustified threats of defamation actions is a significant protection against empty threats of litigation brought solely to stifle debate and silence public debate. Ensuring pursuers are aware of the possibility of counter suits being brought if their threats of actions are unjustified will establish a significant threshold against vexatious claims, while also establishing a process that encourages meaningful discussion between parties and threats of action based on justified and proportionate engagement with the process.

This will not restrict communications sent to parties requesting clarifications or reasonable modifications on published statements but will focus on communications that contain implicit or explicit threats against parties that are deemed to be unjustified. This process can take place during ongoing court proceedings and prior to this through the sending and receiving of legal letters, a process that is oftentimes devoid of public scrutiny and awareness while exerting a significant pressure on free expression in Scotland.

Background: This mechanism is based on the Intellectual Property (Unjustified Threats) Act 2017, which states that anyone who communicates an unjustifiable threat of infringement proceedings in these areas of IP law exposes themselves to an action for unjustified threats by the person or organisation they threaten. In the context of defamation actions, the cause of action would arise as soon as an unjustified threat of legal action is communicated. In practice, this could be the receipt of a legal letter or correspondence communicating an unjustified threat prior to any court action, or as a counter-claim by the defender in the course of defamation proceedings. With appropriate safeguards for legitimate communication and for professional advisors, similar provisions could be introduced to the law of defamation to further discourage the aggressive but baseless use of threats of litigation to silence legitimate criticism and forms of free expression.

SECONDARY PUBLISHERS

Page: 30 - 32

Paragraphs: 95 - 110

Questions:

14. Do you agree that the definitions of author, editor and publisher in section 3 of the draft Bill contained in the Commission's Report will remove liability for secondary publishers?
15. Do you agree that the regulations made by Scottish Ministers under these sections and which will be subject to consultation and parliamentary approval achieve the correct balance between scrutiny and the use of legislative resources?

Recommended Answers:

14. No. The definitions used in the draft bill are an improvement to the vague definitions used in previous laws and establishes a framework to protect secondary publishers and online users who may share, retweet or copy content. However, the draft Bill's definition of "editor" is too ambiguous and open to a more expansive interpretation that could threaten secondary publishers. The draft bill defines an "editor" as "a person with editorial or equivalent responsibility for the content of the statement or the decision to publish it." While the definition of "publisher" is narrow enough to protect secondary publishers, there is a substantial danger that pursuers will argue that individual social media users are effectively the "editors" of the content they choose to publish on online platforms, and consequently, remain liable in defamation proceedings.

15. No. The use of the affirmative procedure will enable consultation and parliamentary approval, establishing a level of public scrutiny and transparency that will ensure liability cannot be brought on different individuals without process. As highlighted in previous responses, accessibility and clarity are vital to ensure people can be informed of their rights, protections and defences. To address this, the bill could require

modifications to who may be defined as an author, editor and publisher to be made via primary legislation. This would maintain public scrutiny and transparency, while also ensuring all changes are reflected on the face of the bill.

Background: The widespread use of digital platforms such as social media by members of the public to source information, communicate and publish material is a central reason for reforming defamation law in Scotland. As social media is built on the ability to share or copy content produced by other users, or to signal a user's approval of this content (such as liking a message), how these secondary publishers are protected or held liable for content shared by the original user is an important step towards modernising defamation law. This section of the consultation paper focuses on the liability of and availability of defences for people who may share content produced by others, not those who originally created or published the material.

The definitions of "author", "editor" and "publisher" need to reflect the responsibilities of different people, especially online where the definitions may need to reflect amended or slightly different responsibilities. Both definitions of "author" and "publisher" are narrowly drawn and function effectively online, as well as off. However, the definition of "editor" is far broader: "'editor' means a person with editorial or equivalent responsibility for the content of the statement or the decision to publish it." Online, this definition may weaken protections for secondary publishers as the decision to publish is vague enough to potentially incorporate the decision of a secondary publisher to share or repost content.

Manually linking to online content, or deciding to retweet content published by other social media accounts, is not an automated process, analogous to Google's algorithm-led archiving of online "publications", or a constantly updating RSS feed, which communicates new content on an ongoing basis without human interference or an individual "decision to publish," in the language of the draft of the Bill.

HONEST OPINION

Page: 34 - 35

Paragraphs: 112 - 120

Questions:

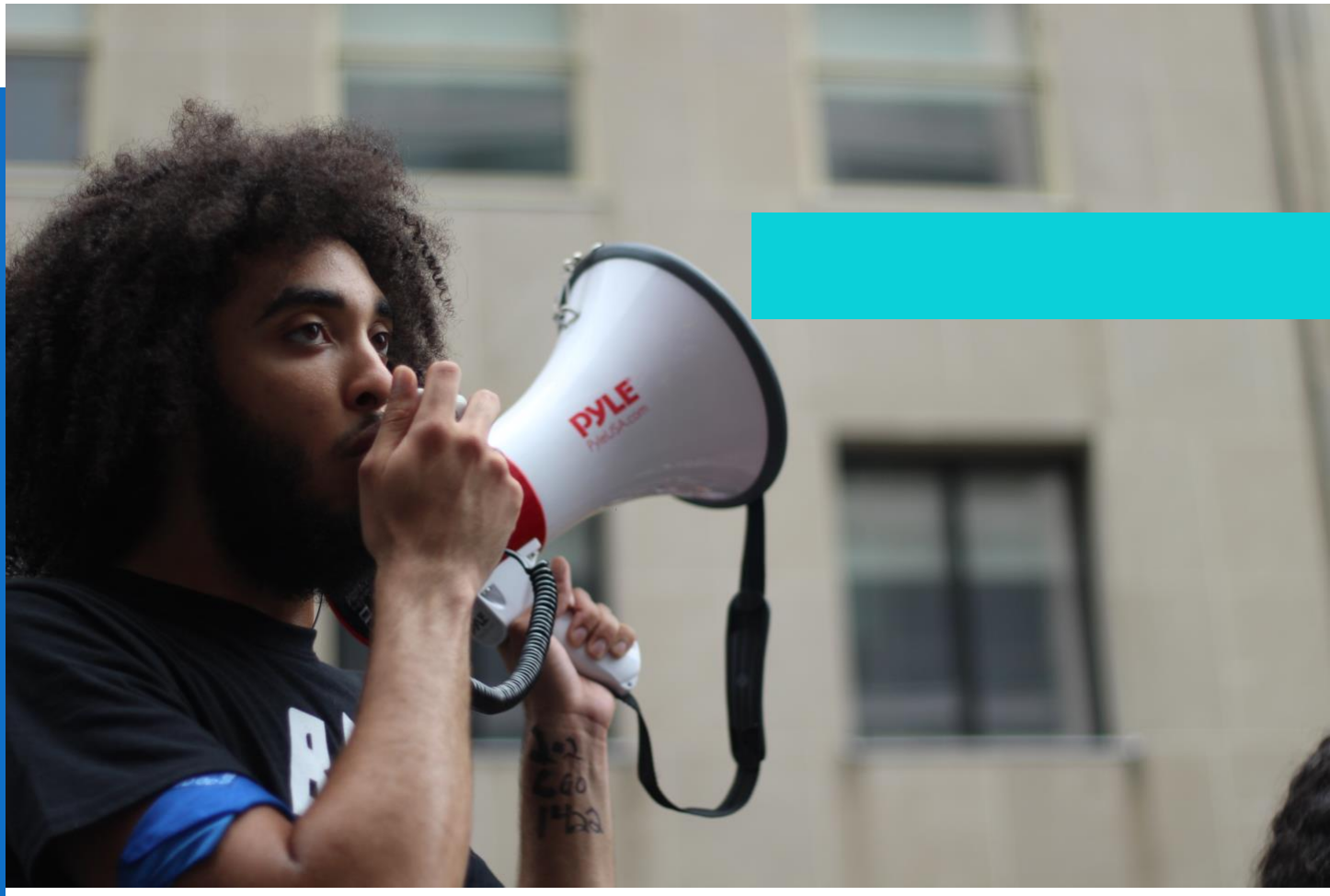
16. Should the defence of honest opinion make allowance for instances where rhetorical devices are used to express an opinion conveyed by the statement that the defender does not genuinely hold? If so, can you provide instances where such a device may have been considered defamatory?
17. Do you agree that the second condition of the recast defence of honest opinion should be capable of taking into account situations where the relevant facts are likely to be known to readers?

Recommended Answers:

16. Yes. Rhetorical devices - such as satire, impersonation or parody - are commonly used by individuals when communicating online and off. While these devices may mask the appearance of an honesty held opinion, they should not obscure it. We believe the courts are best placed to examine whether the honest opinion defence is satisfied on the evidence, based on the facts and circumstances of each case.

17. Yes. While outlining the facts upon which the stated opinion is based is good practice and a clearer way to ensure that this defence is available to the defender, it should not be a pre-requisite for the defence to apply. When individuals are commenting on widely known facts or other events such as news stories, the defender should be entitled to a wider margin of error in relation to how the opinion relates to the underlying facts upon which it is based. The extent to which the facts are likely to be known to readers will be different to each and every case and can be explored during the proceedings.

Background: The honest opinion defence replaces the fair comment defence found in existing defamation law in Scotland. This defence can be used when the statement complained of is based on opinion as opposed to a statement of fact. As outlined in the consultation paper: "comments (which include opinion) can be recognised by readers as a point of view, and as such they can either be agreed or disagreed with. A statement of fact, however, cannot be treated in a similar manner." This defence protects people stating their opinion or point of view even when they use forceful or hyperbolic language. According to the draft bill, to be able to use this defence the defender must show that the statement indicated the facts upon which the opinion was based, the facts existed at the time the statement was published and that an honest person could have held the opinion conveyed by the statement. The defence fails if the pursuer shows that the defender did not genuinely hold the opinion conveyed by the statement.



OFFER TO MAKE AMENDS

Page: 37 - 38

Paragraphs: 122 - 128

Questions:

18. Should it be made clear that an offer of amends is made without admitting that a threshold test has been met?

Recommended Answers:

18. No. If an offer of amends can be made without meeting the serious harm threshold this will establish two different levels by which a defamatory statement can be seen to be actionable, either as part of court proceedings or the process by which an offer to make amends can be made or agreed. While any process that avoids costly court proceedings is to be supported, it cannot be done so in a manner which arguably establishes a lower threshold for defamation. We believe a serious harm threshold is important to avoid defamation law being used to stifle legitimate criticism. An offer to make amends should only deployed when a statement is actionable, as opposed to something that doesn't meet the same threshold as should be present in court.

Background: An offer to make an amends is an offer made by a person who has published an allegedly defamatory statement to make amends to the person targeted by the statement. The offer can include making a suitable correction to the general statement or specific words which may bear the defamatory meaning, making and/or publishing an apology, paying compensation or expenses and a range of other

actions arrived at through discussion between the relevant parties. As outlined in the draft bill, the offer to make amends has to be made before the defender lodges defences to any defamation proceedings brought by the pursuer.

VERBAL INJURY

Page: 39 - 40

Paragraphs: 130 - 140

Questions:

19. Should the test of whether a statement complained of is a malicious publication be strengthened, and if so, how?

Recommended Answers:

19. Yes. While malicious publication is materially different to that of defamation, the test can be strengthened by utilising a similarly substantial threshold to that of defamation, meaning a serious harm threshold. While the inclusion of malice and the burden of proof being placed on the pursuer makes malicious publication less prone to abuse, standardising the harm threshold across the bill will avoid potential confusion over different thresholds and further protect free expression. A key example of this is S23 of the draft bill, which states that the pursuer "does not need to show financial loss if the statement complained of is more likely than not to cause such loss". As highlighted in S1(2) of the draft bill and the answers to the previous questions, the requirement to show serious financial loss in an important principle to ensure that the law is not abused by companies trading for profit trying to stifle legitimate criticism.

Background: Verbal injury is an aspect of established Scots Law, but the draft bill reframes this as malicious publication. As outlined in the consultation paper "verbal injury is a common law civil wrong that covers statements which are likely to be damaging, but the pursuer does not enjoy the presumption of falsity and must establish malice on the part of the defender. In other words, the onus of proof is now on the person bringing the action to prove what is ordinarily assumed in an action of defamation." To fall within the jurisdiction of this part of the draft bill, the statement complained of must seek to cause harm to business interests, doubt as to title to property or must criticise assets. Further to this the statement must be seen to be false and malicious. What differentiates it from defamation is that the burden of proof rests on the pursuer to prove both the falsity of the statement and the malice by which it was shared.

LIMITATION AND THE MULTIPLE PUBLICATION RULE

Page: 42 - 45

Paragraphs: 142 - 159

Questions:

20. Do you agree that the single publication rule is tied to the date of accrual as the date of first publication?
21. Given the previous recommendation of the Law Commission of England and Wales that 1 year is insufficient time in which to prepare litigation, and given the impact that a shorter period may have on parties' ability to utilise alternative means of resolution, should the current limitation period be retained?
22. If the limitation period is shortened to 1 year, do you agree that the period of limitation should be capable of being extended to reflect the period of time parties engage in alternative methods of dispute resolution?

Recommended Answers:

20. Yes. The limitation period should start from the date of first publication, not the date when the publication first comes to the notice of the person bringing the defamation action. While the date of publication can be independently verified, the date the person bringing the action becomes aware of the statement is subjective and difficult to prove. It also has potential for abuse. If there is no limit to the period of time between the date of publication and date of awareness, this period of time can far exceed both one year or even three years as outlined in existing law. If a statement causes substantial damage to a pursuer's reputation, it is difficult to see how this could happen without the pursuer's prompt knowledge of its publication.

21. No. This is an aspect of Scots Law that would benefit from harmonisation with the law in England and Wales, irrespective of the recommendations of the Law Commission. A one-year limitation period gives ample opportunities for the pursuer to experience harm from the allegedly defamatory statement, and to take steps to remedy that in court. As outlined in the previous answer, if a substantial period of time has elapsed between the moment the pursuer was aware of the statement and the moment they bring a defamatory action, questions must be asked as to the level of harm caused by the statement. If a pursuer believes a statement to be defamatory, they should take steps to address the perceived harm caused immediately. This reflects the severity of the situation and a one-year limitation period adequately allows this to take place, while prompting timely engagement with the process.

22. Yes. While I believe that the limitation period should be reduced to one year, a degree of flexibility, at the discretion of the courts, may be justified in the interests of justice. These methods should be encouraged as a way to avoid costly and time intensive court proceedings and the limitation period can accommodate this while also ensuring proceedings are brought in a timely fashion that reflects the severity of the harm caused by the statement.

Background: The limitation period is the time within which a defamation action can be brought. In Scotland it is currently three years from the point the pursuer is aware of the statement – not the date the statement is published. Currently in Scots Law, this limitation period will restart when the statement in question is republished. This is called the *multiple publication rule* and can enable liability for the statement to continue beyond the original limitation period even if the statement is shared by a third party. In the digital age, the multiple publication rule is made problematic by the ease with which third parties can share content i.e. retweeting, liking or copying hyperlinks without editing, modifying or changing the statement or material in question. Without reforming the law these actions could enable liability to continue indefinitely on the thinnest of pretences, such as the viewing of a hyperlink or a sharing of a social media post.

The draft bill recommends moving towards a *single publication rule* that ensures that the limitation period does not restart whenever the statement is republished except when the republication is materially different from the first, in terms of the level of prominence that the statement is given, the extent of the subsequent publication and other matter that the court considers relevant. This change is a significant protection for

those who use social media to share information, retweet or repost existing content or favourite different posts published by other users.

Thank you for taking the time to complete the consultation to reform defamation law in Scotland. It is vital that the Scottish Government hear from a range of people about the importance of updating our laws to protect everyone is Scotland who expresses themselves.

Once you have submitted your response, please encourage as many people as possible to follow suit. Whether this is your family, friends, colleagues, writing group or football team, every extra voice is an extra voice that is harder to ignore. We deserve better laws ensuring we are free to express ourselves and by getting more people to engage with this consultation, we will be a step closer to reform.

If you have any questions please do not hesitate to contact Scottish PEN, via Nik Williams, the Project Manager on info@scottishpen.org