Scottish Defamation Law Reform
What does it mean for writers, editors and publishers?
Introduction

In March 2021, the Scottish Parliament voted to make important changes to defamation law in Scotland. The Bill which passed, titled the ‘Defamation and Malicious Publications (Scotland) Bill’, represented the first major reform to the law in Scotland for over 20 years. The Bill became law on 21st April 2021.

Scottish PEN had been campaigning for the law to change for many years. We knew that the law was out of date, didn’t reflect the ways we share and publish information online, and offered too few protections for free expression.

We also knew that writers, editors, bloggers and publishers did not understand defamation law, or what it meant for them. Although many people told us they had experience of receiving legal threats, many reported a culture of uncertainty and possible self-censorship in public discourse. You can find out more about our work to understand the views of writers by reading our report:

Impact of defamation law in Scotland

What is defamation?

Defamation is a wrongful act where someone shares false information about a person that badly affects the reputation of the person targeted.
An example might include publishing a news story wrongly stating that a business owner has committed crimes. If the business owner can demonstrate how their reputation has been tarnished by the story, for example by citing a drop in business immediately after publication, they may be able to pursue defamation action against the person who wrote and published the article. This could include seeking compensation, asking for the story to be removed, or in some cases, seeking prosecution.

Why was reform to the law needed?

- The law was difficult to understand and information was hard to find
- The law did not protect those sharing content online, or reflect the way information is easily republished in social media settings
- There was no agreed minimum threshold or definition of what ‘serious harm’ to a reputation looked like, meaning that those with money and resources could pursue vanity cases to shut down fair criticism
- There was no rule stating that public bodies could not bring defamation action against members of the public
- The law allowed a three year period for claimants to bring defamation action to court, meaning writers faced years of uncertainty and worry
What are some of the important changes to have been made?

A new **one-year limitation period** on bringing defamation action has been set, which means writers are no longer subject to a 3 year period of worry, uncertainty and financial loss.

A **‘serious harm test’** will set a new threshold for prosecutable action, meaning writers will be protected from vanity cases.

**Secondary publishers** will be excluded from defamation action, meaning that people who share content which they did not write or first publish cannot not be held accountable.

**Public bodies** will no longer be able to bring defamation action, ensuring that local authorities and other publicly funded organisations can be held accountable to the public.

**Online notices** can now be used to alert the public to legal action, avoiding unnecessary ‘takedown measures’ and ensuring judgements are not made about the content of writers’ work prior to legal judgement.

Defamation law now has an **agreed statutory definition and defences**, which will make it easier for everyone to understand the law and how it can be used.
What does this mean?

Here is what organisations involved in campaigning for change had to say about what the law change would mean for writers, editors, publishers and social media users in Scotland:

‘Reform of defamation law in Scotland was long overdue. Unwarranted threats of defamation have a significant and detrimental effect on the work of journalists, encouraging those with thin skin and thick wallets the right to suppress fair criticism and to stifle honest reporting of wrongdoing. The threshold of ‘serious harm’, a one-year limitation period to seek redress, and the introduction of a statutory public interest defence will also strengthen journalism in Scotland.’

John Toner, National Organiser for Scotland, National Union of Journalists.

With the proliferation of social media platforms showing no signs of abating, the law had been criticised for failing to keep up with the evolving nature of what it is to publish. These reforms address the impact of internet communication on defamation while preserving the balance between the right of freedom of expression – and insult – and the protection of reputation.

Julie Hamilton, Law Society of Scotland
‘There was no doubt that the Defamation Act needed an update. As a digital rights organisation, we scrutinised the draft reform for unintended consequences which could further constrain freedom of expression online. We found that one of the Bill’s provisions, Section 30, could have been used to chill free speech, as it would have given the Courts the powers to order the operator of a site to take down a passage of contested text before a legal judgement on the defamatory nature of the content. In other words, it forced site operators to act as judge and jury over potentially defamatory content. In response, we worked with the Scottish Parliament to create a different power for the courts: a prominent notice regime.

This gives the court a power to order the website operator to state, in a prominent location on the website, that the statement is subject to defamation proceedings, but not to order its takedown altogether...This very simple alteration ensures that it becomes substantially harder for defamation law to be abused as a means of chilling free speech’.

Heather Burns, Open Rights Group Scotland

‘The value of the serious harm test in defusing vexatious claims is already clear, but social media is ensuring there is no shortage of people willing to try. As a serving councillor, the incorporation of the Derbyshire Principle to prevent local authorities from suing is also a valuable addition to the armoury of journalists seeking to hold them to account’.

John McLellan, Director, Scottish Newspaper Society
Learn more

Below is a list of useful links to resources which will provide further detail about what the changes to defamation law mean for writers, editors, publishers and social media users in Scotland.

**Scottish Parliament website**

- Find out more about the Defamation and Malicious Publication (Scotland) Act 2021
- Watch the final parliamentary debate and vote on the Defamation and Malicious Publication (Scotland) Bill

**Scottish PEN website**

- Watch our short video about the law changes
- Read our blog regarding the passage of the Defamation and Malicious Publication (Scotland) Bill
- View our campaign materials
- Watch our contribution to the Justice Committee evidence sessions

**Read organisational responses**

- The Law Society of Scotland
- Scottish Newspaper Society
- Open Rights Group Scotland
- National Union of Journalists
- BBC Scotland
- PEN International