RESPONSE

by

FACULTY OF ADVOCATES

to

SCOTTISH LAW COMMISSION

on

DEFAMATION AND MALICIOUS PUBLICATIONS (SCOTLAND) BILL

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1. In June 2016, the Faculty submitted a response to the Commission's Discussion Paper on Defamation. A draft Bill has now been produced, the Defamation and Malicious Publications (Scotland) Bill. Most of the matters raised in the Bill are matters covered by the Discussion Paper. They are therefore matters upon which the Faculty has already provided its view. It is not considered helpful to repeat points made in the original response.
2. Instead, this response will:
   i. Respond to the points raised in the Covering Note issued with the Bill;
   ii. Respond to certain general points, raised by the Commission in granting an extension of the time limit for this response; and
   iii. Make some initial comments on the draft Bill. We highlight areas where, having reviewed the draft Bill, the Faculty revises its position from its previous response. We also identify areas of concern or where further clarification will be required.

Matters Raised in Covering Note

Issue 1 – Treatment of Secondary Publishers

3. Given that the Bill is intended to create a comprehensive legislative scheme, we consider this is an issue that should be included. Failure to do so risks leaving a significant gap in the proposed legislation. The treatment of secondary publishers is an important issue. On-line communication, often on hosted websites, is an increasingly common aspect of defamation litigation. That is a trend that is likely to accelerate.
4. We note that the Commission takes the view that any such review would be more appropriate on a UK wide basis. However, we are unaware that there is any such exercise pending. The effect of delay, therefore, might be that a Bill designed to provide a comprehensive statement of the law in this area will not do so based only on a *potential* future UK review. We have a concern over such an approach. The Scottish Courts can, and do, require to address these issues on an ongoing basis.
5. We note further that despite the stated intention to leave this matter to a future UK review, the Bill thereafter proposes, in s.3, what seems to be an interim solution. It is not clear why a partial intervention in this area is considered appropriate when dealing with the matter more fully is considered inappropriate?
6. Turning to the terms of the section in the Bill, the explanatory notes accompanying the Bill are largely silent on the policy considerations which inform the content of these provisions. For example, the definitions contained in s.3(3)(a) to (g) would benefit from further discussion and illustration – particularly standing the breadth of the catch-all provision at s.3(4). In the event that such a broad power for Ministers to make substantive change to the law by regulation is to be included, we would welcome an approach which sets out in clear terms the necessity for that provision.
7. In addition, in our view many of the provisions of s.3 as drafted create difficulty in interpretation of which persons or activities are covered.

Issue 2 – Proceedings in Defamation by Public Authorities

8. The Faculty shares the view that encapsulating the principle in *Derbyshire County Council v Times Newspapers Limited* is sensible. That principle, as we read it, is that a governmental body or an organ of government cannot sue for defamation. The

Commission's intention in proposing the provision, as expressed at paragraph 9 of the Covering Note, accords with that view.

9. However, s.2 appears to create a much wider exclusion. The definition in s.2 includes "*…a person…if the person's functions include functions of a public nature*." The exclusions from that definition relate to non-natural persons. That, it seems to us, arguably leads to a complete exclusion for natural persons, if they perform "functions of a public nature".
10. We foresee difficulty in that regard. Take, for example, an MSP who wishes to raise proceedings in defamation. Are they excluded and, if so, to what extent? What about an employee of such an MSP? Is a doctor, whose role extends to assisting in the running of a health board, precluded from bringing proceedings? This definition goes beyond the principle in *Derbyshire* and beyond the Commission's stated intention. In our opinion, thought should be given to defining public authorities more tightly.

Issue 3 – Defamation of the Deceased

11. The Faculty agrees with the Commission's approach on this issue without further comment.

Issue 4 – Verbal Injury: re-branding

12. In our initial response, paragraphs 52 and 53, we expressed support for an attempt to avoid confusion in this area. We remain of that view. The Faculty supports the clarity given in the Bill in relation to business concerns in Part 2 .
13. In relation to the provisions as they impact on natural persons, our residual concern is that the provisions go beyond what is described in the covering letter from the Commission as "re-branding". Section 26 of the Bill abolishes the common law of verbal injuries. As we indicated in our original response, a few of us have experience of actions of malicious falsehood on behalf of natural pursuers, either as a stand-alone ground of action or as an adjunct to an action for defamation. With the introduction of the "serious harm" test, proposed in the Bill, this small category of case could in fact become more relevant. The Bill would however have the effect of removing that ground of action. The result would appear to be the removal of an

existing legal remedy for individuals, albeit in a small category of cases. A clear explanation of the basis for that approach would be helpful.

Matters Raised in Correspondence

Issue 5 - potential benefits and cost savings that the Bill may bring about if enacted (e.g. making Scotland a stronger forum for litigation, saving of court time, reduction of legal costs as a result of defamation law that is clearer and more certain?)

14. The approach taken by the Faculty in the original response was a caution against following the line of reform in England too closely. As we observed, defamation litigation in Scotland lags well behind its equivalent in England and Wales. We expressed the concern that, by following the English model of reform too closely, an already under-developed area of Scots Law might retract further still (see particularly, the Faculty's previous response to questions 2 and 4 in the Discussion paper.)
15. With this in mind, our view remains that some of the proposed reforms have gone further than we wished to see. Most notably, the motivation for the introduction of a "serious harm" test (s.1(2)(b)) is unclear. That test was designed to deal with the specific issue, in England and Wales, of excessive litigation. As noted, Scotland has the opposite problem.
16. The effect of following the English reforms so closely, is that we do not think that Scotland will be a stronger forum for litigation. In fact, we think an opportunity to achieve that result is, at least potentially, being missed. Given our comments on the low level of defamation cases, we do not think a saving in court time is an applicable motivation.
17. However, particularly having had sight of the draft Bill, the Faculty does welcome a comprehensive codification in this area. When litigation numbers are low in Scotland, but high in England, it can make for uncertainty regarding which decisions of the English courts will be followed in this jurisdiction. Codification assists in limiting that uncertainty.

Issue 6 - Business and Regulatory Impact Assessment (BRIA) and so we'd value any thoughts from the Faculty on the sorts of issues described above and also, for example, any information they might be able to give us as to the volume of defamation cases in Scotland and the number of advocates who specialise in defamation cases.

18. The volume of cases, in our experience, remains low; perhaps concerningly so. In our experience, most defamation cases end up at some stage with Counsel. Despite that, no member of Faculty can sustain a practice in this area alone. This is in stark contrast to London, where entire sets of chambers specialise in the area. Perhaps of more direct parallel, we also note the success of Dublin in establishing the Irish Courts as a centre of litigation. The obvious question arises as to whether there is scope for Scotland to increase this area of work to the benefit of both the law and the economy. We believe that potential exists.
19. In terms of those who, in Scotland, "specialise" in the area, there are perhaps two or three counsel (including one QC) who are instructed in a majority of cases. Beyond that, there are a pool of around 5-10 other advocates who are instructed in cases on a semi-regular basis. This, combined with our experience of low case-numbers, leads to the law in the area developing slowly and often having to rely on importation from South of the border.

The Draft Bill

General

20. The Faculty will make a more detailed written submission on the Bill as part of any future legislative process. That said, it may be of use for the Commission to be aware at this stage of a number of concerns arising from an initial review of the Bill documents provided.
21. In general, we would consider it helpful to have much greater explanation of the policy considerations underpinning the specific proposals made. The original consultation document set out a range of competing considerations in each area and it would be of assistance in understanding the approach being taken to have as full an understanding as possible of the rationale for the final proposals now made.

22. Further, we note that some of the core provisions of the Bill (sections 5,6 & 7) appear to have been largely borrowed from the Defamation Act 2013 (sections 2,3 &4). That said, they appear to be presented in the draft Bill with material differences (see for example section 3(4) of the 2013 Act when compared with section 7(4) and 7(8) (c) of the draft Bill). We consider that it would be very helpful if the policy considerations underpinning the modifications from the 2013 Act could be explained. It may be, for example, that they represent an attempt to avoid difficulties experienced after the introduction of the 2013 Act. If so, they may be welcome and justified. But absent any explanation, we are restricted in the degree to which we can comment on such differences and whether they will strengthen or weaken the final legislation.

Specific sections of the Bill

23. We note the wide discretion given to Scottish Ministers throughout the Bill, notably in Section 4. Section 4 allows Scottish Ministers to make substantive changes to the law by Regulation. We would again note that the Explanatory Notes do not offer much by way of explanation or policy justification beyond, presumably, a desire to give flexibility. That aspect may be a matter more for the relevant Parliamentary Committee addressing a future Bill than for us.
24. We note the introduction at Sections 14 & 28 of current English procedure in terms of making a statement in open court. We are in principle relaxed about such an innovation, albeit thought would have to be given to how, in practice, such measures would be implemented in a Scottish Court.
25. Section 27(3) appears to be a significant and broad power for the Court to instruct parties, including the media, not just what to print but the time, manner, form and place of publication. The Courts have been traditionally very slow to enter into such a role and we have reservations about this Bill forcing them to do so. Further, it is unclear how that provision would operate in practice where the party subject to the order is an individual? Again, greater explanation of the policy considerations and an assessment of where such measures are currently operating successfully would be of great assistance in considering the merits of this proposal.

26. Section 29 relates to an “operator”. That term is not defined within the Bill, and might usefully be so.
27. Section 30 (2) restricts the period for raising proceedings to 1 year from 3 years. We would appreciate in the explanatory note an understanding of the policy considerations underpinning this approach. Chapter 10 of the original consultation document set out a number of the strong reasons for proceeding with caution.
28. Section 30 (3) – whilst we understand the point made in the explanatory notes as to the risk of a perpetual liability, we have some concern around the definition (despite it also being in the 2013 Act) of the term “a section of the public”. We note that term is also used in Section 8 of the 2013 Act. As we understand the proposal, publication to a “section of the public” would trigger the 1 year period with the consequent risk that a defamed party would not become aware of the defamation and might fail to raise proceedings within 1 year. Maintaining the current 3 year period, but introducing the provisions on avoiding perpetual liability might provide a better balanced approach.

Other comments arising from sight of draft Bill

29. In our previous response we advised that we saw no need to include the defence of truth in codification. Our view was that the defence was well-understood and would not benefit from codification. Having had sight of the draft Bill, we would revise our view. Sections 5-8 of the Bill provide the defences to an action for defamation. That being the case, it would be odd for truth not to appear.