



Open Rights Group response to Defamation and Malicious Publications (Scotland) Bill call for views

Open Rights Group are a grass-roots campaigning organisation focusing on supporting the right to freedom of expression, and the right to privacy online. the Open Rights Group are grateful for the opportunity to provide comments to the Defamation and Malicious Publications (Scotland) Bill for consideration by the Justice Committee.

The reform in Scotland provides an opportunity to ensure:

- That Freedom of Expression is respected;
- That individuals can remove defamatory material, and challenge the removal of that material, through due process.

To achieve this we must:

- Restrict the liability of internet intermediaries to prevent immediate and pre-emptive takedowns.
- Maintain fairness for disputed material, where the defamatory nature is yet to be determined.
- Limit the time for which a statement can be claimed to be defamatory.

Do you think the Bill strikes the right balance between freedom of expression and the protection of individual reputation?

The Bill is a significant improvement to the current state of affairs in Scotland. The last reform in Scotland of defamation laws was in 1996, the nature of communication has changed dramatically since then due to modern communications. It is now time for the laws in Scotland to meet these changes and engage with the question of how best to balance freedom of expression. This reform begins that process.

Do you have views on the Bills provisions covering a single publication rule and secondary publishers?

Open Rights Group are happy with the proposed changes to a single publication rule and protecting secondary publishers.

Single publication rule

Modern communication has made information and content always available and easily discoverable. While previously, back issues of newspapers were rarely collected and circulated articles are permanently available in multiple places at any one time. This makes a single publication rule necessary to prevent perpetual liability for a potential defamatory statement.

Currently, the rule in Scotland is that an action must be brought within three years from the point the pursuer is aware of the statement and will restart when the statement in question is republished. These rules sit in stark contrast to the nature of accessing content and communications on-line.

Without a single publication rule that begins when the information is made public (rather than accessed) combined with a narrowed limitation period such as one year, there is a risk that you create perpetual liability for an author, editor, or publisher. Especially if republishing the information could constitute a retweet or mirroring the content on another site. This situation is not at risk in Scotland because of setting a single publication rule with an increased test for "republishing".

Secondary publishers

ORG's focus on the restriction of actions against secondary publishers is for on-line publishers. The proposals at 3(4)(c), (d) (f) all correspond to the important limitations set out in the E-Commerce Directive¹ from the European Union. Protecting secondary publishers who are merely storing or transmitting the information retains the smooth functioning of cross-border services and would help to prevent any distortion of competition, while also protecting

1 E-Commerce Directive, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN>.

freedom of expression by avoiding creating a greater sense of caution within these platforms which could lead to platforms censoring content, or monitoring the upload of content which would be in breach of the prohibition against general monitoring at Article 15 in the E-Commerce Directive².

Open Rights Group are signatories to the Manila Principles on Intermediary Liability³. These principles are backed by civil society organisations around the world that set out proportionate limits to intermediary liability for third party content. The principles state "Intermediaries should be shielded by law from liability for third-party content". These reforms achieve that.

What are your views on the proposed reduction of the limitation period for actions from three years to one year, and the other provisions covering limitation periods?

Reducing the limitation period for actions is an appropriate response to the permanence of internet communications. Further, the clarification of jurisdictional relevance is useful.

Limitation period

Reducing the limitation period from three years to one year, combined with a single publication rule, is welcome by Open Rights Group. The rate, ease and prominence of on-line communications all contribute to a faster moving society in terms of when content could be read and opinions formed, reducing the period to one year is a reasonable response to this change. Further, the time bar commences when the statement is published and ORG welcomes this. It sets an objective point at which it is hoped all parties can agree when the limitation period began, as opposed to when the pursuer was made aware which is a much more subjective exploration.

Currently, the rule in Scotland is that an action must be brought within three years from the point the pursuer is aware of the statement and will restart when the statement in question is republished. This current rule needs reform and the proposed reforms are satisfactory.

Jurisdiction

Previously, the rules for when actions for defamation in England and Wales could be brought were too permissive. They were so permissive that they allowed a Russian oligarch to take an American publication to court in the UK, despite the circulation of the publication in question

2 Article 15, E-Commerce Directive, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN>.

3 Manila Principles on Intermediary Liability, <https://www.manilaprinciples.org/>.

in the UK being a fraction of its home jurisdiction in America. This 'libel tourism' was broadly ended in 2013 in English courts, it is worth establishing similar in Scotland⁴.

The Bill does not deal specifically with issues created by the ease of internet publication (although a lot of its provisions will be relevant to such cases). Are you content with this approach?

The Bill incorporates necessary standards protecting intermediaries from liability for statements published on their platforms. This is an important protection for freedom of expression and restriction for pre-emptive take downs by cautious platforms. However, there are other areas that Open Rights Group feels requires specific attention:

Section 30 - Power of court to require removal of a statement

Section 30 of the Bill provides that, in defamation proceedings (or malicious publications proceedings) a court may order:

- the operator of a website on which the statement complained of is posted to remove the statement, or
- any person who was not the author, editor, or publisher of the original statement to stop distributing, selling or exhibiting material containing the statement.

Explaining the reason for this power, the explanatory notes that accompany the Bill states at para. 130 that section 30 is intended to provide for the fact that it may not always be possible for the author of material which is the subject of defamation proceedings or proceedings under Part 2 for a malicious publication to prevent further distribution of the materials. This is a fair reflection of the nature of online publishing where the author of a statement can quickly lose control of the spread of a statement.

However, paragraph 131 goes on to explain that the "exercise of this power is not confined to circumstances in which the final outcome of the proceedings has already been determined by the court. Accordingly, the court would be entitled in an appropriate case to grant an order for removal or cessation of distribution on an interim basis, before the final outcome of the proceedings is known."⁶

4 Libel tourism at an end, says lawyers following high court rulings, 15 October 2013, <https://www.theguardian.com/media/2013/oct/15/libel-tourism-high-court-karpov-subotic-foreign-sue>.

5 Para 130, Defamation and Malicious Publications (Scotland) Bill: Explanatory Notes, [https://www.parliament.scot/S5_Bills/Defamation%20and%20Malicious%20Publication%20\(Scotland\)%20Bill/SPBill61ENS052019\(1\).pdf](https://www.parliament.scot/S5_Bills/Defamation%20and%20Malicious%20Publication%20(Scotland)%20Bill/SPBill61ENS052019(1).pdf).

6 *ibid.*

This measure strikes Open Rights Group as disproportionate and risks creating a tool to restrict freedom of expression by litigious parties prior to any proper determination of the potential defamatory nature of a statement.

Open Rights Group recommends making explicit that the power of the court to require removal of a statement is only where the statement complained of is determined to be defamatory.

The measure under section 30(1)(a) is disproportionate given the ability for other less restrictive actions to be taken that would better preserve the right to freedom of expression and the disputed statement. The operator of a website could place a statement such as a disclaimer ahead of the article noting that it is disputed, this would provide context for the reader that the statement is in dispute but would not prevent the statement (which is yet to be determined defamatory) from being read and so the freedom of expression is maintained.

In the case of *Loutchansky v. Times Newspapers* the court determined that the law of defamation should not inhibit the responsible maintenance of archives, it stated that "the attachment of an appropriate notice warning against treating it as the truth will normally remove any sting from the material"⁷. This principle was confirmed by the European Court of Human Rights in *Times Newspapers Ltd (Nos 1 and 2) v. The United Kingdom*⁸. The Bill in its current form risks sitting outside of established human rights standards and Open Rights Group encourages change to be made as a result.

Open Rights Group would be happy to provide further evidence to the Committee as required. We are broadly supportive of the direction of travel of the Bill and welcome the effort to reform standards of speech in this Internet age.

7 para 74, *Loutchansky v. The Times Newspapers*, [2001]EWCA Civ 1805, <https://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2001/1805.html>

8 para. 47, *Times Newspapers Ltd (Nos 1 and 2) v The United Kingdom*, [2009] EMLR 14, <http://hudoc.echr.coe.int/eng?i=001-91706>.