

*These notes relate to the Defamation and Malicious Publication (Scotland) Act 2021 (asp 10) which received Royal Assent on 21 April 2021*

# DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) ACT 2021

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 1: Defamation**

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

#### *Section 2: Prohibition on public authorities bringing proceedings*

16. Section 2 places on a statutory footing the principle laid down by the case of *Derbyshire County Council v Times Newspapers Ltd*<sup>1</sup> that a public authority has no right at common law to bring proceedings for defamation. Although a principle of English common law, it is thought to represent Scots common law also.
17. Subsection (1) sets out the basic principle laid down in *Derbyshire* that a public authority may not bring proceedings for defamation.
18. Subsection (2) sets out what is meant by a public authority in this context. The first two limbs relate to central and local government (and any non-natural persons that are owned or controlled by them). This therefore, will include:
  - the Scottish Ministers and other offices in the Scottish Administration, the agencies and other bodies (however described) that are part of central government,
  - each local authority, both in its capacity as a local authority and as education authority, roads authority, etc.
  - companies and charitable bodies that are owned or controlled by the Scottish Ministers or a local authority to discharge particular functions of a public nature e.g. the Scottish National Investment Bank as well as government agencies and other public bodies.
19. The third limb confirms that courts and tribunals are public authorities for the purposes of this provision. This includes judges in their capacity as holders of judicial office (but not as individuals, by virtue of subsection (5)).
20. Subsection (2)(d) provides that other persons or offices whose functions include functions of a public nature are also public authorities for these purposes. This general provision covers a range of bodies and offices.

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<sup>1</sup> [1993] AC 534. At page 547, Lord Keith of Kinkel said: "There are, however, features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading. The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech."

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21. A list of Scottish public bodies can be found at the following website: [National public bodies: directory](#).<sup>2</sup> It is important to note that this list is not exhaustive and that some of the bodies on this list may not constitute a public authority for the purposes of this section. What constitutes a public authority for the purposes of this section may develop over time.
22. The power to make regulations in subsection (6) may supplement subsection (2) in order to address any bodies or types of body which should or should not be considered a public body for the purposes of this provision. This may arise where, for example, there is a question over whether a type of body should be a public authority.
23. Subsection (3) sets out a default position which excludes from the category of public authorities both bodies set up to trade for profit and charitable organisations where either exercises public functions from time to time, provided (in both cases) that they are not owned or controlled by a public authority. Typical examples may include companies and charitable organisations contracted by Government or local authorities to discharge functions on their behalf at certain times. Use of the words “from time to time” is intended to reflect the fact that such entities may operate on a contractual basis, discharging public functions sporadically. It seeks to ensure that they will not be deemed to fall into the category of public authorities by reason only of such periodic discharging of public functions. The provision does not preclude the possibility of them being found to be public authorities, but that finding may not be made solely on the basis of their carrying out functions of a public nature occasionally. The reference to their not being under the ownership or control of a public authority is designed to distinguish bodies covered by the exception from corporate vehicles set up or taken over by central or local government.
24. Subsection (4) elaborates what is meant by a non-natural person being under the ownership or control of a public authority. This includes situations where a public authority holds the majority of shares in it or has the right to appoint or remove a majority of the board of directors.
25. Subsection (5) puts beyond doubt that an individual who discharges public functions in the capacity of an office-holder or an employee is not prevented from bringing defamation proceedings in their personal capacity. Such proceedings may, for example, relate to the individual’s professional/occupational position and reputation. This option will be available insofar as the matter concerned relates to the position of the individual, rather than the public functions.
26. Subsections (6) to (8) provide Scottish Ministers with the power to make regulations to specify persons or descriptions of persons who are or are not to be treated as public authorities for the purposes of subsection (1). The regulations are to be the subject of consultation by the Scottish Ministers, and are to be subject to the affirmative procedure of the Scottish Parliament. As noted above, it is expected that this power could be used to provide clarity in relation to any description of body which has aspects of a public authority, but which is not to be prevented from raising proceedings. It is not intended to be used to provide an exhaustive list.
27. Subsection (9) provides definitions of the terms “charity” and “charitable purposes”.