

# DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) ACT 2021

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 1: Defamation

#### Defences

##### *Section 5: Defence of truth*

40. Section 5 replaces the common law defence of veritas (truth) with a statutory equivalent, known simply as the defence of truth. The section is intended broadly to reflect the current law while simplifying and clarifying certain elements.
41. Subsection (1) sets out the basis on which the defence operates. It applies where the defender can show that the imputation conveyed by the statement complained of is true or substantially true. “Imputation” means a slur impinging in some way on a person’s reputation. There is a long-standing common law rule that it is no defence to an action for defamation for the defender to prove that they were only repeating what someone else had said (known as the “repetition rule”). Subsection (1) focuses on the imputation conveyed by the statement in order to incorporate this rule.
42. In any case where the defence of truth is raised, there will be two issues: (i) what imputation (or imputations) are actually conveyed by the statement; and (ii) whether the imputation (or imputations) conveyed are true or substantially true. The defence will apply where the imputation is one of fact.
43. Subsection (2) deals with a case where defamation proceedings are brought in relation to a statement which conveys two or more distinct imputations. It replaces section 5 of the Defamation Act 1952 (“the 1952 Act”) (the only significant element of the defence of veritas which is currently in statute). It makes clear that the defence does not fail if not all of the imputations are shown to be true or substantially true. Rather, the defence can still be relied upon if the defender can show that, having regard to the imputations that are shown to be true or substantially true, the publication of the remaining imputations has not caused serious harm to the reputation of the pursuer. The phrase “materially injure” used in the 1952 Act is replaced by “seriously harm” to ensure consistency with the test in section 1(2)(b) of the Act. This subsection gives statutory effect to the rule laid down for England and Wales in *Polly Peck (Holdings) plc v Trelford*<sup>1</sup>, and thought also to apply in Scotland.

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<sup>1</sup> [1986] QB 1000.