

# DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) ACT 2021

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 1: Defamation

##### Defences

##### *Section 6: Defence of publication on a matter of public interest*

44. Section 6 creates a new defence on the basis that the statement in relation to which proceedings were brought related to a matter of public interest. It is based on the common law defence established in England and Wales by the leading case of *Reynolds v Times Newspapers Ltd*<sup>1</sup> (and generally accepted in Scotland). The House of Lords held in *Reynolds* that a publisher may have a defence in defamation proceedings if it published defamatory allegations on a matter of public interest, provided that the publication was “responsible”. Section 6 is intended to reflect the principles developed in that case and subsequent case law. It may therefore be regarded simply as a statutory incarnation of the common law position, albeit with a change of focus. The test to be applied is now reasonableness of the belief that publication of the statement complained of was in the public interest, rather than the responsibility of the journalism behind the statement.
45. Subsection (1) sets out the components of the defence. The defender must show that the statement complained of was, or formed part of, a statement on a matter of public interest. The defender must also have reasonably believed that it was in the public interest for the statement to be published. The intention in this provision is to reflect the existing common law in England and Wales as most recently set out in *Flood v Times Newspapers*.<sup>2</sup> It reflects the fact that the common law test contained both a subjective element – what the defendant believed was in the public interest at the time of publication – and an objective element – whether the belief was a reasonable one for the defendant to hold in all the circumstances.
46. Subsection (1) does not attempt to define what is meant by “the public interest”. However, this is a concept which is well-established in the common law. It is made clear that the defence applies if the statement complained of “was, or formed part of, a statement on a matter of public interest” to ensure that either the words complained of may be on a matter of public interest, or that a holistic view may be taken of the statement in the wider context of the document or article in which it is contained in order to decide if overall this is on a matter of public interest.

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<sup>1</sup> [2001] 2 AC 127.

<sup>2</sup> [2012] 2 AC 273.

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

47. Subsection (2) provides that, subject to subsections (3) and (4), the court must have regard to all the circumstances of the case in determining whether the defender has shown the matters mentioned in subsection (1).
48. Subsection (3) provides for one consideration that is not to be taken into account, namely any failure by the defender to verify the truth of an imputation conveyed by a statement which forms part of an accurate and neutral report of a dispute to which the pursuer was a party. In instances where this doctrine applies, the defendant does not need to have verified the information reported before publication because the way that the report is presented gives a balanced picture. In effect, this places on a statutory footing the common law defence of “reportage”. It is intended to reflect the fact that reportage has been recognised by the Supreme Court as a special form of Reynolds privilege, namely in the case of Flood mentioned above. In cases other than those involving reportage, the general position will be that steps should be taken by the defender to verify the truth of the imputation complained of. The Act does not, however, lay down an express requirement of verification. It will, therefore, accommodate any situation in which the public interest in publication is so strong and urgent as to justify publication without steps towards verification.
49. Subsection (4) provides that, in determining whether it was reasonable for the defender to believe that publishing the statement was in the public interest, the court must make such allowance for editorial judgment as it considers appropriate. This expressly recognises the discretion given to editors in judgments such as that of Flood, but is not intended to be limited to the judgement of editors in a media context.
50. Subsection (5) makes clear that the defence can be relied upon regardless of whether the statement which has been complained about is one of fact or opinion.