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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Defamation and Malicious Publication (Scotland) Bill: Stage 2



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- (c) general questions relating to powers to make subordinate legislation;
- (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;
- (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;
- (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meeting on 16 February 2021, the Delegated Powers and Law Reform Committee considered the delegated powers in the Defamation and Malicious Publication (Scotland) Bill (“the Bill”) as amended at Stage 2.ⁱ
2. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.
3. The Committee published its Stage 1 Report on the Bill on 4 February 2020ⁱⁱ; it reported it was content with the delegated powers provisions contained in the Bill.
4. The Bill completed Stage 2 on 26 January 2021.

ⁱ The Bill as introduced is available [here](#)

ⁱⁱ [Delegated Powers and Law Reform Committee, 10th Report 2020 \(Session 5\): Defamation and Malicious Publication \(Scotland\) Bill: Stage 1](#)

Overview of the Bill

5. The Scottish Government Bill was introduced by the Cabinet Secretary for Justice, Humza Yousaf MSP, on 2 December 2019. The lead committee is the Justice Committee.
6. The Policy Memorandumⁱⁱⁱ prepared by the Scottish Government, notes the overarching policy objectives of the Bill are to modernise and simplify the law of defamation (and the related action of malicious publication) in Scotland in order to:
 - strike a more appropriate balance between freedom of expression and the protection of individual reputation; and
 - clarify the law and improve its accessibility.
7. The Bill confers certain key elements of Scots common law on a statutory basis. It also replaces and restates, in one place, elements of the existing statutory provisions.

ⁱⁱⁱ The Policy Memorandum is available [here](#)

Delegated Powers

8. The Scottish Government has produced a Revised Delegated Powers Memorandum^{iv} which describes the provisions in the Bill conferring power to make subordinate legislation which were introduced at Stage 2.

Section 2(6) – Prohibition on public authorities bringing proceedings

Power conferred on: the Scottish Ministers Power

exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

9. Section 2(6) provides that Scottish Ministers may make regulations to specify persons who are and are not to be treated as public authorities for the purpose of section 2(1), which states that public authorities may not bring defamation proceedings.
10. Section 2(3) provides that a non-natural person will not be considered a public authority if it carries out functions of a public nature from time to time if its primary purpose is trading for profit, or is a charity, or is an organisation which has purposes consisting only of one.
11. Regulations made under section 2(6) are subject to the affirmative procedure. Scottish Ministers are also required to consult with such persons as they consider appropriate before laying a draft of the regulations before the Parliament.

Committee consideration

12. The Committee considers that the power to make regulations under this revised provision will ensure that the right balance can be struck between allowing public bodies to be criticised and unduly restricting bodies from raising proceedings to protect their reputation.

13. **The Committee therefore considers the revised power in Section 2 to be acceptable. It is also content that the power is subject to the affirmative procedure.**

Section 34(1) – Provision of information society services

Provision

14. Section 34(1) of the Bill provided that Scottish Ministers may make regulations to specify the circumstances in which persons providing information society services are, or are not, to be held liable in defamation proceedings. Those regulations would have been used to implement the provisions of the EU electronic commerce

^{iv} The Revised Delegated Powers Memorandum is available [here](#)

directive into the Bill, had the UK not withdrawn from the EU at the end of January 2020.

15. Following the UK's withdrawal from the EU, Section 34 has been removed from the Bill as it is considered that section 3 of the Bill provides protections for secondary publishers akin to those in the directive.
16. The Committee therefore considers that as the power in Section 34 has been removed from the Bill, no further consideration is necessary.

