

# **The Educational Institute of Scotland**

## **False and Defamatory Allegations**

### **Introduction**

- 1.1 The following resolution was approved by the 2015 Annual General Meeting:

“This AGM calls upon the EIS nationally to develop comprehensive strategies for responding to false and defamatory allegations against teachers and lecturers.”

- 1.2 This paper sets out strategies for Local Association Secretaries, Branch Secretaries and Officers to use in response to false and defamatory allegations against teachers and lecturers. It builds on the following resolution which was approved by 2005 Annual General Meeting:

“This AGM instructs Council to issue advice to all members on an individual basis on the contractual and legal rights of members who are subject to spurious, vexatious or malicious complaints.”

- 1.3 Arising from the 2005 resolution, the EIS provided a summary of its position which was issued to members as a leaflet. A revised and updated version of this leaflet is included in this paper.
- 1.4 Our advising solicitors have assisted in setting out the legal issues section.

### **2.0 Definitions**

- 2.1 The definitions which are assumed within this process are appended to this report (Appendix A).

### **3.0 Legal Issues**

- 3.1 The statutory provisions in the Defamation Act 1952 and the Defamation Act 1996 have, for the most part, covered the UK as a whole. The Defamation Act 2013 (the 2013 Act) reformed the law of defamation, but many of its provisions extend to England and Wales only. The Scottish Government was consulted on the 2013 Act during its passage through the UK Parliament. However, the Scottish Government felt that the existing Scottish law was adequate and did not require the same legislative change as the rest of the UK. There are no immediate plans to review the law in Scotland.
- 3.2 Defamation law in Scotland has always had some significant differences from that in the rest of the UK. Since very little of the Defamation Act 2013 applies to Scotland, the differences are now more acute. The new public interest defence does not apply in Scotland and the requirement for there to be “serious harm” which now applies in England does not apply in Scotland. In addition, someone bringing a defamation action in

Scotland has 3 years in which to bring a claim whereas in England and Wales it is 12 months.

- 3.3 Members who are subject to inappropriate behaviour from vexatious complainants may have a number of possible routes for legal remedy. It is possible to seek an interdict to stop the parent coming to a school/college or otherwise approaching the member. An interdict is usually governed by the need for urgent action to protect someone from harm. Therefore, interdicts are more likely to be granted in circumstances where there is perceived threat of violence. To obtain an interdict the employer or member would have to persuade a sheriff that there was a course of conduct which was likely to lead to harm.
- 3.4 Threats or abusive behaviour towards teachers and lecturers should be reported to the police as a breach of the peace. Employers also have an obligation to take action on threats or abusive behaviour directed to staff.
- 3.5 Under the Protection from Harassment Act 1997, a person must not pursue a course of conduct which amounts to harassment of another and (a) is intended to amount to harassment of that person or (b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of the person. To satisfy the requirement that there is a "course of conduct", there would have to be at least two occasions when harassment is said to have occurred. It should be noted that conduct includes speech. The most likely defence to a claim of harassment is that the conduct was reasonable in the circumstances. However, breach of a non-harassment order is a criminal offence.
- 3.6 A member may be able to pursue an action for defamation for verbal injury. Defamation requires the member to prove that a statement made, orally or in writing, is false. However, it should be noted that those who complain, in writing or at a meeting, may be covered by qualified privilege. For example, a parent who makes a statement in the interests of her/his child is protected if the parent honestly believes the statement. In a case in which the Institute received an Opinion from a QC a statement made by a parent at a School Board meeting regarding a Head Teacher was considered to be covered by qualified privilege and not capable of being challenged. If qualified privilege obtains the member would have to have evidence that the statement was malicious.
- 3.7 The Institute's advising solicitors continue to recommend caution on actions relating to defamation. Any such action would inevitably attract press coverage and that brings unwarranted pressure on the member involved. Complainants who make allegations in a false, spurious or a vexatious way may welcome the oxygen of publicity given to them by court proceedings. Often these cases involve parents/students who have little or any assets against which an order for damages can be enforced. The Institute would therefore look particularly carefully at prospects of success in any court action. It should be noted that Legal Aid is not, as a matter of public policy, available to either pursue proceedings for defamation or to defend them.

- 3.8 Any legal support for members in pursuing false, spurious, vexatious or malicious complainants is subject to the EIS Case Handling Protocol, and decisions of the Employment Relations Committee.

#### **4.0 Strategies for responding to allegations**

- 4.1 Local authorities and Further Education and Higher Education establishments have a duty to investigate complaints. Therefore, Managers will normally be required to investigate complaints.
- 4.2 Local Association Secretaries and Branch Officials should enter into discussion with employers to ensure that there are clear procedures to deal with complaints from pupils, students, their parents or guardians. Local authorities, Further Education and Higher Education establishments will be expected to have clear complaints procedures which indicate how complaints will be managed and how those who are subject of complaints are supported.
- 4.3 It should be noted that even where a complaint or allegation is dropped, is unfounded, is not upheld or is unsubstantiated, it does not necessarily follow that the complaint has been false, spurious, vexatious or malicious. While it can be difficult to demonstrate that this is the case, members are entitled to know the basis for a complaint not being progressed.
- 4.4 Members should normally be advised of the nature of the complaint and should cooperate with any investigation. It should be noted that the details of complaints under child protection procedures may not be fully set out and Headteachers often do not have the details of such complaints. The EIS accepts that in the circumstances of child protection matters only a very general description of the allegation may be provided at the outset.
- 4.5 The 2001 teachers' agreement, "*A Teaching Profession for the 21st Century*", sets out that teachers have a contractual duty to work in partnership with parents. This contractual obligation is normally fulfilled during parental consultation meetings which are set out in a school's working time agreement. Members in promoted posts may be required to meet with parents as part of their management function. Beyond that members may choose to meet with parents, on particular matters, on a voluntary basis.
- 4.6 In circumstances where parents have submitted formal complaints the member may decline to meet the parent other than during a contractual meeting (i.e. a parental consultation meeting as set out in 4.5 above).
- 4.7 A member who is subject to a complaint by a parent or guardian can request accompaniment by an appropriate line manager at any subsequent meeting. In such circumstances the line manager is not an arbiter but is acting as an agent of the authority and has a duty of care to support the member.
- 4.8 Where a member has been subject to a previous complaint that member can also request to be accompanied at contractual parents' meetings.

- 4.9 Where a member is dissatisfied with the conduct of a meeting with a parent the member should withdraw from the meeting and advise the line manager of the reasons for doing so.
- 4.10 A member who is subject to false, spurious, vexatious or malicious complaints should expect support from the employer to ensure that the actions stop. In the first instance, the EIS would expect the employer to write to the complainant setting out concerns about the complainant's actions and requesting that these cease.
- 4.11 If the employer fails to support members then the employer may be breaking her/his statutory duty and could potentially be sued if the member's health is affected by such omissions.
- 4.12 Often members will be told complaints have been dropped following an investigation. Where complaints have been dropped or found to be unsubstantiated members should have this confirmed in writing.
- 4.13 The EIS believes that members are entitled to be advised if the employer has found the complaint to be false, spurious, vexatious, or malicious and that the complainant should be advised of the employer's conclusions. In any discussion on complaints procedures at local and establishment level this objective should be sought by local negotiators.
- 4.14 In circumstances where an anonymous complaint has been lodged the employer will have to decide whether to investigate that complaint. It should be noted that the employer cannot disregard anonymous complaints which relate to child protection matters.
- 4.15 If an allegation is determined to be false, the local authority should determine what further action may follow.
- 4.16 In the event that an allegation is shown to have been vexatious or malicious, it is expected that the pupil or student will be dealt with through the establishment's disciplinary procedures for pupils and students. In addition, the police should be asked to consider whether any action might be appropriate against the person responsible if s/he was not a pupil or student.
- 4.17 The use of staff suspension pending investigation of an allegation should be regarded as a last resort option i.e. where there is a clear risk of harm to a young person from the person remaining in post.
- 4.18 The time taken to investigate allegations should be reduced.
- 4.19 More guidance and illustrations of alternatives that can be effective would be useful to avoid suspension where possible.
- 4.20 There is clearly scope to clarify and to improve the recording of outcomes of concluded cases with a need for better guidance on how information should be recorded.
- 4.21 In conducting their own investigations schools, further education and higher education establishments are currently more likely to adopt a binary approach to complaints, whether substantiated or not. Greater

understanding of what constitutes a false, malicious, unfounded or unsubstantiated outcome should be established.

- 4.22 The support available to members of staff subject to allegations is varied. There is anecdotal evidence to suggest that teachers and support staff accused of an allegation would benefit from more formal support from their employer.
- 4.23 More should be done to standardise processes and systems for recording allegations of abuse. Standard definitions relating to the categories of outcomes of allegations would be beneficial to schools, colleges and universities. This would enable better monitoring of trends and a determination of whether or not incidents of allegations are increasing.

## 5.0 Advice Leaflet to Members

### Advice Leaflet to Members

#### Members Subject to Complaints

- 1.1 Local authorities, Colleges and Universities have a duty to investigate complaints. Members subject to such investigation are advised to co-operate and to seek early advice and support from their EIS Representative.
- 1.2 The following advice is for all members who are subject to complaints and to situations where the complaints are believed to be false, spurious, vexatious or malicious.

#### Legal Rights

- 2.1 Members who are subject to false, spurious, vexatious or malicious complaints may have legal remedy. However, the legal routes outlined below are complex and should not be considered lightly. Furthermore, any request for legal representation can only be approved by the Employment Relations Committee. Requests for legal advice should be discussed with your Local Association Secretary/Branch Secretary.
- 2.2 It is possible for employers to seek an interdict to stop a complainant coming to a school/college or otherwise approaching a member. An interdict is likely to be granted only where there is a risk of harm, normally arising from a threat of violence.
- 2.3 Under the Protection from Harassment Act 1997 a person must not pursue a course of conduct which amounts to harassment of another and (a) is intended to amount to harassment of that person or (b) occurs in circumstances where it appears to a reasonable person that it would amount to harassment of the person. There would have to be at least two occasions when harassment has occurred. In such actions it is necessary to demonstrate beyond doubt that the action was unreasonable in the circumstances. A non-harassment order may be made by a Sheriff.
- 2.4 A person may be able to pursue an action for defamation for verbal injury. Defamation requires a complainant to prove that a statement made, orally or in writing, is false. Complaints made to Headteachers, Principals, Education Departments, MPs, MSPs or Councillors are liable to be covered by qualified privilege.
- 2.5 Qualified privilege can be summarised as follows:  
  
*Privilege is a legal right to do or say something unrestricted and without liability (e.g. a witness in Court or a Member in Parliament). Qualified privilege will apply to individuals who make statements in the discharge of private or public duties. This covers parents, guardians and students.*
- 2.6 You should note that defamation actions are difficult to pursue successfully, and are likely to bring unwarranted media attention.

## Contractual Advice

- 3.1 Where you are advised that a complaint has been raised against you, you should immediately advise your representative who will advise the Local Association Secretary. If there is a likelihood of police involvement EIS HQ must be informed. In Further and Higher education you are advised to contact your Branch Secretary. It is expected that employers will have explicit complaints procedures. Investigations should be conducted in accordance with such procedures.
- 3.2 Employers are under an obligation to investigate complaints. Therefore, even if you believe the complaint is false, spurious, vexatious or malicious, you should cooperate. When being interviewed you should seek to be accompanied by your representative or by a colleague. Where a complaint moves beyond investigation to disciplinary procedures you are entitled to be advised and represented by EIS.
- 3.3 In circumstances where parents have submitted complaints you can decline to meet the parent unless the meeting is a parental consultation meeting set out in the school's working time agreement. It is not appropriate for members to meet with parents who have initiated formal complaints through an employer's complaints procedure in relation to that complaint.
- 3.4 If, however, you do choose to meet the parents you are entitled to seek accompaniment by a member of the establishment's senior management team. If you are a Headteacher you can seek this support from the authority.
- 3.5 You may withdraw from any meeting with a parent if you are dissatisfied with how the meeting is being conducted. If you do so you should advise your line manager of your reasons for doing so.
- 3.6 You are entitled to be advised if complaints are dropped or proven to be unfounded. If you believe there is evidence of false, spurious, vexatious or malicious complaints you should ask your employer to protect you from future complaints. You should raise this with your Local Association Secretary or Branch Secretary.

## **6.0 Recommendation**

- 6.1 The paper and the accompanying leaflet should be issued to Local Association Secretaries, Branch Secretaries and EIS Officers.

### Some Legal Definitions

**Defamatory statements.** An offending statement may not necessarily be defamatory as it may fall into another category of hurtful words, such as being a "malicious falsehood" or a "slander of title". To be defamatory "a statement must be false and must lower the defamed in the estimation of right thinking members of society". In addition, a defamatory statement must be communicated. The traditional forms of communication are publication in print or oral dissemination. However, modes of communication have increased with technological advances and now include communications made on Twitter, LinkedIn, Facebook, Trip Advisor and blogs. The greater the circulation by the original defamer, the greater the sum of damages is likely to be. However, qualified privilege, which is explained below, sets out a context for defence.

**Interdict** is a judicial prohibition or court order preventing someone from doing something. In English law, this is called an injunction.

**Malice.** There is clear evidence to prove there has been a deliberate act to deceive and the allegation is entirely false.

**Qualified privilege.** Privilege is a legal right to do or say something unrestricted and without liability (e.g. a witness in Court or a Member in Parliament). Qualified privilege will apply to individuals who make statements in the discharge of private or public duties. This covers parents, carers and students.

**Substantiated.** There is sufficient identifiable evidence to prove or disprove the allegation.

**Unfounded.** There is no evidence or proper basis which supports the allegation being made, or there is evidence to prove that the allegation is untrue. It might also indicate that the person making the allegation misinterpreted the incident or was mistaken about what they saw. Alternatively they may not have been aware of all the circumstances.

**Upheld.** This means to confirm or support something which has been questioned.

**Unsubstantiated.** This simply means that there is insufficient identifiable evidence to prove the allegation.