Scottish Law Commission
promoting law reform

RESPONSE FORM

DISCUSSION PAPER ON DEFAMATION

We hope that by using this form it will be easier for you to respond to the questions set out in the Discussion Paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

Please note that information about this Discussion Paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gsi.gov.uk. Comments not on the response form may be submitted via said email address or by using the general comments form on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

Name: Dr Paul Bernal
Organisation: University of East Anglia Law School
Address: Earlham Hall, Norwich Research Park, Norwich NR4 7TJ
Email address:

List of Questions

1. Are there any other aspects of defamation law which you think should be included as part of the current project? Please give reasons in support of any affirmative response.

(Paragraph 1.21)

Comments on Question 1

No obvious omissions.

2. We would welcome information from consultees on the likely economic impact of any reforms, or lack thereof, to the law of defamation resulting from this Discussion Paper.

(Paragraph 1.25)

Comments on Question 2

No comment

3. Do you agree that communication of an allegedly defamatory imputation to a third party should become a requisite of defamation in Scots law?

(Paragraph 3.4)

Comments on Question 3

Yes. Private communication between two parties does not fulfil what is generally understood to be defamation anywhere else in the world, and should be dealt with through different laws.

4. Should a statutory threshold be introduced requiring a certain level of harm to reputation in order that a defamation action may be brought?

(Paragraph 3.24)

Comments on Question 4

Yes, though this may not be easy. The 'serious harm' threshold in the Defamation Act 2013 has not, as yet, produced the clarity that some hoped. If Scotland does something similar, it should be with better and clearer guidelines.

5. Assuming that communication to a third party is to become a requisite of defamation in Scots law, are any other modifications required so that a test based on harm to reputation may "fit" with Scots law?

(Paragraph 3.24)

Comments on Question 5

No comment

6. Do you agree that, as a matter of principle, bodies which exist for the primary purpose of making a profit should continue to be permitted to bring actions for defamation?

(Paragraph 3.37)

Comments on Question 6

Yes, though potentially under different terms, limiting the situations in which the relevant business can sue.

7. Should there be statutory provision governing the circumstances in which defamation actions may be brought by parties in so far as the alleged defamation relates to trading activities?

(Paragraph 3.37)

Comments on Question 7

Yes – to ensure that defamation law does not limit genuine criticism of traders, products and so forth.

8. Do consultees consider, as a matter of principle, that the defence of truth should be encapsulated in statutory form?

(Paragraph 4.15)

Comments on Question 8

«Yes. This is one of the most important areas.

9. Do you agree that the defence of fair comment should no longer require the comment to be on a matter of public interest?

(Paragraph 5.11)

Comments on Question 9

Yes. It would be better to remove the often confusing and unnecessary debate over what actually constitutes the public interest.

10. Should it be a requirement of the defence of fair comment that the author of the comment honestly believed in the comment or opinion he or she has expressed?

(Paragraph 5.12)

Comments on Question 10

I would recommend not, because determining 'honest belief' may be very difficult indeed, and add to the confusion, time and cost involved in a case.

11. Do you agree that the defence of fair comment should be set out in statutory form?

(Paragraph 5.21)

Comments on Question 11

Yes - to add clarity and context. See also the responses to questions 8-10.

12. Apart from the issues raised in questions 9 and 10 (concerning public interest and honest belief), do you consider that there should be any other substantive changes to the defence of fair comment in Scots law? If so, what changes do you consider should be made to the defence?

(Paragraph 5.21)

Comments on Question 12

No comment

13. Should any statutory defence of fair comment make clear that the fact or facts on which it is based must provide a sufficient basis for the comment?

(Paragraph 5.21)

Comments on Question 13

I don't believe this should be a requirement, though it could be noted that it might help the

use of the defence. If the facts upon which the comment is made are 'common knowledge', for example, it should not be necessary to state them in order to get the defence. This is particularly important in relation to defamation on social media systems such as Twitter where the length of a comment is very limited. 'Fair comment' should be a defence available for tweeters – commentary is one of the most important uses for social media, and Twitter in particular.

14. Should it be made clear in any statutory provision that the fact or facts on which the comment is based must exist before or at the same time as the comment is made?

(Paragraph 5.21)

Comments on Question 14

Yes, but see the answer to question 13. I do not believe that statement of the relevant facts should be a requirement. Those facts should exist, however.

15. Should any statutory defence of fair comment be framed so as to make it available where the factual basis for an opinion expressed was true, privileged or reasonably believed to be true?

(Paragraph 5.21)

Comments on Question 15

Yes, but there is a question of what would constitute a 'fact'. The 'fact' that someone else has said something, for example, where that someone else is someone that could be reasonably expected to be trustworthy, should count. This might include commentary by a professional journalist, for example.

16. Should there be a statutory defence of publication in the public interest in Scots law?

(Paragraph 6.15)

Comments on Question 16

Unequivocally yes. One of the most important defences to set out in statutory form.

17. Do you consider that any statutory defence of publication in the public interest should apply to expressions of opinion, as well as statements of fact?

(Paragraph 6.15)

Comments on Question 17

Yes. Amongst other things, this would reduce the scope for legal argument about the nature of a comment – reducing costs, speeding up trials and improving legal certainty.

18. Do you have a view as to whether any statutory defence of publication in the public interest should include provision as to reportage?

(Paragraph 6.15)

Comments on Question 18

No particular view.

19. Should there be a full review of the responsibility and defences for publication by internet intermediaries?

(Paragraph 7.33)

Comments on Question 19

Yes - including a proper review of the different types of internet intermediaries. An ISP, for example, is very different from the operator of a social media service or a search engine. The defences available to different kinds of internet intermediaries should be different.

20. Would the introduction of a defence for website operators along the lines of section 5 of the Defamation Act 2013 address sufficiently the issue of liability of intermediaries for publication of defamatory material originating from a third party?

(Paragraph 7.39)

Comments on Question 20

It is possible, but not in the form set out in the Defamation Act 2013, which is not clear enough nor detailed enough to be of sufficient help to either claimants or intermediaries. There must be clarity over what constitutues a 'website operator' – and a modern law should acknowledge that even the term 'website' is neither clear nor up to date. Many services, for example, are accessed via apps on smartphones, not through web-browsers. Are they

'websites'? Who operates them? More complex social network sites have tiers of control – what does an 'operator' mean in the case of a Facebook group? Is Facebook the operator? Is the person who moderates the group? What if there are joint moderators?

All this needs to be much clearer than is in the Defamation Act 2013 – and the levels of responsibility must be much clearer too. The law should be very careful not to create a chill, for example by putting responsibility on those who run message boards or discussion groups, nor to remove the incentive to moderate discussions (which is generally a good thing) by putting responsibility on moderators or those who allow moderated groups.

Further, it is important not to create a situation where anonymous or pseudonymous comments are prevented from occurring. For many people, anonymity or pseudonymity is a crucial protection – from whistle-blowers to those at risk of abuse or bullying, or those with stalkers or other enemies. Concern over defamatory comments by anonymous or pseudonymous people are often overblown: if a comment has no attribution is has far less credibility and hence less capability of creating harm to a reputation.

21. Do you think that the responsibility and defences for those who set hyperlinks, operate search engines or offer aggregation services should be defined in statutory form?

(Paragraph 7.47)

Comments on Question 21

Yes, in principle, though they need to be flexible enough to react as technology changes – different forms of search mechanism and aggregation can develop very fast.

22. Do you think intermediaries who set hyperlinks should be able to rely on a defence similar to that which is available to those who host material?

(Paragraph 7.47)

Comments on Question 22

Similar, but not identical. It should be acknowledged that hyperlinks are often set automatically by algorithm – for example in search results – so the level of involvement is different.

23. Do you think that intermediaries who search the internet according to user criteria should be responsible for the search results?

(Paragraph 7.47)

Comments on Question 23

Yes, but the nature of that responsibility is different from other forms. Google's mechanism for applying the Google Spain ruling – via an online form – might be a route forward here.

24. If so, should they be able to rely on a defence similar to that which is available to intermediaries who provide access to internet communications?

(Paragraph 7.47)

Comments on Question 24

Yes, and again it should not necessarily be identical

25. Do you think that intermediaries who provide aggregation services should be able to rely on a defence similar to that which is available to those who retrieve material?

(Paragraph 7.47)

Comments on Question 25

Yes. Definitions and borders between types of services are blurred here, and may well become more blurred.

26. Do you consider that there is a need to reform Scots law in relation to absolute privilege for statements made in the course of judicial proceedings or in parliamentary proceedings?

(Paragraph 8.9)

Comments on Question 26

No comment.

27. Do you agree that absolute privilege, which is currently limited to reports of court proceedings in the UK and of the Court of Justice of the European Union, the European Court of Human Rights and international criminal tribunals, should be extended to include reports of all public proceedings of courts anywhere in the world and of any international court or tribunal established by the Security Council or by an international agreement?

(Paragraph 8.12)

Comments on Question 27

Yes.

28. Do you agree that the law on privileges should be modernised by extending qualified privilege to cover communications issued by, for example, a legislature or public authority outside the EU or statements made at a press conference or general meeting of a listed company anywhere in the world?

(Paragraph 8.19)

Comments on Question 28

Yes.

29. Do you think that it would be of particular benefit to restate the privileges of the Defamation Act 1996 in a new statute? Why?

(Paragraph 8.19)

Comments on Question 29

Yes, for clarity and simplicity. Defamation law should be accessible to people other than legal experts – ordinary people can become caught up in defamation, so to have the law more easily accessible and understandable for those ordinary people is highly desirable.

30. Do you think that there is a need to reform Scots law in relation to qualified privilege for publication (through broadcasting or otherwise) of parliamentary papers or extracts thereof?

(Paragraph 8.23)

Comments on Question 30

No comment.

31. Given the existing protections of academic and scientific writing and speech, do you think it is necessary to widen the privilege in section 6 of the 2013 Act beyond a peer-reviewed statement in a scientific or academic journal? If so, how?

(Paragraph 8.27)

Comments on Question 31

No comment.

32. Do consultees agree that there is no need to consider reform of the law relating to interdict and interim interdict? Please provide reasons if you disagree.

(Paragraph 9.8)

Comments on Question 32

No comment.

33. Should the offer of amends procedure be incorporated in a new Defamation Act?

(Paragraph 9.12)

Comments on Question 33

Yes, for similar reasons to my response to Question 29.

34. Should the offer of amends procedure be amended to provide that the offer must be accepted within a reasonable time or it will be treated as rejected?

(Paragraph 9.12)

Comments on Question 34

Yes.

35. Are there any other amendments you think should be made to the offer of amends procedure?

(Paragraph 9.12)

Comments on Question 35

No comment.

36. Should the courts be given a power to order an unsuccessful defender in defamation proceedings to publish a summary of the relevant judgement?

(Paragraph 9.18)

Comments on Question 36

Yes.

37. Should the courts be given a specific power to order the removal of defamatory material from a website or the cessation of its distribution?

(Paragraph 9.18)

Comments on Question 37

Yes, but care needs to be taken and proper guidance given so that this does not overly burden the people in charge of the websites .

38. Should the law provide for a procedure in defamation proceedings which would allow a statement to be read in open court?

(Paragraph 9.20)

Comments on Question 38

Yes.

39. Do you consider that provision should be enacted to prevent republication by the same publisher of the same or substantially the same material from giving rise to a new limitation period?

(Paragraph 10.20)

Comments on Question 39

With care in relation to how 'republication' is defined in relation to the internet, yes.

40. Alternatively, if you favour retention of the multiple publication rule, but with modification, should it be modified by: (a) introduction of a defence of non-culpable republication; or (b) reliance on a threshold test; or (c) another defence? (We would be interested to hear suggested options if choosing (c)).

(Paragraph 10.20)

Comments on Question 40

Overall, I think the single publication approach is probably the best way forward, though the defence of non-culpable republication has its merits too.

There is a specific issue here in relation to social media, and in particular to Twitter (and to a certain extent Facebook). The idea that a Tweeter could be held to account for re-tweeting something posted by a source that it is reasonable for them to trust – most directly a professional journalist – is something to be avoided. Users of social media who are **not** professional journalists should be entitled to assume that the professional journalists have done their work properly, and should not be expected to fact-check them. The non-professionals have neither the expertise nor the information to be able to do this, nor even, necessarily, to know that a given statement might be considered to be defamatory: the damage of any statement should be considered to be made by the journalist, not by those RTing the stories.

This means that **more** responsibility is on the journalists for their statements on social media – this is part of their job. Unlike the ordinary users, they **should** be expected to understand the law and to take responsibility for it.

41. Should the limitation period applicable to defamation actions be reduced to less than three years?

(Paragraph 10.20)

Comments on Question 41

Yes. One year seems more appropriate and consistent, though of course any period is to an extent arbitrary.

42. Should the limitation period run from the date of original publication, subject to the court's discretionary power to override it under section 19A of the 1973 Act?

(Paragraph 10.20)

Comments on Question 42

Yes.

43. Subject to the outcome of the Commission's project on aspects of the law of prescription, should the long-stop prescriptive period be reduced to less than 20 years, in so far as it applies to defamation actions?

(Paragraph 10.20)

Comments on Question 43

No comment

44. Would you favour alteration of either or both of the time periods discussed in questions 41 and 43 above even if the multiple publication rule is to be retained?

(Paragraph 10.20)

Comments on Question 44

Yes.

45. We would welcome views on whether it would be desirable for a rule creating a new threshold test for establishing jurisdiction in defamation actions, equivalent to section 9 of the 2013 Act, to be introduced in Scots law.

(Paragraph 11.4)

Comments on Question 45

Yes, but great care is needed so that there cannot be any 'gaming' of these threshold tests. Percentages of access, for example. can be manipulated, particularly online, where it might be possible to arrange to have automated systems to access a page from a particular location enough times to take something out of a jurisdiction.

46. We would welcome views on whether the existing rules on jury trial in Scotland should be modified and if so, in what respects.

(Paragraph 11.13)

Comments on Question 46

No comment

47. Should consideration be given to the possibility of statutory provision to allow an action for defamation to be brought on behalf of someone who has died, in respect of statements made after their death?

(Paragraph 12.26)

Comments on Question 47

I would avoid allowing defamation actions to be taken in respect of the dead. There are

points in its favour, but they are outweighed in my view by the downsides.

48. Do you agree that there should be a restriction on the parties who may competently bring an action for defamation on behalf of a person who has died?

(Paragraph 12.30)

Comments on Question 48

Yes, if this is to be brought in, it must be closely limited.

49. If so, should the restriction on the parties be to people falling into the category of "relative" for the purposes of section 14 of the Damages (Scotland) Act 2011?

(Paragraph 12.30)

Comments on Question 49

Yes.

50. Do you consider that there should be a limit as to how long after the death of a person an action for defamation on their behalf may competently be brought? If so, do you have any suggestions as to approximately what that time limit should be?

(Paragraph 12.32)

Comments on Question 50

For consistency, a year would be as good a period as any.

51. Do you agree that any provision to bring an action for defamation on behalf of a person who has died should not be restricted according to:

(a) the circumstances in which the death occurred or;

(b) whether the alleged defamer was the perpetrator of the death?

(Paragraph 12.36)

Comments on Question 51

If we **are** to allow defamation actions on behalf of the dead, we need to be flexible.

52. Against the background of the discussion in the present chapter, we would be grateful to receive views on the extent to which the following categories of verbal injury continue to be important in practice and whether they should be retained:

- Slander of title;
- Slander of property;
- Falsehood about the pursuer causing business loss;
- Verbal injury to feelings caused by exposure to public hatred, contempt or ridicule;
- Slander on a third party.

(Paragraph 13.40)

Comments on Question 52

I would remove them all. Ordinary defamation should be enough.

53. We would also be grateful for views on whether and to what extent there would be advantage in expressing any of the categories of verbal injury in statutory form, assuming they are to be retained.

(Paragraph 13.40)

Comments on Question 53

No comment.

General Comments

Scottish Law has a chance to avoid the mistakes that the law of England and Wales made over defamation law, and to make Scotland a place with a good balance between free speech and protection of reputation. Further it could be a place where both of these are accessible to ordinary people rather than just to 'media professionals' and litigious politicians and celebrities. The key to this is to make the new laws clear, comprehensive and as simple as they can be. A number of the responses to the questions that I have made above are along these lines: removing distinctions that create possibiltiies for excessive legal arguments, for example.

The other key here is how Scots Law deals with online defamation – the law of England and Wales to an extent dropped the ball here, failing to provide either proper protection for ordinary people who use social media or clarity for those operating websites. There is an opportunity for Scots Law to take a lead here.

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.