Scottish Law Commission
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RESPONSE FORM

DISCUSSION PAPER ON DEFAMATION

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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 given my understanding of the resources and time available to the SLC – along with the need for a relatively swift reform of defamation – I do not think anything else needs to be covered. Possibly a statement of verbal injuries would be useful.

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

I'm afraid I'm not much help here.

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

I do not think this is necessary. There is a particular wrong here which I do not think either the Harrasment from Protection Act 1997 nor the Communications Act 2003 sufficiently protects. The DP highlights in para 3.4 the potential inadequacy of the 1997 Act or the 2003 Act to remedy what a defamation action presently can do. Although the DP rightly notes that this action is rarely raised, it does not cause too much confusion nor is it leading to a flood of litigation. It would appear to be unnecessary to require that a statement be made to a third party. Plus I think any future Bill, proposed by the SLC which included this sort of amendedment to the present law, would attract unnecessary debate in Parliament and distract from the main task of the DP: to deal with more pressing issues such as the threshold test, internet communications, etc. Moreover, to require third party communication also introduces the difficult question of who is a third party, what is a suffidient communication and whether it is necessary for a third party to hear, understand or acknowledge the communication? In sum: I don't think a *MacKay* action is particularly troublesome; I don't think it causes any difficulty in practice; and I think it caters for a

particular wrong not covered for elsewhere in the law.

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, there is a clear need for a threshold test. That being so, the question is whether this should be a *procedura*l test or a test of *substantive* law. As noted in the DP, in English law the threshold test developed out of the abuse of process test; however, in time it has migrated into the substantive law and is now necessary for establishing defamation in English law (s 1 (1) Defamation Act 2013). For the reasons discussed on 21 October 2015 at the Glasgow Forum for Scots Law on defamation, I think Scots law should be careful about introducing a threshold test into the *substantive* law. Eric Descheemaeker has given very strong reasons to explain why English law has taken a wrong turn here (see 'Three Errors in the Defamation Act 2013' (2015) Journal of European Tort Law 24-48 which the DP references on p 20, fn 41). The DP's analysis from para 3.20 to 3.24 is spot on. I'm in complete agreement that "there may in principle be scope for the introduction in Scots law of a threshold test. Nevertheless, the criticism that has been expressed of the threshold test in England and Wales shoud not, of course, be lost sight." (Para 3.24). The SLC has a real opportunity to improve upon and learn from the English experience without necessarily repeating the same mistakes.

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

See my answer to question 3 above.

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, but it may be that improved clarity and definition with regards to verbal injuries is preferable. Clarity with regard to verbal injuries - which I think the DP's report has already

done - would allow profit driven organisations a more refined, focused and appropriate claim formulation. Paras 3.29-3.34 give a good overview of the difficulties faced by profit driven organisations when they pursue their claims through a defamation action rather than as a particular verbal injury. I found Elspeth Reid's analysis at the SLC defamation event in April very helpful here; I think Elspeth demonstrated clearly the economic pedigree of verbal injuries and their close relationship to claims for economic loss which given them an advantange over defamation actions.

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

I think the SLC would be prudent to explore this further. We need to avoid the chilling effect of organsations with large resources using the threat of a defamation action to stifle criticism or negative opinions. Of course such organisations, in spite of whatever restrictions might be introduced with regard to their use of defamation actions, could still pursue an action by way of verbal injury.

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

I agree that there appears no evident problems with the common law postion. But there may be some coherence in giving it statutory footing given the overall project. However, in doing so the Bill should be careful not to replace the existing law or indeed introduce any new terminology or complex wording. If it is decided to put things into a statute: the simplier, the better. A wording which maintains the status quo would be preferable to anything which introduces uncertainty or new understandings - the latter would be most unwelcome.

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

What the DP says in para 5.11 is persuasive: I agree.

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

It certainly should be a requirement. What the DP says in para 5.12 is persuasive: I agree that there is an appropriate balance struck.

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 I agree that it should be set out in a statutory form - but this will be a difficult task! I don't think the 2013 Act got it right as para 5.13 to 5.19 rightly say. Again however there is an opportunity for the SLC to improve upon and learn from the mistakes of the 2013 Act. The DP raises the right issues and it seems possible to offer a wording which will not fall foul of the same interpretation problems with regard to s 3 of the 2013 Act.

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.

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

This is certainly something worth considering. In the case of *Clark v Norton* [1910] VLR 494 at 499 there was a useful formulation of what fair comment is: "something which is or can reasonably be inferred to be deduction, inference, conclusion, criticism, remark, observation, etc." (This was an Australian case decided by Cussen J which Descheemaeker quotes in

Mapping Defamation Defences, MLR (2015) 641-671, 652). Here the important point is the use of the word “reasonably”. Determining the reasonableness of the comment seems to be what the court is being asked to do. It might be better to stick to that terminology – “reasonably” - rather than the terminology of sufficiency. Argubly, the term “sufficient” or “sufficiency” has a sense of quantity or size or sum of resources which may be misinterpreted to mean that there needs to be a quanity of individual facts or a large amount of evidence, i.e. there was lots of individual facts or stats or different pieces of evidence which lead x to make y comment. I think that would detract from the original meaning of “reasonably” which is related to an assessment of degree or moderation or commonality with regard to the matter under consideration, i.e. x observed a situation or circumstance or read something which may be a singular instance or difficult to quanitify in terms of numbers or individual facts; but nonetheless, in spite of this, the comment made was a reasonable deduction or induction based on what was observed or read etc.

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

What the DP suggests about this seems sensible. Fair comment would not be appropriate as a defence - if it an unreasonable comment at the time of the utterance but subsequent evidence proved its veracity then defence of truth may be appropriate. Or indeed a verbal injury action would be more appropriate for the pursuer.

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

I might mention here that don’t think the term “opinion” is helpful here. Opinions are different from comments as Eric pointed out at the SLC defamation event in April (see also p 652 ff of his MLR piece). Maybe this is an overally pedantic point but I think it is still worth making.

In answer to the question, no, it doesn’t appear necessary that fair comment be used in these instances as other defences are available. In regard to comments upon a priviledged statement, I would tend to agree with the analysis the DP provides at para 5.16.

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

(Paragraph 6.15)

Comments on Question 16

I'm in complete agreement with para 6.15.

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

I don't think it needs to extend to expressions of "opinion". I find the approach of Lord Nicholls in *Reynolds* (p 193 – 195) persuasive.

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

Yes but a cut and pasting of s 4 (3) from the Act 2013 would unsatisfactory. The present wording of s 4 (3) is too wide and suggests that there should be no assessment of the responsibleness of the reporting and does not indicate that the reportage should be neutral, albeit such an explanation is found in the explanatory notes. If there is to be a statutory formulation it would seem appropriate to stress the need to be neutral and responsible in reporting a dispute.

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 this is of the utmost importance.

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

I don't think the 2013 Act did a very good job here, unfortunately. I think the issue is not with the intermediary but with the "publisher" who has some form of editorial control. But it does seem to be necessary that on various social media platforms a user is allowed to request that content about them be withdrawn if it is defamatory. In that regard, section 5 does something useful in setting up a procedure.

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

I think this would be very difficult. Again, I wonder if traditional categories such as editor and publisher may allow a court to then develop a jurisprudence which is flexible to accommodate the fast changing nature of the internet and social media. Adopting today's terminology and schema risks becoming obsolete very quickly.

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

Probably.

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

No.

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.

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.

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

I see privilege as being closely linked to the constitutional settlement of the UK, and therefore symmetry here is important – this isn't just about private law but also public law and the need for free debate within democratic forums such as parliament or within judicial setting. Thus, so long as the UK remains as it is, I think the Scots approach should align closely with that of England and Wales and so the approach of the 2013 should be followed.

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: I agree with para 8.12.

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

I think the Scots approach should align closely with that of England and Wales and so the approach of the 2013 should be followed.

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 - clarity, coherence and ease of accessibility would be my first few reasons as to why this should be so.

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

I think the Scots approach should align closely with that of England and Wales and so the approach of the 2013 should be followed.

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

I think the Scots approach should align closely with that of England and Wales and so the approach of the 2013 should be followed.

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

I have no firms views at present.

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

(Paragraph 9.12)

Comments on Question 33

This is an interesting suggestion; I have no firm views but appears sensible. Any provision should make clear about the legal effect of an offer of amends, i.e. the defender is not absolved – they has committed a wrong - but an action is barred or the wrong they have committed is remedied by the offer of amends.

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

Prima facie, this seems sensible.

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

(Paragraph 9.12)

Comments on Question 35

I have no views on this.

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,

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

I'm sceptical about the value of this procedure if it is understood to offer a pursuer their opportunity to speak in court. I wonder how successful such things have been in criminal courts, i.e. victim statements? One would hope modern judgements written in plain English would satisfy this need. One might suggest that there is a need for the Court of Session, for example, to follow the press statement procedure of the Supreme Court, that may be just as valuable and less cumbersome and legally ambiguious as a statement made in court.

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

No comment.

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

No comment.

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

(Paragraph 10.20)

Comments on Question 41

No comment.

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

No comment.

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

No comment.

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

No comment.

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)

No comment.

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

No comment.

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

No comment.

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

No comments.

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

No comment.

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 think verbal injuries are important. I am in complete agreement with the analysis and argument made by Elsepth Reid at the SLC's defamation event in April. Some of the problems we experience with the law of defamation stems from the fact that defamation actions are raised when an economic injury could be remedied more efficiently and appropriately by slander of title, falsehood about the pursuer causing business loss etc. Or

indeed highlight that a defamation action is sometimes not appropriate – i.e. it is being used to chill criticism rather than remedy an economic loss suffered by an economic organisation. The existence of verbal injuries demonstrates that the law does protect economic organisations from loss steming from harmful public statements; it also helps frame that the purpose of defamation is to protect reputation not the economic status of an organisation nor to stifle fair criticism.

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

I think there is great value in verbal injuries which offer a good balance in Scots law, albeit underused and misunderstood.

General Comments

This is an invaluable DP which will no doubt be a reference point in years to come as we develop and update our law of defamation in Scotland.

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.