

**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](mailto: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.

<b>Name:</b>  Eric Clive
<b>Organisation:</b>  Individual response
<b>Address:</b>  
<b>Email address:</b>  

## 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

If the threshold proposal does not go through then other reforms, such as a cap on damages other than those for proved patrimonial loss, would be worth considering but if the threshold reform goes through that should do the job.

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

The likely economic impact would be small but beneficial. Defamation actions are wasteful of resources.

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.

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. This is an extremely important reform. At present defamation actions can be raised or threatened by those who have suffered no actual distress and suffered no actual loss. They

can cause real distress and real loss to alleged defamers who have no or minimal culpability.

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.

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.

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**

Not necessary.

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**

Not necessary but might be desirable.

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

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**

This is likely to cause difficulty if the publisher is not the author – e.g. if a blogger allows a comment to appear on his or her blogpage. At the very least something like the provision in section 3 of the 2013 Act would be necessary.

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.

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**

Much will depend on how the statutory defence is framed. I would like to see something quite general, not linked to facts set out in the statement etc., and focussing on the whole substance of the comment, so that if the comment as a whole is fair the defence would apply.

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**

No. This is too restrictive.

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**

No. Why should a commentator not say e.g. "If the facts alleged in such and such a report are true then I consider X is not fit for public office."?

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 would prefer to see the defence divorced from factual base but if not then I would support this proposal.

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

(Paragraph 6.15)

**Comments on Question 16**

Yes. This is very important.

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.

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**

It definitely should.

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

(Paragraph 7.33)

**Comments on Question 19**

This is something which might be better done at supra-national level.

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**

«InsertTextHere»

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**

«InsertTextHere»

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**

«InsertTextHere»

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**

«InsertTextHere»

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**

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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**

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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**

Yes. See below.

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**

There would be benefit for users in having everything set out in one place.

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**

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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**

The existing protection seems arbitrarily narrow but I am not sure whether the remedy is to abolish it and rely on a threshold plus expanded fair comment or to expand it.

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**

Yes

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

(Paragraph 9.12)

**Comments on Question 33**

Yes.

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**

It should be made clear that an offer of compensation and expenses is not always required. In some cases a correction and apology would be enough - but this might be linked to the threshold proposal.

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**

Yes, if necessary. Could this not be done already?

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**

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**

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

(Paragraph 10.20)

**Comments on Question 41**

Yes.

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**

Yes.

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.

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**

I would be happy for defamation cases to be handled by judges.

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**

No – for all the reasons mentioned in earlier consultations.

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 – it should be nobody.

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**

It should be nobody.

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**

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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**

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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**

None seems important in practice but the first three should probably be retained for use in rare cases. The last two should be swept away if they exist.

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**

Not very important.

#### **General Comments**

The Commission is to be congratulated for publishing this excellent Discussion Paper. The proposed reforms are important and timely, not because of the 2013 Act but because reform is highly desirable. The law of defamation in its present state does more harm than good.

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.