Scottish Law Commission
140 Causeway Side
Edinburgh
EH9

15th June 2016

Dear Sirs,

SCOTTISH LAW COMMISSION
PAPER NUMBER 161
DISCUSSION PAPER ON DEFAMATION

I refer to the above.

I have previously raised with the Honourable Lord Pentland, Chairman of the Commission, the issue of whilst there is much to benefit the Defender by way of proposed reform the question to the fore is "What is in it for the Pursuer?"

I raise that because of the likely impact that such proposed reform will have, and as I see it, the likelihood that litigation (and indeed instruction) will all but dry up in this field (particularly should there be harmonisation between English law and Scots) as parties will choose to explore matters in the English courts rather than in Scotland, to the detriment of Scottish practitioners and the Scottish bar.

I would submit that there needs to be some incentive to proceed in the Scottish jurisdiction and whilst that is not an encouragement to run to litigation in Scotland , there needs to be some divergence either in practical terms through procedural rules or in the substance of the legislation which creates or retains an element of uniqueness in the Scottish defamation field.

Historically, under the primary place of publication rule, there was a stream of litigation in Scotland given the level of publication within Scotland. The internet and online publication and the formation of case law (eg Dow Jones v Gutnick and Sheville v Presse Alliance)

resulted in Claimants being able to proceed to litigation where the publication was downloaded. As a consequence from a practitioner position, proceedings which would have once found their way in the Scottish system are now litigated South of the Border.

The reforms brought in to play in England and Wales were done so as a consequence of continuingly high level of cases being brought before the English Courts, many of which were to use the language of the Jameel, "not worth the candle" and many others which were at best forum shopping to use the awards and associated costs aligned with the English jurisdiction as a deterrent to those publishing or defending. That has never been the position in Scotland. That is partly because the costs regime is nowhere near as disproportionate as in England and because the number of cases being litigated in Scotland has historically always remained low.

With the exception of those in academic study, most of those practitioners involved in the initial Consultation Group have a propensity towards Defender led work. My own firm for example has probably a division of 70% Defender led work to 30% Pursuer based. Even on those figures however, I am not aware of any other firm in Scotland raising on behalf of Pursuers, more litigation on Defamation matters, than my own. On that basis, given that the majority of those assisting the Commission will have a Defender slant (quiet naturally) to any response provided to the Consultation Paper, my responses herein are provided on the basis of issues which the proposed Consultation Paper will have on any potential Pursuer and particularly where that remedy will be harder and indeed substantially harder to achieve under the new proposals.

I do not intend to answer every question contained within the paper but will use the same numbering as per the paper in response:-

1. Yes. Any consideration of Defamation law requires to consider the practical problems presently facing practitioners so far as the issue of meaning is concerned. At present, the matter which comes to the fore at debate, is whether the article is capable of bearing the defamatory meaning plead by the Pursuer. That remains a debate point.

The level of meanings used in England (Chase level meanings 1 to 3) are not regularly plead in terms of Scots Law. For example following the principles in Lewis –v- Telegraph, the article meant that 1. A was guilty of a criminal offence. 2. there were grounds to suspect A of committing a criminal offence and 3. there were Grounds to investigate that A had committed a criminal offence.

Each clearly carry a different, albeit defamatory meaning.
In Scotland the practice is simply to aver that the words complained of are capable of bearing a defamatory meaning and then averring that meaning.

Under the English CPR rules it is open to a judge to determine the level of meaning attributed to the statement complained of. The difficulties in the Scottish procedure can be seen for example in the recent case of Cayzer –v- Times Newspapers where the Inner House (overturning the decision of the Lord Ordinary on meaning) held that the article was capable of bearing a defamatory meaning but went no further as to what the actual meaning of the article was. This leaves parties no further forward when moving to proof particularly where more than one meaning is pled arising from the article.

It is submitted that should such a procedure be established in Scotland then that would benefit both parties to the litigation in clarifying at debate stage, firstly whether the article was capable of bearing a defamatory meaning, secondly the level of that meaning and thirdly what the meaning of the article was.

2. I consider that the proposed reforms will impact economically on those practitioners and Counsel representing Pursuers (and indeed Defenders) on the pretext that any threshold proposed will reduce significantly the likelihood of proceedings being either raised or indeed contemplated in Scotland.

   As the Consultation Paper highlights, there is a limited level of Scottish authority so far as Defamation is concerned but that is mostly because there is a limited amount of litigation in Scotland in this field and certainly an insignificant level of litigation in comparison to that conducted in England.

It should not be forgotten that unlike in England where the expenses regime is prohibitive for most claimants the same does not apply in Scotland. Notwithstanding that and indeed since John –v- MGN, with the disparity between awards in England and Scotland narrowing, litigation in defamation remains at low level in Scotland. It is submitted that by unifying the law in the two jurisdictions that such a proposal will further delimit the amount of litigation in this field in Scotland.

3. In principal, it seems inherently sensible that an allegedly defamatory imputation to a third party should be necessary. However it would be possible to envisage a situation where a communication is sent by party A to party B which is defamatory of party B. Party B may be under a legal duty to pass that information on to a third party who would become aware of the defamatory imputation which would have only been passed between party A and party B. There would in those circumstances be publication by party A only to one party which would mean it was not actionable. That would seem inequitable where a duty exists to advise others of the defamatory material.

4. No. If a threshold test is brought in to play, such as serious or significant harm to reputation, then the question of harm which was previously a matter of Proof under Scots Law, now becomes a threshold test, which is substantially weighted in favour of the Defender rather than the Pursuer.

   In short, if a Pursuer is in a position to establish that material published of and concerning him is capable of bearing a defamatory meaning, then at present under Scots Law that is sufficient for the Pursuer to take matters to Proof (subject to relevant and specific averments of loss) and is a matter which weighs in the balance for a Defender in deciding whether to proceed with litigation or offer to settle.

   To amend that position by placing a threshold of serious harm puts the onus on the Pursuer to fund and adduce considerable evidence prior to commencing litigation (or indeed making complaint) as to the question of serious harm. This is all the

more so where the Pursuer is simply reacting to material which has been published of and concerning him. It is simply not equitable to force the Pursuer in those circumstances to overcome a further barrier.

There seems to be a belief that Pursuers are actively seeking out litigation which has never been my experience so far as Defamation law is concerned in Scotland. The more common position is where an individual feels genuinely aggrieved as a result of a publication of material of and concerning them. The publisher has made that decision to publish. Ultimately at proof the pursuer will require to prove loss. There is no reason why that hurdle should be introduced at the start of litigation.

Indeed such a hurdle sits obliquely with existing Regulatory Practice by way of the Editor's Code of Practice under the IPSO regime. Once the Regulator is satisfied that the Complaint falls within IPSO's remit and raises a possible breach of the Editors' Code of Practice it is not for the complainer to satisfy IPSO that a story is in some way materially inaccurate or breaches the code. It is for the newspaper to establish that it has not breached the Code by responding to the complaint. Whilst accepting that the Regulator has no interest in defamatory material (rather material breaching the Code), what is proposed by way of onus (hurdle) by way of reform makes it more likely that those who consider that they have been defamed would use the Regulator to consider their complaint not on the basis of Defamation but on the basis of a regulatory breach which would not provide any financial compensation to the complainer.

5. It has been suggested by others, that rather than introduce a serious harm test as a threshold test, that a new defence (rather than a threshold test) is created whereby it would be a defence to show that there was no serious harm. That would place the onus on the Defender to prove that there was no serious harm and take the expense and expenditure in proving that matter away from the Pursuer and transfer it onto the Defender.

   The benefit of so doing form a Pursuer's perspective is that if this were introduced as a separate defence, then if the Defender wished to avail itself of a section 2

defence, and offer amends under the 1996 Act, then they would require, prior to the submission of the defences (including no serious harm) to decide whether they would wish to avail themselves of a discount by proceeding by way of amends or alternatively by continuing to defend the proceedings incorporating a defence of no serious harm. This would differ from the position in England, where presently the Defender can proceed by application in relation to serious harm, but at the same time reserve their position under the offer of amends procedure so that if unsuccessful in relation to the threshold test, they still can obtain a discount. Such a provision in England seems heavily weighted to the Defender.

6. Yes

7. Yes they should require to show loss (as they presently need to by averments and at proof) in Scots law however that loss need not have to be significant. Loss should include in those circumstances costs incurred in brand reputation management and restoration.

8. I agree that there are no gaps or shortcomings in the defence of veritas at common law but the encapsulation of the common law in a statutory form would make sense provided it was as a matter of principle not unwieldy.

11 to 15 - It is becoming more apparent at practitioner level that a defence of fair comment will be advanced by a Defender as one of the defences to the fore. Indeed in most pleadings it is standard practice that Defenders are riding several horses at the same time eg veritas, qualified privilege and fair comment are commonly run together.

The main difficulties that arise for the Defender so far as the fair comment defence is concerned (and where the Pursuer is able to successfully defeat the defence) is where it is arguable that the underlying facts are not true and where the comment is not based on a matter of public interest. Accordingly, if fair comment no longer required to be either on a matter of public interest or the underlying facts not true then it would lead to significant issues at proof and in pleading. For example (i) a matter of public interest

is a Reynolds requirement and (ii) the substantial truth is part of veritas. Neither would be required however under fair comment if delimited as above.

From a practitioner perspective, the real difficulty arises in establishing whether or not what has been said is in fact comment or fact. Unlike in England a common sense approach seems to be adopted as to whether what was said was comment or fact or mixed comment and fact. It is also difficult at times to establish the underlying facts on which a comment is based.

There appears to have evolved into general pleading principles, the proposition that any time an individual is quoted within an article, that their quote is a comment. In short if an individual is asked by a publication for comment then there is a genuine held belief that that comment will always be fair comment.

On that basis, in practical terms the boundaries appear to have become blurred with the law as it presently stands and there seems to be a belief that any quote in response to a matter is fair comment even where that quote contains facts rather than comments. Accordingly if a statutory defence of fair comment is to be introduced then it would require to state that the fact or facts on which it is based provide a sufficient basis for the comment and must be in existence at the time where the comment is made.

16 to 18 - Reynolds privilege has done considerable service to Defenders since it came to the fore. From experience, it is perhaps the most commonly referred to defence to a pre action letter of claim and is almost always incorporated as a defence to proceedings raised. Notwithstanding that aside Adams –v- Guardian Newspaper, there is little or no direct authority to establish the proposition that Reynolds is in fact part of Scots Law, there is a general acceptance at practitioner level that it is treated as being part of Scots law and indeed most journalists are fully trained in Lord Nichols 10 point test and the responsible journalism test laid out there.

It should be noted however that notwithstanding that Reynolds has been of considerably assistance to Defenders it is not a panacea for all wrongs. Cases including

Cooperative Funeral Care Services against Scottish Daily Record and Sunday Mail Limited (settled) and Cayzer –v- Times Group Newspapers (settled) are cases where Reynolds privilege defences were advanced. It is possible from a Pursuer's perspective to successfully defeat the Reynolds privilege defence (albeit an uphill struggle).

26. No.

27. Yes.

33 to 35. The Offer of Amends procedure has proved an invaluable tool to Defenders (as well as to Pursuers) who are aware once the offer of Amends is advanced (and accepted) that all they are thereafter arguing about is the level of compensation. One difficulty which arises is that at present in Scotland there has been no case which has looked at the level of discount awarded in English procedure (for example Nail –v- Newsgroup Newspapers Limited) and confirmed that the level of discount being awarded in England is comparable to that which a Scottish Court would award. Practitioners are left with explaining to the Pursuer in Scotland that it is likely that a Scottish Court would follow that of its English counterpart so far as discount is concerned without being able to authoritatively advise clients as to that matter when considering a tender which inevitably flows from the Offer of Amends procedure.

38.

It would be a considerable benefit to any Pursuer to be able (if they so wished) from the perspective of reputation management and reputation restoration to have the ability to allow statements to be read in open Court.

41.

One of the main differences between the English and Scottish legal systems so far as Defamation is concerned is the fact that the limitation period in Scotland is three years. Again, there seems to be a mistaken belief that parties will run to Scotland to litigate because they are time barred in England. Such a proposition at practitioner level, has no basis in reality. I am only able to recollect one case in the last 20 years where a Pursuer time barred in England who was refused an application in terms of extending the

limitation period in England, sought to raise proceedings in Scotland (Kennedy –v- Aldington). Mr Kennedy however had a substantial link to Scotland as was plead in terms of the averments. The case ultimately settled. It would seem however that to expunge this difference between the two systems is another method by which there will be further harmonisation between England and Scotland and will result in parties limiting their advice to English jurisdiction rather than Scotland.

47. No. There appears in terms of the Consultation paper a general tendency towards the harmonisation of Scottish and English law. One obvious benefit to the Pursuer and the Pursuer's solicitors would be that no such provision exists in terms of English law which would allow parties to sue uniquely in Scotland as part of Defamation of the deceased. Given that no such provision exists under English law then the principle of liable tourism may indeed come to the fore with parties raising proceedings in Scotland for Defamation of the deceased as a consequence of publication in the UK where downloadable in Scotland. How one would establish a necessary threshold of harm for a deceased relative would, it is submitted be far from straightforward.

Finally, there is a general held belief amongst those pushing for reform in relation to Scots Law that the consequence of the changes brought in by the Defamation Act 2013 in England would result in litigation flowing to Scotland from London from Pursuers/Claimants seeking to take advantage of Scots Law and the fact that Scotland had not incorporated the 2013 Act into legislation.

It is submitted that such calls were fanciful, scaremongering and have not been borne out by any reality. The position in fact is that litigation so far as Defamation law in Scotland is concerned remains at historically low levels and should alignment with the English legislation come to the fore then that level is likely to fall further.
As I indicated to the Honourable Lord Pentland my greatest concern is that the Commission will create a statute which is entirely fit for purpose but which will not be tested for the simple reason that other jurisdictions will prove more advantageous.

Yours sincerely

Campbell S Deane