Response to questions on defences (Eric Descheemaeker)

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

As noted in the DP the defence of truth/*veritas* operates successfully in Scotland. The position taken by s 2(3) of the 2013 Act is welcome but it is not an innovation: it simply restates the earlier position as defined by s 5 of the Defamation Act 1952 and the common law. It could be translated into the Scottish Act, except of course for the word "seriously" if, as is to be hoped, the Act does not follow the English (counter-) model on this point.

The main debate in the field concerns whether it is right that it should be for the defender to prove the truth of the sting of the statement rather than for the pursuer to prove its falsity. The recent English Act retained the historical position, which is that falsity is presumed from the publication of the defamatory statement. In principle this makes sense if we believe that the interest protected by the wrong of defamation is reputation (Lat. *existimatio* = reckoning), i.e. the way others think of us, rather than – as has been suggested in the common-law world – deserved reputation. This is the historical position of Scots law and it is entirely defensible; accordingly no change is suggested on this point.

The current debate about the "Chase level 1, 2 and 3" meanings is exactly the sort of things that we do *not* want to put on a statutory footing; it is part of the natural development of the common law.

The one change the Scottish Act could profitably operate is to abolish s 8 of the Rehabilitation of Offenders Act 1974, which removes the defence of justification (truth/*veritas*) in respect of the malicious publication of spent convictions. Not only is this incompatible with a basic tenet of the law; it has the absurd consequence that a person sentenced for an offence is in a better position than someone who was never taken to court and condemned for it. (For a fuller discussion, see E. Descheemaeker, "*Veritas non est defamatio*'? Truth as a Defence in the Law of Defamation", 31 *Legal Studies* (2011), 1).

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

As often this question is best addressed by going back to first principles. Historically fair comment arose (like many other defamation defences) from the need to rebut to presumption of malice: an incrimination would not not malicious if it was a fair (i.e. honest) take on a matter of public interest; otherwise it would be regarded as gratuitous. If this is the paradigm adopted then the removal of the requirement makes no sense.

On the other hand, if we believe that the law of defamation should not be, and evidently no longer is, based on malice then the basis for the defence – if it is to be retained at all – must be different. Arguably the best (if not only) such justification is that fair comment operates *quasi ex veritatis*: honesty (i.e. genuineness) is to comment what truth is to primary facts. If this (the freedom to reason) is the reason why honestly held statements are protected, then the requirement of public interest is illogical. It should indeed be removed.

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?

Yes. This is an analytical necessity: if fairness means honesty (which it always has) then a fair comment must by definition be honestly held. To put the same point in a slightly more forceful way, if comment is a personal take on primary facts that are "out there" then it is only comment if it is honestly believed. A "comment" that is not believed by the defender to be true is no comment at all; just words stringed together (possibly in order to injure the pursuer).

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

Yes. Changes from the current common law must be made and are the sort of changes which a statute is well (probably best) placed to achieve.

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?

The first thing to note is that the DP is absolutely right to retain the label of "comment" rather than "opinion": as explained at some length elsewhere (E. Descheemaeker, "Mapping Defamation Defences", 78 *Modern Law Review* (2015), 641), this is what the defence has always been about in English law (from which Scots law lifted it); indeed, even after the 2013 Act, it is not limited to opinions in the sense of assertions of non-falsifiable matter. The defence was and remains concerned with authoritativeness rather than falsifiability: matter that is represented as true by the very fact that it is asserted must be justified (in the sense of the *veritas* defence); on the other hand matter that can be seen to be the defender's take on prior facts ("primary facts") is comment and need not be so justified.

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?

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?

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?

13-15. The first question immediately raises the issue of the relationship between the comment and its basis. In English and Scots law the requirement emerged that (i) there should be a visible factual basis to the comment (either through direct reference or because these facts are already widely known) and that these facts should be true, or more accurately protected by a defence (which could

also be qualified privilege).

This requirement conflates analytically separate issues and creates much confusion. The existence of a basis of fact that should be known to, or knowable by, the recipient simply works out what it means for the incrimination to be recognisable as comment. If it is an obvious opinion (*example deleted as confidential*) the requirement is superfluous, but if it is a fact it is crucial to ascertain whether it is a primary fact that must go to justification ("XX stole my laptop") or a secondary fact that only needs to be honest to be protected (e.g. I have previously asserted the following three primary facts: "my laptop disappeared"; "only XX was around when it happened"; "he blushed the next time I saw him").

In practice, in the context of "traditional" media against whom most actions are brought in the UK, the same defender would have stated both the facts – assumed to be defamatory themselves – and the inference drawn from them. This explains why fair comment as it has evolved really conflates two layered defences: one for the underlying facts (justification, privilege etc) and one for the comment properly so called. Analytically these can and should be distinguished. There is no reason why the comment should be based on explicitly stated facts, even less so that these facts should be true or otherwise protected; the only necessity is that the statement should be recognisable as derivative from some pre-existing facts "out there".

The best stance for the law to take would be as follows: (primary) facts, if and when they are asserted by the person who also comments on them, must be defended according to the provisions that relate to them (e.g. truth, privilege, responsible journalism); the comment itself – insofar as it is recognisable as such – only needs to be honest to be protected.

A key question is how to deal with commentators who (as is common for instance on social media) do not themselves assert facts. There are logically four possibilities:

i. an explicit reference is provided (e.g. hyperlink);
ii. no source is given but the facts relied upon are generally known or knowable, e.g. because they are in the news;
iii. neither of the above applies but the statement is nonetheless recognisable as comment;
iv. neither of the above applies and the statement is not recognisable as comment.

On (i) and (ii) the current law (before and after the Defamation Act 2013) is that those facts must be defended in and by themselves for the defence of fair comment/honest opinion to apply. This strikes me as absurd both in terms of logic (how could one's comment encompass another's statement of fact?) and of justice (it makes the commentator responsible for the facts relied upon, putting him in a worse position than the primary asserter of those facts; by so doing it also removes much of the usefulness of the defence).

The best course of action, as mentioned above, would be to remove the necessity of underlying facts from the defence: these would only need to be defended if and when they are in fact asserted. Failing this, at the very least the law should make it easier to defend those primary facts. The suggestion made in the NI Consultation Paper, i.e. to extend the protection to facts reasonably believed to be true (§3.39) is a good one, especially if it is coupled with a generous judicial interpretation whereby a non-professional journalist is prima facie justified in relying on facts provided by others. Requiring only honest belief in the truth would give the defence effectively the same teeth as the uncoupling of facts and comment argued for above.

Scenario (iii) makes the same point even clearer: as the law stands it seems that such bare comment

("X is a disgrace to human nature") necessitates the proof – or other protection – of facts sufficient to hold the opinion; in other words the defender is required to make and then defend statements of fact about the pursuer that he did not in fact make in order to be protected in the inference that he did make. This is absurd.

Scenario (iv), on the other hand (e.g. "XX stole my laptop" without the disclosure of primary facts), should be treated as an allegation of fact, going to truth rather than comment. This is consonant with first principles.

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

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?

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

16-18. Given that changes from the current common law are likely to be wanted, and the fact that the seminal authority for the defence in Scots law is an English case whose authority has now been superseded in its original jurisdiction, the *Reynolds* defence is indeed a prime candidate for inclusion in an Act of Parliament. The question is what form it should take.

As argued in much greater length elsewhere (E. Descheemaeker, "Three Errors in the Defamation Act 2013", 6 *Journal of European Tort Law* (2015), 24), the statutory defence enacted in England in 2013 is highly problematic. One principal reason is that it hinges on a concept, "public interest", which is not only notoriously open-textured but is now being used in a novel sense: whatever public interest might have meant in the law of defamation, it always applied to the *subject-matter* of the incrimination, not the circumstances of its disclosure (for which a complex battery of duties and interests were pressed into service). In its newer sense, "publication in the public interest" seems to be no more than a token of approval: a "good thing" as opposed to a "bad thing". This is seriously damaging for the clarity and accountability of the law.

The main reason for this unfortunate turn of events would appear to be the desire to bring the nascent defence of reportage into the *Reynolds* defence when its basis is in fact completely different. The result was that the Supreme Court – which heard the appeal in *Flood* at a most unfortunate time – and then the British Parliament were forced to settle for the vaguest possible formulation of the defence: language that was broad enough to encompass two entirely distinct rationales, i.e. reasonable belief in truth (mainstream *Reynolds*) and warranted republication independently of any truth value (reportage). These absolutely must be disentangled if the defence that has stemmed out of the seminal *Reynolds* case is to remain intelligible.

The gist of ordinary *Reynolds* privilege was best encapsulated to my mind not in any British case but by the Supreme Court of Canada in *Grant v Torstar* (2009) in the words of McLachlin CJ,

> "I … would formulate the test as follows. First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances"

In other words this really is a defence of "reasonable truthfulness", where the defender argues that he ought to escape liability because he tried reasonably hard to get it right.

If this is true then it follows that the defence is properly limited to statements of fact. This, indeed, makes much sense: truth and *Reynolds* go to justifying a statement of (primary) fact; fair comment secondary facts and opinions; while qualified privilege cuts across these as protecting the context of a defamatory disclosure rather than its content.

Reportage, on the other hand, is predicated on the view that, in some circumstances, it is perfectly justifiable to repeat a defamatory incrimination (whether fact or comment) that was made by another, without endorsing it or taking a stance as to its truth value. This can only be understood against the background of the rule of repetition whereby the repeater is prima facie treated as the main "asserter" of a statement.

The rule of repetition is absurdly broad and the defence of reportage is accordingly to be warmly welcomed. But it is arguably too ill-formed at this stage to be put in statutory form. The danger of getting it wrong is too great. Courts must work out the shape of the defence and ideally relate it to other ways of qualifying the rule of repetition (such as the great number of qualified privileges, whether statutory or at common law, for reports). Not putting it on a statutory footing is in no way a problem provided it is made clear that the defence of responsible publication (in its *Grant v Torstar* form) is not to be read as excluding other possible defences.

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

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?

19-20. The position of internet intermediaries highlights much of what is wrong with the English/Scots law of defamation. As with a number of other requirements of the prima facie cause of action, the law starts with an absurdly broad definition of what counts as a publisher, only to backpedal frantically at the defences stage, involving itself in considerable – and, to my mind, entirely unnecessary – difficulties in the process.

At common law, everyone who is facilitating the publication of a defamatory statement is regarded as a publisher provided they are more than a mere conduit (it is not clear where the line is drawn between the two: e.g. in the offline world, the Post Office is a mere conduit but a public library stocking a newspaper or a paper boy selling it are [secondary] publishers potentially liable in defamation). In the offline world this did not really matter as, in practice, they would be most unlikely to be sued, even less so to be sued successfully given the additional defence of "innocent dissemination" that they can avail themselves of.

As often what the online world does is not so much to create a new reality requiring new or different rules, but to bring the inadequacy of existing rules into sharper focus. Due to the possible anonymity of the primary publisher, the practical difficulty of getting a remedy against them (especially in a cross-border situation) and the fact that what they really want is often to have a statement taken down so as to prevent further publication rather than damages, pursuers really do sue internet intermediaries in

defamation.

I have no principled objection to the taking down of a statement on the internet or access to it being blocked by an intermediary having technical control: the online world is subject to the rule of law, and to policing, every bit as much as the offline one. Like many other forms of material, from apology of terrorism to pedopornography, defamatory statements available online might be found to be unlawful and action taken in consequence. But it is absurd to sue intermediaries as defenders (even subsidiary ones) in a defamation action, just as much as it would be to say that e.g. Blogspot promotes terrorism because a blog it hosts does.

Internet intermediaries, to the extent that they are regarded as secondary publishers, can avail themselves of all the defences available to offline facilitators, including innocent dissemination. But they have also been given an additional ad hoc defence in the guise of s 5 of the Defamation Act 2013.

This provision is especially interesting because it exposes the clash of logics between defamation actions and policing the internet. On the face of it, it presents itself as an ordinary defence to an ordinary action in defamation, i.e. where P is suing D for having published a statement liable to cause others to think less well of them. In reality what the defence requires is essentially for the intermediary to do one of two things: either establish a line of contact between poster and complainant to allow the latter to sue the former directly, or remove the statement complained of.

But neither of these options makes much sense if the intermediary has committed the legal wrong of defamation, which is supposed to be the case. You do not normally escape liability in delict by pointing the finger to someone else; and removing the cause of harm would only reduce the quantum of damages, not remove the liability altogether. This gives away, to my mind, the fact that s 5 is not a defamation defence in any meaningful sense of the term; it is a mechanism to police the internet which has been misplaced in a Defamation Act (creating great injustices in the process: why should people complaining about defamatory statements be given a privileged position)?

More importantly perhaps, the policing mechanism is a perverse one. Assuming satisfactory contact cannot be established between the two “real” parties, the alternative for the intermediary is simple: either remove the statement complained of or risk being sued. It is not difficult to see why they would opt for the former: besides the sheer hassle and cost of defending a defamation action, their position would be highly precarious given the difficulty for someone who is not a publisher in any real sense of the term to rely on such defences as truth, responsible publication etc. Accordingly they are likely to indulge the complainant’s request.

But *why* should they remove the statement? No legal wrong has been established (it is not even clear that any has been *alleged*). Even from a policing-the-internet perspective, it would only be justifiable if it was unlawful, i.e. defamatory-in-law (taking into consideration all defences). But of course the intermediary is not a court of law and is utterly unable to adjudicate on such a question. What they might do is judge whether it is prima facie defamatory – so much is generally obvious – but they have neither the factual nor the legal knowledge to decide whether the statement is a libel in the legal sense. (Indeed the MoJ guidelines suggest that they should take at face value the complainant’s assertion that the statement is “factually inaccurate” or contains “opinions not supported by fact” [§9], which are neither necessary nor sufficient conditions for a libel to be constituted.) If they are afraid of being sued, they will simply remove the material because someone does not like it: the potential for stifling free speech, in particular the publication of *justified* material (e.g. defamatory but true), is

enormous. This provision is wrong in every respect.

What we really need is to draw a clear and satisfactory line between (real) publishers and non-publishers. Most internet intermediaries are not publishers in any meaningful sense of the term and so should not be potential defenders in a defamation action in the first place. This would render the law of defamation clearer, more logical and more protective of free speech.

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?

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?

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

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?

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?

This is typically the sort of provisions that should not be included in an Act. For one thing, there is no particular reason why these specific contexts should be dealt with by ad hoc provisions rather than the application of general principles. Additionally these factual contexts are those most likely to vary dramatically in the near future: a label used in 2016, such as “aggregation service”, might mean something very different in 2020, rendering the 2016 rule unsuitable; additionally new realities will almost certainly come into existence that will not be accounted for by the law, thereby creating further difficulties. The temptation to tweak either the substance or the formulation of the law in response to any new technological development must be resisted at all costs.

In terms of the substance of the law, most of these intermediaries should not be regarded as publishers in the natural sense of the term, which would terminate any defamation action brought against them. While predictive results in a search engine should logically count as primary publication, the search engine operator would escape liability on the basis that the publication, being automated, would lack the required element of intentionality. Again, someone who sets a hyperlink should not be any more responsible for the content of the page linked to than one referencing a book in a footnote. Besides the usual difficulties (e.g. they might not even be aware of the defamatory content) there is the additional fact that the content of a page can be altered ex post the publication of the link. It is unacceptable on the most basic principles of justice to hold someone accountable for something they have no control over. The only way to avoid liability would be to refrain from hyperlinking altogether: this would be as undesirable as banning footnotes in academic works.

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?

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?

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?

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?

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?

Qualified and absolute privilege are both difficult doctrines. It is less than clear why they exist and have the shape they currently have. This is especially true for qualified privilege, which like fair comment (and perhaps what has now become absolute privilege) emerged as a way to rebut the presumption of malice. In ordinary situations of qualified privilege, i.e. those based on limited disclosure in the context of a special relationship (e.g. past employer writing a reference letter to a prospective one), the existence of reciprocal interests or duties dislodged the presumption of malice and made it necessary for the pursuer positively to prove some sort of spite or ill-will. This, however, is not true of the very great number of privileges for reports, which really are (like reportage) concerned with the warranted republication of defamatory statements made by others.

Both subcategories are crying out for rationalisation. However this cannot be done in a simple way. The situations in which one is justified in repeating a potentially false and defamatory statement without having to bear the risk that it might not be provably true is one of the most pressing concerns that the law of defamation should address. It is hoped that courts will do so as they further engage with the nascent defence of reportage. On the other hand, it is not clear that the continuing existence of a defence predicated on the rebuttal of malice makes sense when the paradigm of defamation has been moving decisively away from *animus iniuriandi*. But these are questions which go beyond the brief of the current reform project of the Scots law of defamation.

Against this background it is believed that the least bad option would be to align Scots law on English law and, accordingly, to replicate s 7 of the 2013 Act in the forthcoming statute. This would at least provide consistency across Great Britain.

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?

No. There does not appear to be any reason why academic discourse should be treated differently from other forms of public interest speech. At any rate it is well covered by existing defences.