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

n/a

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 doubt there will be any significant economic impact, given the low volume of defamation claims seen annually in Scotland.

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

Absolutely. The archaic provisions under Scots law which countenance a claim for *solatium* where publication is to the pursuer alone are indefensible in a modern legal system. Such provisions fail to give appropriate weight to (a) the fundamental purpose of defamation, which is to protect reputation (which *ex hypothesi* is not affected by a publication to the pursuer alone); (b) Article 10 rights (which include the right to shock or offend); and (c) the need for proportionality, which suggests that even in the case of third-party publication a small number of recipients may mean that the costs of a claim in defamation is "not worth the candle" [or even the wick]: *cf. Jameel v Wall Street; Ewing v Times Newspapers*. In the event of repeated baseless accusations being made to the pursuer alone for malicious purposes, other remedies are available, such as under anti-harassment legislation. There is, now, no need for the law of defamation to respond to such circumstances, and several cogent reasons why it should not.

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

A requirement for substantial harm, similar to that now applicable in England, would in my view be appropriate. The problems discussed above re proportionality mean that it is difficult to justify a legal system which allows claims to be made where no substantial harm has resulted.

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

A requirement that there be publication to a third party with consequent substantial harm to reputation would, it seems to me, suffice.

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. There can be no justification for excluding companies or the like from claims in defamation.

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

Having initially been attracted to a requirement, such as that applicable under English law to show actual or potential serious financial loss, I have come to the view that this is overly-prescriptive. If a requirement for "substantial harm" is already being introduced as a threshold for any claim, it seems to me that this would suffice to protect against

unmeritorious corporate claims. The law could then develop incrementally in a way which would not impose unnecessary hurdles on a corporate pursuer. Whilst in many or even most cases, one would expect a corporate claimant to be able to show an actual impact on trading receipts, so requiring in every case would not cater for situations such as those where multiple effects on trading profitability are in play, nor for situations where the corporate pursuer was newly formed and thus had no demonstrable trading ability.

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

It probably makes sense to update the law and the terminology, moving away from *veritas* and towards substantial truth.

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. Whilst the concept of public interest is broadly interpreted in the law as it stands, there is no obvious reason why it is a necessary part of the defence of honest comment. Parties should be able to comment freely on private matters as well as public ones, as long as they do so honestly.

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

Yes. Absence of honest belief in general would deprive the defence of fair comment of any legitimacy. A system of law which allowed malicious imputations to be advanced merely on the basis that they were comments rather than assertions of fact would not strike the correct balance between Articles 8 and 10.

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

(Paragraph 5.21)

Comments on Question 11

This would be of some assistance. The precise boundaries of the defence of fair or honest comment are presently in some doubt, following the decision of the Inner House in *Massie v McCaig.* In particular, it is presently unclear as to whether or not the requirements of the defence under English law (*Joseph v Spiller*) are echoed under Scots law. Given the lack of case law in Scotland on this particular defence (prior to *Massie* the last appellate decision was in *Wheatley,* in 1927), codification would be sensible and helpful.

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

The primary doubt left open by *Massie v McCaig* is as to whether "malice is part of the equation" (2013 SC 343 at [30]). Resolution of this question is not assisted by the fact that in the subsequent opinion in *Massie* ([2013] CSIH 37, at [7]), the Inner House asserted that nothing said previously was in conflict with the decision in *Joseph v Spiller.* With respect, it is difficult to understand that assertion: *Joseph* makes it clear that malice (in the sense of dishonesty) would defeat the defence, whereas in *Massie* the indication was that "malice is not part of the equation".

It may well be that when the Division said that "malice is not part of the equation", it had in mind malice in the sense of an intent to injure, and not in the sense of dishonesty. If that is so then it is correct to say that there is nothing in *Massie* which is dissonant from what was said in *Joseph,* and that *animus iniurandi* will not defeat the defence (in either jurisdiction), but that dishonesty will. It respectfully seems to me that this ought to be clarified, and that the clarification should follow the development of the lines in *Joseph*: a dishonest comment is actionable, but an honest comment is not – even where it was made with the intent to hurt.

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. The justification for the defence, as I see it, is that the "audience" is in a position to judge the comment for itself. As long as the defence requires the commentator to state, at least by reference, the facts upon which his comment is based, the audience is put in that position. If one starts to introduce a requirement that the facts provide a "sufficient basis" for the comment, then one starts to introduce notions of censorship which have no place in the law of defamation. A complete disconnect between the facts stated and the comment offered

might be evidence of dishonesty on the part of the commentator, but it seems to me that if one starts to require the court to assess the sufficiency of the factual underpinning for the comment then one enters very dangerous territory. A statement of opinion that X was a disgrace [plainly a comment] because he had voted for the Y political party would satisfy the modern requirements for the defence: as long as it is made honestly, the audience is able to listen to the comment and its factual underpinning, and make its mind up for itself. Requiring the court to judge whether or not the facts provided an adequate foundation for the comment would complicate matters significantly, and one can envisage real difficulties for a court in assessing what is, or is not, a "sufficient basis".

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. The purpose of the defence is to allow comment to be passed on true facts (or facts covered by privilege). If the facts did not exist at all at the time of the comment then the justification for the comment is absent.

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

The factual underpinning should either be true, or covered by privilege. Allowing the defence where defamatory comment is made on "facts" which are not actually true or covered by privilege, merely because they were reasonably believed to be true, would overly extend the defence.

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

(Paragraph 6.15)

Comments on Question 16

Yes. A codification of the *Reynolds* defence, along the lines seen in the 2013 Act, would be

welcome.

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. The criticisms of the fact that this is the situation in England do not seem to me to be of particular force. Moreover, the utility of such a defence is amplified in the event of public interest being removed as a factor in the defence of honest comment, as is being considered.

The point of the public interest defence is that it should be available to protect speech of whatever nature as long as the public interest favours the utterance. It would be anomalous to say that such a defence is lost merely because the speaker was commenting rather than making a statement of fact. In many cases, an utterance in the public interest will involve a combination of statements of fact and opinion thereon. To protect only the former and not the latter would be anomalous.

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 should. Reportage provides protection where there is a political "spat" which it is appropriate to bring to the public's attention, whether or not the reporter believes the comments or accusations made in the course of that spat to be true. As long as the reporting is undertaken neutrally, it seems to me to be appropriate to allow for a defence of reportage in such circumstances, as otherwise the ability to publicise such matters is unjustifiably hindered.

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

(Paragraph 7.33)

Comments on Question 19

Ideally, yes – although I do not underestimate the task in anticipation. As the Discussion Paper indicates, the law as it presently stands is confused and confusing, with a number of statutory and common law principles creating a patchwork quilt which is neither easy to advise upon nor easy to apply. It can also be said with some force that the law has struggled to keep pace with technological developments in this area.

Nevertheless, the stark fact remains that for internet publication claimants are likely to litigate elsewhere. Given that publication on the internet is published wherever it is accessed, it is likely that jurisdiction can be found in the specialist media courts in London. There has been little in the way of defamation litigation based on internet publication in Scotland. Proportionality therefore perhaps dictates that the wholesale review that would be necessary purely to address this point under Scots law might not be a profitable use of money or resources. The new English regime under s.5 has its critics, but it is an improvement over what existed before its inception.

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

As before, it would be an improvement notwithstanding the deficiencies identified in the paper.

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

A more up-to-date definition of “publisher”, taking account of such matters, would be helpful.

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

Yes. Similar principles are in play.

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. That seems to me to be unrealistic: liability should rest with people who make, publish, repeat or endorse defamatory statements. To impose liability on someone who allows another to find such statements seems to me to be a step too far, and would verge on censorship.

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

n/a

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

I answer this in the same way as Question 23 – the principles seem to be to be broadly similar.

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, unless a complete codification is contemplated. Otherwise, the law is clear.

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 the Paper that it is difficult to see a good reason for not making this extension.

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

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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

The format of the 1996 Act with its various schedules is perhaps not the most user friendly. But equally I am unaware of any particular difficulty arising therefrom, and do not consider there to be a pressing need for reform.

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. The law here is sufficiently settled.

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. The adoption of s.6 plus the existing defences of honest comment and public interest / *Reynolds* privilege seem to me to provide adequate protection.

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

The only area where I suggest consideration might be merited relates to the rule in *Bonnard v Perryman*, which has formed part of the law of England for over a century yet which is not part of Scots law – a point reaffirmed in *Massie v McCaig.*

The introduction of s.12(3) of HRA perhaps means that there is no need for any change here: both jurisdictions require to follow s.12(3) which might be said in many ways to supersede *Bonnard.* Moreover, it is arguable that the rule in *Bonnard* gives insufficient weight to Article 8 rights, and that it has seen an artificial tendency towards other causes of action, such as "false privacy", in order to avoid the invocation of the rule.

Nevertheless, if the law of defamation is to be the subject of significant overhaul, it seems to me to be worth considering whether the *Bonnard* rule should be imported into Scots law.

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

(Paragraph 9.12)

Comments on Question 33

I do not see any need for this. The procedure, which is extremely useful and now well-used, is stated in three sections of the 1996 Act, and readily accessible.

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. The decision in *Moore v SDR* is anomalous, and the reasoning of Eady J in *Tesco Stores v Guardian News & Media* is more consistent with the legislative policy. Building on that, either rejection of an Offer of Amends, or the expiry of a given time limit for acceptance (whether stated in days or weeks, or merely by way of a requirement to accept within a "reasonable time"), should mean that parties thereafter know where they stand and can litigate on the basis that the Offer cannot thereafter be accepted.

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 suggest that the Commission might want to consider whether the repercussions of *Warren v Random House* are consistent with the legislative intent. In terms thereof, a pursuer who is given a qualified offer amends may embark upon two separate litigations: a Minute to enforce the Offer of Amends, and a separate claim in defamation insofar as the publication complained of (or the meanings therein) are not covered by the qualified Offer. Dual litigation such as that is difficult to justify, and I wonder whether a better solution would be to say that t pursuer accepting a qualified Offer has a simple choice: *either* accept the Offer and enforce it alone; or accept it on the basis that he still insists on the other meanings complained of – in which case the claim would still be litigated, with the accepted Offer falling to be dealt with as part of the ultimate decision. Otherwise there are potential difficulties in double compensation, assessment of damage to reputation, and the like.

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. IPSO ejoys such a power, and I cannot think of a good reason for denying it to the Courts.

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

Such a power probably already exists, under reference to the Court of Session Act 1988 and actions *ad factum praestandum*. I have certainly obtained such orders under the existing law. But it would make sense to make express provision therefor.

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 understand that this is deemed extremely useful under English procedure, and cannot see a compelling reason why it should not be adopted in Scotland.

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

I consider that Scotland should adopt the same limitation period as that applying in England and Wales, as otherwise one is simply encouraging libel tourism. Someone complaining of defamation can be expected to "get a move on" in order to protect his or her reputation, and so I cannot see any justification either for a longer limitation period or, all the more so, one which is of a constantly renewable nature.

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

n/a

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

(Paragraph 10.20)

Comments on Question 41

As discussed above, 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

Again, I consider that this should be so.

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. A longstop of five years would be more consonant with the points discussed above. If a person is unaware of a defamatory allegation for more than five years, it is perhaps indicative of a lack of serious harm to reputation.

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

It is true to say that there are but isolated incidences, so far, of "libel tourism" in Scotland. I myself have come across only three in 15 years of practice: *Ewing v Times* (to get round the fact that the pursuer was a vexatious litigant in England); and two other cases, which settled, raised in Scotland as a result of being time-barred in England. It is thus difficult to say that there is a pressing need to deal with "libel tourism". Equally, however, in order to deal with the potential therefor, I cannot see a convincing objection to measures such as those taken south of the border.

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 query whether defamation should remain an enumerated cause. The law is becoming ever more complex, and such cases are accordingly less and less suited for determination by jury.

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. I was part of the Faculty Committee which responded to the previous suggestion made in this regard by the Scottish Ministers. I do not consider that the limited justifications advanced for such a change in the law are sufficient to override the significant objections thereto. I should be happy to make the Faculty response available, if the Commission does not have this already.

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

If the law is to be changed, then only spouses, parents or children should be able to sue. The much wider range of relatives entitled to sue for damages for actual death would be

inappropriate in this context.

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, as above.

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

If permissible at all, the same one year time limit discussed above should apply.

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 permissible at all, I would not support any such restrictions.

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

These are almost unknown in my experience. I have dealt with one case of verbal injury, and none in the other categories.

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 do not consider there to be any need for reform in this area, given that the law is relatively certain and very rarely invoked.

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.