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**To:** SLC info  
**Subject:** Defamation

DP 161: DEFAMATION

I'm no expert in the law of defamation, so the value of the following is limited!

As you will see, I offer views on only a minority of the questions.

I incline to think that the law of defamation has done, and continues to do, more harm than good. Accordingly I incline to think that the delict of defamation should be abolished. No doubt the abolition would have some adverse consequences, but these would be likely to be outweighed by the benefits of abolition. Of course, I entirely understand that the ideal of abolition is not possible at the present time.

(There is also the question of why we have a separate nominate delict, called defamation, whereas the rest of the law of delict is in principle unitary, ie our law is in general a law of delict, whereas in England there is a law of torts, not a law of tort. In other words, the existence of the delict of defamation is arguably anomalous in terms of the principles of private law. But I merely mention this thought, and do not seek to develop it or to derive any conclusions from it. In this response my objection to the delict of defamation is substantive, not taxonomic.)

Given that the delict of defamation will continue to exist, I favour a vigorous haircut, ie as much alteration of the law in favour of defenders as can reasonably be achieved.

Q3. I would agree, but would suggest that the doctrine in question is not part of the law of defamation, because it is not about harm to reputation – to fama. But see further my response to questions 6 and 7.

Q4 and Q5. Section 1 of the 2012 Act naturally appeals to me, given my views – see above – about the law of defamation. Nevertheless I struggle with its logic. For delict in general we do not say that minor harm is unactionable. If the delict of defamation merits retention (which in my view it does not) then why should it be different in this respect from delict in general? If harm is minor, that should be reflected in the quantum of damages, as happens in delict claims in general. (And cf breach of contract claims.)

Q6 and Q7. I offer no direct answers. But there may be a case for limiting defamation claims to patrimonial loss – in effect, extending s 1(2) of the 2013 Act to all defamation claims

There is a link here with the issue raised in Q3. Should there be damages for non-patrimonial loss? Or not? If "yes", why abrogate the rule in *Mackay v McKankie*? If "no" why continue to allow it in ordinary defamation claims? Which is it?

I would add that a claim for patrimonial loss should have to be proved, not presumed, as is true of delictual actions in general.

Q9. Yes.

Q 16 and 17. Yes.

Q 18. Reportage should be covered by the legislation.

Q33. Yes. More broadly, as a matter of legislative technique it would be helpful if all existing statutory provisions about defamation could be consolidated in the new bill (including those bits of the 2013 Act that apply in Scotland). This would be useful to those who have to deal with the law – journalists, solicitors etc. It may also be worth respectfully mentioning that s 3(1) of the Law Commissions Act 1965 calls on the two commissions to pursue “the reduction of the number of separate enactment.”

Q 46. Juries should be abolished in all civil proceedings.

Q 47. I oppose this suggestion. The idea of an additional category of competent defamation claims depresses me. One shudders to imagine the consequences. The Ozzies have this right. The German rule is a bad one but at least it is confined to the Strafgesetzbuch, so that some rational control happens via the common sense of the Staatsanwaltschaft.

Best,

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