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

Why does the Scottish Parliament not adopt the wording (in total) of the whole Defamation Act 2013?

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

Given that libel actions have reduced considerably since the coming into force of the new Act (England & Wales) – this has already had a positive impact on 'libel tourism' in the High Court/ London. I can provide no example (for my current version of the textbook 3rd ed.) as settled case law given the substantial threshold of the 'serious harm' test ((s1(1) Def. Act 2013). All anecdotal cases have settled out of court (i.e. non-reported court actions – e.g. *Niall Horan* (of 'One Direction') *v Express Newspaper group* (*Daily Star*) Dec. 2015; *Serrano Garcia (Jose Antonio) v Associated Newspapers Limited* (2014)).
[*Remainder of response deleted as confidential****]***

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:

The 'serious harm' test (as per s1(1) DA 2013) should be introduced. Since the 2013 Act has been in force, English courts have regularly struck out potentially trivial cases at first hearing on the basis that they are an abuse of process because they do not meet the s 1 'serious harm' threshold test. In **Cooke v Mirror Group Newspapers Ltd** [2014] EWHC 2831 (QB), Bean J accepted that evidence is admissible and may be necessary on the issue of whether serious harm to reputation has been or is likely to be caused (at paras 37 – 39).

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

Without being too obvious and telling the Scottish Law Commission about its own laws, the main difference between English and Scots defamation law is that an offending statement may not necessarily be defamatory and forms part of delict (Roman law). Scots law then refers to 'hurtful words', and is similar to German or French law in this respect i.e. being essentially harmful to the character, honour or reputation of the affected person ('the pursuer') because it is 'derogatory' or 'disparaging' or 'demeaning' or 'calumnious' in the eyes of the reasonable person. It is then more akin to 'malicious falsehood' (or 'malice') in English law or a slander of title. Whilst English law makes the distinction between libel and slander, Scots law does not make this distinction, making 'defamation' a separate delict amounting to 'verbal injury' or *convicium*. Present Scottish law centres on the ('defamatory') statement which must be false and must lower the defamed in the estimation of right thinking members of society. There is also a separate delict of 'invasion of privacy' in Scots law, linked to Article 8 ECHR, in which the making of a statement may give rise to liability to an attack on someone's reputation. These variables (the delict and the privacy aspect, should be brought under one 'law' of defamation in order to assess damages if proved. Since there has been little precedent set by the Scottish courts to put a precise figure on 'injured reputation' or 'hurt feelings', Scottish judges can at times find it problematic to assess the seriousness of an account for damages in relation to the defender.

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

This question addresses 'injury to business reputation'. Many people tend to think of

defamation law in connection with someone's conduct or character in their personal life. This may be because common law in the past tended to focus on *individual* litigants. Recent case law has allowed for defamation actions in relation to corporate reputations and companies' ability to sue for defamation for injury to their business reputation. Presently, the basic principle remains: the tort of defamation exists to protect against blatantly untrue damaging statements which can potentially ruin a company's business acumen and international standing (English and Welsh law – see: *Derbyshire County Council v Times Newspapers Ltd and Others* [1993] AC 534). It was held in ***Jameel No 3*** (2007) that a corporation *can* sue for defamation on its reputation and may recover damages without proof of special damage (i.e. economic loss). By a majority of three to two, the Law Lords agreed that reputation is a thing of value and applies equally to companies as to individuals (see: *Jameel (Mohammed) v Wall Street Journal Europe Sprl (No 3)* [2007] 1 AC 359). I would agree with Baroness Hale (dissenting in *Jameel No 3*) - quoted the constitutional writer Weir - that a 'company has no feelings' which "might have been hurt and no social relations which might have been impaired" (at para 154). If trading corporations and large conglomerates are permitted to sue in defamation (as is the case in English law) they should only be able to do this in law in respect of an attack on their *business reputation* and not any other reputation (e.g. performing charitable duties – for this would simply be an indirect way to protect the company's business reputation). I would contend that the company has to show *actual* loss (under the 'serious harm test') and be able to prove special damage.

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

The idea that loss of reputation has such a high-perceived monetary effect on a company libelled formed part of the discussion when the Defamation Bill/s in Australian legislatures were discussed. In 2005, the federal Government in Australia passed legislation preventing corporations (other than not-for-profit organizations or small businesses of fewer than ten people) from suing for defamation (see: *Defamation Act 2005 (Australia)* as at 15 October 2015).

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

Absolutely. Before an alleged defamatory statement can be considered 'defamatory', defences of truth in form of 'honest opinion' and publication on matters of 'public interest'

should be formulated and incorporated in statute. This means the still-existent *Reynolds* defence should be abolished (common law). There should also be the introduction of greater protection for operators of websites.

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. See my comment in para 8 above.

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

The common law defence of 'fair comment' should be replaced by a statutory defence of 'honest opinion'. This would broadly simplify and clarify these defence elements, but does not include the previous requirement for the opinion to be on a matter of public interest.

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

(Paragraph 5.21)

Comments on Question 11

See above in para 10. 'Fair comment' should be abolished and put on a new statutory comment of 'honest opinion'. There could then be an additional safeguard in law which would make certain conditions:

Condition 1: that the statement complained of was a statement of opinion;

Condition 2: that the statement complained of indicated, whether in general or specific terms, the basis of the opinion; and

● **Condition 3**: that an honest person could have held the opinion on the basis of any fact which existed at the time the statement complained of was published or anything asserted to be a fact in a privileged statement published before the statement complained of.

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 *Reynolds* defence (and the 10-point criteria which is a very tall hurdle for any defendant to prove) should be abolished and subsumed by statute e.g. statute should provide for the defence to be available in circumstances where the defendant (e.g. newspaper or online publication) can show that the statement complained of was, or formed part of, a statement on a *matter of public interest* and that the journalist or publisher reasonably believed that publishing the statement complained of was in the public interest. This would also incorporate Art 10 ECHR. The public interest at the time of publication is an objective test.

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

Provision should be made in statute which provides 'privilege' given to comment in peer-reviewed statements (e.g. academic journals or book reviews) and should extend to publication of a fair and accurate statement or assessment. This applies to material that is 'substantially the same' as the original publication. This must exlude malice which would safeguard a person's reputation (or 'honour').

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

The *single publication rule* should be introduced into statute thereby abolishing the 'multiple publication rule' (Re. *Brunswick*). There should be a one-year limitation period from the date of the first publication of that material to the public or a section of the public. This should include online publications (*Budu v BBC* 2010] EWHC 616 of 23 March 2010 (QB)). This measure would also underpin freedom of expression under Article 10 ECHR by providing far greater protection to publishers and authors.

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

See my comments above.

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

(Paragraph 6.15)

Comments on Question 16

Yes (see my anwers above). This would limit the Scottish court's jurisdiction to hear and determine an action until and unless it is satisfied that, of all the places in which the statement complained of has been published, Scotland would be the most appropriate place in which to bring an action in respect of the statement. Since the measure is already in statute in England and Wales (s 9 Def. Act 2013) – it would be best to adhere to the same law to close the loophole for some 'forum shoppers' like Mr Ewing. This would also overcome the problem of courts readily accepting jurisdiction simply because a claimant frames their claim so as to focus on damage which has occurred in the Scottish jurisdiction only.

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

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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

«InsertTextHere»

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 a complex issue and case law is not quite clear on this. You could adopt the US stance that ISPs are only 'hosts' or 'walls upon which graffiti can be posted'. This was adopted by Eady J in *Tamiz v Google Inc* [2012] EWHC 449 (QB). I think operators of websites and ISPs should be made responsible for content (defamatory or harassment) once it has been brought to the notice of internet intermediaries (see: *Godfrey v Demon Internet* [2001] QB 201). This then limits the circumstances in which an action for defamation can be brought against someone who is not the primary publisher of an allegedly defamatory statement (see: *Lord McAlpine of West Green v Sally Bercow* [2013] EWHC 1342 (QB).

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

Yes, definitely. See my comments above. s 5 Def Act 2013 is so well constructed that it would be best to adhere to the same wording.

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

This links to the Google Spain ruling by the ECJ ('right to be forgotten' - *Google Spain SL v Agencia Espanola de Proteccion de Datos* (AEPD) (C-131/12) [2014] Q.B. 1022) – and this case has already set the precedent for all member states of the EU which is:

- The operator of a search engine is obliged (in certain circumstances) to remove links to web pages that are published by third parties and contain information relating to the data subject from the list of results displayed, following a search made via the search engine on the basis of that person's name ('de-listing' or 'de-linking');
- Courts (or regulators) have to balance the data subject's right to privacy and the

economic interest of the data controller;

- Activities of search engines and publishers of websites are liable to affect significantly the fundamental rights to privacy and to the protection of personal data;
- Article 10 ECHR includes the right of internet users to receive information (via internet search engines);
- Individuals playing a role in public life may not benefit from the right to be de-listed ('the right to be forgotten').

Therefore there is no need to introduce a measure into Scots law. The Scottish courts can rely on ECJ jurisprudence.

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

See above.

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

See above

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

The EU Data Protection Directive covers this (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data). ***Google Spain*** had wide-reaching implications on providers of search engines (such as Google or Bing) and operators of websites. Following the 'right to be forgotten' (RTBF) ruling by the ECJ in May 2014, Google and others were forced to establish a system to deal with requests for removal of personal (inaccurate or irrelevant) data.

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

See my comments above and relevant case law.

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

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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

An interesting question. The answer should be ‘yes’ but I cannot see international laws being changed (e.g. Geneva Convention) or the UN Security Council. Not all countries have the ‘open justice principle’ like the UK – though increasingly we see ‘closed courts’ and in camera proceedings (e.g. in ‘secret court’ and terrorism proceedings). ‘Absolute privilege’ is UK-specific and I cannot see it being introduced in the ECtHR (Strasbourg) nor the ECJ) Luxembourg).

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

See my comment in para 27.

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

s 2 Def Act 1996 ('offer to make amends') should be retained or reformulated in statute. This will keep matters out of court and reduce the high cost of litigatation. There should be three conditions:

- The publisher or newspaper (or online media) should make a suitable correction of the statement complained of and a sufficient apology to the aggrieved party;
- The 'defamer' should publish the correction and apology in a manner that is' reasonable'; and
- pay to the aggrieved party compensation and costs (this is at the discretion of the court/ tribunal/ mediator).

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

Unfortunately there does not exist any definition in law at present as to the meaning of 'qualified privilege' (e.g. s 15 Defamation Act 1996 does not do so). Until and unless 'qualified privilege' is properly defined in statute (codified) – there will always be judge-made law in this respect.

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

Contributors to academic or scientific discourse must be able to avail themselves of the defences of 'honest comment' or 'honest opinion'. Such primary defences must be

readily usable to deter attempts – particularly by large corporations - to bully the academic author of a critical report through the threat of legal action. Otherwise this would have a chilling effect on scientific speech (see: the Dr Simon Singh case - *British Chiropractic Association v Singh* [2010] EWCA Civ 350).

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

I agree: the law on interdict/ interim interdict should not be reformed. How else would be have found out about certain superinjunctions such as Ryan Giggs and the celebrity superinjunction of PJS?!

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

(Paragraph 9.12)

Comments on Question 33

Yes. See my comment above.

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

«InsertTextHere»

35. Are there any other amendments you think should be made to the offer of amends procedure?

(Paragraph 9.12)

Comments on Question 35

Damages in Scottish libel actions are compensatory rather than punitive (see: *Baigent v BBC* [1999] SCLR 787). This is a good idea and should be incorporated into statute.

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

Absolutely! This should be done 'prominently' (e.g. on the front page of a newspaper and online edition).

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

In an ideal world yes (operators of websites). But what do you do with operators of websits and ISPs that are located outside UK jurisdiction? We are back to the *Google Spain* case and have to rely on existing EU law.

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

Ideally the law should be so written that court ligitgation is avoided, due to the exorbitant costs. Court are open anyway – and soon we have courtroom TV (with Scotland being the forerunner in any case) – and all statements read out in open court can be published, recorded and read out.

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 (see above comments). The multiple publication rule (Brunswick) should be abolished in Scots law; the limitation period should be one year.

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

«InsertTextHere»

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

(Paragraph 10.20)

Comments on Question 41

Yes. One year.

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. To the court's discretion.

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

The long stop prescriptive period should be abolished.

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

The multiple publication rule should be abolished. This is the internet age!

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

Section 9 addresses the issue of 'libel tourism' and focuses the provision on cases where an action is brought against a person who is *not* domiciled in the UK, an EU Member State or a state which is a party to the Lugano Convention.

> This section applies to an action for defamation against a person who is not domiciled –
>
> 9 (a) in the United Kingdom;
> (b) in another Member State; or
> (c) in a state which is for the time being a contracting party to the Lugano Convention.

I have already addressed this point above. Scots law should adopt the full wording of s 9 Def Act 2013 so that there is UK-wide jurisdiction.

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

There are no libel jury trials in Scotland (and the 2013 Act removed jury trials in defamation actions from the English/ Welsh courts – subject to the judge's direction in very exceptional cases). This is welcomed and Scots law should remain 'judge alone' in defamation actions.

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

This is a moot point and has been discussed in the Scottish Parliament for some time (e.g. in relation to the family of schoolgirl Diane Watson, stabbed to death by a fellow pupil). It has been raised by those who are relatives of deceased who have been accused of historic child sexual abuse (e.g. Jimmy Savile or Sir Leon Brittan). A measure in law of this kind would open the doors for bereaved relatives of the dead to take an action if the reputation of a relative is traduced by the media after their death, possibly even invoking Art 8 ECHR. I think this would be an unwelcome development.

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

This point was discussed as the Defamation Bill passed through Parliament (specifically in the HL). But the part of the bill was defeated. It would only mean that aggressive litigants would use the threat of a very expensive libel action to suppress adverse coverage for many years – Art 10 ECHR – freedom of expression should prevail. Death must end any such threats. This allows journalists and authors (and victims of historic sexual abuse) to air allegations after a person has died. The families of the dead may be distressed at media coverage and it would be extremely worrying to think that they might be able to use human rights law (or Scots law) to continue to prevent legitimate exposure after their death.

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

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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

«InsertTextHere»

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

The law on defamation should be revised and include libel and slander (as in England). Both should be codified and defined in statute and be subject to the 'serious harm' test. There should be actual or future proof of economic loss. All the above terms should be abolished.

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

See my points made in para 52. 'Slander' should cover this term and 'verbal injury' should be abolished (too archaic).

General Comments

There are clearly increasing problems in relation to defamation conducted on the internet ('internet libel') and there has to be a concept of self-governance in cyberspace as opposed to governmental territorial legislation. The Defamation Act 2013 has already had some success in England and Wales due to the threshold of the 'serious harm' test under s 1(1) of the 2013 Act. Arguably, the existing definition of what is defamatory has not changed with the 2013 Act, and there is still no clear definition of what is meant by 'defamatory' (or indeed 'qualified privilege'). This might be the chance for the Scottish law-makers to improve on the 'English' Act. One thing is clear though: it has become more challenging to bring an action in defamation in the English/ Welsh courts and libel tourism may well have shifted to the Scottish and Northern Irish courts.

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.