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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

The existing scope is comprehensive, and I believe covers all the key issues raised with regards to the English Defamation Act 2013. I would consider it a shame that a codification of Scots defamation law is off the table, albeit for understandable reasons. I did consider it an opportunity missed when the English Act did not at least consolidate the existing statutory provisions that remain unchanged alongside the new measures in one single statute, even leaving all the rest to common law.

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

n/a

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

Wholly and unreservedly. That defamation should extend to protectingmere self-esteem in the absence of publication to a third party is at best quaint. I should think also that, were such a case to be considered in light of Article 10 of the European Convention on Human Rights, it would be found wanting. Conceptually, as defamation is, broadly speaking, understood to be about the protection of an individual's reputation, it is inconsistent to encompass within its ambit situations in which no publication to another party in whose eyes the subject's reputation can be maligned.

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 test in Section 1 is one of the great advances of the Defamation Act 2013 in England and Wales. (It may be of interest to Scots lawyers to note that in requiring at least the *likelihood* of harm to reputation be established, it marks a significant, if still only partial, dissolution of the difference between libel and slander in English law.) In requiring a claimant to actively satisfy the court that there is at least the likelihood of serious harm to reputation, it can help to avoid unnecessary and vexatious cases much more simply than requiring the defence to go through with an application to strike out on the same basis. It helps defamation law ensure an equitable balance between the right to reputation and freedom of expression, in line with the Convention rights. On this basis, it is laudable that Westminster went beyond the bare minimum of making this apply only in cases of a significant inequality of economic arms, apply it to all cases. (Article 1(2), of course, makes clear that this encompasses the sort of situation as was, regrettably, seen in *McDonald's Corporation v Steel & Morris* ([1997] EWHC QB 366; popularly known as the 'Mclibel trial').

Bean J, in *Midland Heart v MGN & Trinity Mirror* ([2014] EWHC 2831 (QB)), stated:

"I do not accept that in every case evidence will be required to satisfy the serious harm test. Some statements are so obviously likely to cause serious harm to a person's reputation that this likelihood can be inferred. If a national newspaper with a large circulation wrongly accuses someone of being a terrorist or a paedophile, then in either case (putting to one side for the moment the question of a prompt and prominent apology) the likelihood of serious harm to reputation is plain, even if the individual's family and friends knew the allegation to be untrue. In such a case the matter would be taken no further by requiring the claimant to incur the expense of commissioning an opinion poll survey, or to produce a selection of comments from the blogosphere which might in any event be unrepresentative of the population of 'right thinking people' generally."

As Bean J's shrewd analysis here makes clear, this is no significant burden upon those with a serious case to bring.

It should, of course, be recognised that while a welcome change to the law in theory, in practice it does seem to have created an extra layer of expensive hearings, so the continual, underlying problem of the sheer expense of fighting a libel action in English law will not be mitigated any by this provision in many cases.

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

Something which Scots lawmakers may wish to clarify if they go down this path of legislation is the exact point in time at which the court is to consider the appropriate oneto use for the purpose of analysing whether serious harm to reputation has occurred or could be likely to occur. To date there have been three reported cases on Section 1(1). In the first, *Cooke & Midland Heart v MGN & Trinity Mirror* ([2014] EWHC 2831 (QB)), Bean J held that there were two logical options – the date of issue of the claim, or the date of the trial / proceedings on the preliminary issue of serious harm. Bean J opted for the former. In *Lachaux v Indeendent Print, Evening Standard* [2015] EWHC 2242 QBD, however, Warby J preferred the view that the appropriate point in time to determine this matter was when the issue appeared before the court, thus meaning that the status of a publication could change from defamatory to non-defamatory between publication and time of the hearing (or, potentially, vice versa). One would raise concerns as to whether this might, in fact facilitate an unscrupulous publisher in publishing defamatory material, later to be followed up, in the event that a libel writ is issued, with an apology designed to dilute the impact of the original article such as to render it no longer 'serious harm'. Given the degree to which the tabloid pres in Britain has historically managed the bane and antidote test in order to publish scandalous rumours while remaining on the right side of the libel law by balancing them out with an equally firm denial, it is certainly conceivable that Warby J's preferred interpretation could be open to abuse. Notably, while it all happened prior to the issue of the writ, Bean J in *Cooke & Midland Heart*, in finding a lack of 'serious harm', took into consideration the fact that the defence had published an apology (which, indeed, had greater prominence and was much more likely to be found online than the original, allegedly defamatory, piece) which helped to reduce the likely harm done to reputation beneath the 'serious' level. It is easy to see how this could play out were Warby's standard to be used. In *Theedom v Nourish Training Ltd* ([2015] EWHC 3769 (QB)), HHJ Moloney QC referred to this as "an unresolved question of law" – one which he did not consider relevant in the immediate case, and so elected not to address. For the avoidance of confusion, it would be beneficial for any Scottish legislation to take a clear position on this issue. In respect of this issue, it would be worth reviewing this alongside the Offer of Amends defence (Defamation Act 1996 Ss2-4), on the basis that the defence is designed to assist a defendant who has genuinely attempted to resolve a situation with an unreasonable claimant. One would be inclined to argue that if this defence might be available, it would seem conceptually inconsistent to decline to permit the defence to argue that in a given set of circumstances their subsequent actions in attempting to put the matter right could not be considered as having mitigated any harm to reputation.

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. No fair-minded person wishes to see any rerun of *McDonald's Corporation v Steel & Morris* ([1997] EWHC QB 366), however, it would seem rather unfair to block a private, for-profit company from being able to sue where it had a legitimate grievance as regards

damage to its reputation.

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

Yes. In my view, Section 1 of the Defamation Act 2013 is a good standard in this regard. The Scottish Parliament might, however, wish to consider setting the bar somewhat higher. For instance, requiring proof of actual financial loss as a result of the alleged defamation, or at least an actual financial loss which could reasonably be attributed to the alleged defamatory publication, as distinct from merely the possibility of such.

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

Yes, *however*, I would strongly advise against styling it as a defence of 'Truth'. I have grave reservations about the notion that a court can determine 'the truth' on a mere balance of probabilities; I woul be much more comfortable with the defence being styled as one of 'fact', or perhaps 'provable fact'. Leave 'truth' to the philosophers, and perhaps the theologians. Whether something is 'proven fact' or 'substantiall proven fact' seems much more appropriate in a civil court on a matter of private law.

Other than my reservations about naming, the defence laid out in Section 2 of the Defamation Act 2013 is a good one, and its encapsultation in statutory form does it no harm.

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

I found this a regrettable change to the defence when it transitioned to the defemce of Honest Opinion in Section 3 of the Defamation act 2013. The standard of public interest required – see, for example, *London Artists v Littler* ([1968] 1 All ER 1075), in which the mere fact that the general public were being invited to buy theatre tickets for a show which the publication in question suggested might not go ahead owing to a strike involving several

key performers was considered to satisfy the public interest test – was so low that it was not an onerous burden upon the defence.

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

As in English law, this should be the core of the defence.

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

(Paragraph 5.21)

Comments on Question 11

I believe it would be a useful exercise, making the law more accessible to non-lawyers.

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

I am unclear as to the exact position in Scots law, however I find it regrettable that the English law did not take the opportunity to vary the position from requiring that the defendant ith prove the fct on ehich his opinion relies, or rely on a narrow category of privileged statements. It would seem preferable, in this case (and especially bearing in mind online publication, and the vast range of publications in that forum being by those who are not professional journalists with duty lawyers to hand) to instead require that an honest opinion be accompanied by a reasonable belief that the opinion expressed is based on fact. This would seem more conceptually consistent with the nature of the honest opinion defence.

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

Yes – subject to the proviso that, as noted above, I would support the view that the factual basis at the time of the comment being published should be that as was honestly believed to be the case by the defendant.

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

Completely (again, preferably subject to the standard of the facts being what the defendant reasonably believed to be factual at the time). One cannot have opinions on a matter of fact (or reasonably believed fact) of whih one is unaware at the tiem that opinion is expressed.

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

Yes, as noted above, I do believe that the test should extend not only to opinion based on the narrow categories of provable fact and privileged statements, but also to material reasonably believe to be factual at the time. I would stress that this should be clarified to apply only to 'X believes Y to be an established fact', as distinct from 'A suspects B to be the case, but lacks an honest believe that is has been proven'. The defence should protect an honest opinion, not mere speculation.

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

(Paragraph 6.15)

Comments on Question 16

I was sceptical about this being included in the Defamation Act 2013, as I was unconvinced that statute could adequately replicate such a nuanced concept as Reynolds privilege. How well it works in practice remains to be seen.

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

No. I believe that, as regards matters of opinion, the Honest Opinion defence is already sufficient.

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

I would not be opposed to it.

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

(Paragraph 7.33)

Comments on Question 19

Yes, although it should of course be borne in mind at all times that there are limitations as to the changes in law which can be made, in the light of the UK's commitments under the EU Electonic Commerce Directive (2000/31/EC). (At time of writing, I note this in the hope and expectation that the UK will elect to remain within the EU.) This key issue was missed in early stages of the campaign to reform English libel law (the Libel Reform Campaign's 2009 'Free Speech is not For Sale' report contained a call for online intermediaries to be absolved of all liability in respect of third party uploaded content. Had this been pursued, it would have flown directly in the face of European law.

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

It would certainly help. Section 5 provides a mechanism for a clear notice based system whereby a compliant website operator can be sure of being entitled to the defence in Section 1 of the Defamation Act 1996, while potential claimants are not unfairly deprived of the opportunity to bring a case against an identifiable poster of a defamatory allegation. The effect of Section 10 of the Dfamation Act 2013 should also be considered in this context. Applying more broadly, to all ISPs, not only 'operators of websites', Section 10 provides that these may only be sued in defamation where it is not "reasonably practicable" to sue the party or parties directly responsible. This not only helps to further protect the operator of a website (per Section 5) from being sued where all necessary and appropriate steps have been taken to identify the real culprit, but also to shield all service providers from bearing the brunt of litigation as easy targets and perceived deep pockets.

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

Yes, it would be useful to clarify the law relating to links in this manner.

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.

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

Not where the search return is purely an automatic operation of the software as per the user's commands. I would, however, draw a distinction between user-inputted search terms and a search engine's own auto-complete function. Google have been found liable for

defamation in several cases across a range of EU jurisditions as well as in Japan when their system automatically offered defamatory statements (Satanist being one, rapist another) when users inputted the names of specific individuals. I feel this is it entirely reasonable to hold the search engine to account in such circumstances.

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

An awareness-based defence as regards material inputted by the third-pary user would be appropriate.

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

Insofar as internediaries control the informantion provided over such services, they should be held to the strict liability standard as primary publishers.

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.

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.

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

Yes.

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

Aside from the more general desirability of consolidating all Defamation legislation into one Act, there is no particular reason to do this.

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

It would seem sensible to clarify the law in this regard.

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 – I believe we can trust a court to recognise an appropriate peer-reviewed journal when it sees one, without further statutory clarification. I would be strongly opposed to this defence being extended further. It is possibly worth mentioning that I was unconvinced of the value of this defence when it was introduced into the 2013 Act. This was, of course, a reaction to the Singh and Wilmshurst cases, all of which were won by the defendants. While I can certainly see an argument that Wimlshurst was unfairly pursued in multiple cases, I do not consider this defence to have been an appropriate reaction to a situation in which the law already operated to protect the interests of these defandants.

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 see no reason to disturb the existing balance of the law here.

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

(Paragraph 9.12)

Comments on Question 33

Yes.

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

This seems reasonable.

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

(Paragraph 9.12)

Comments on Question 35

No.

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. I would also suggest that such a provision place emphasis on any such summary being given a similar level of prominence to the original publication.

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

Yes.

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

Yes; the added publicity which this can give, as distinct from 'only' a statement in one published outlet, can be a positive benefit for the claimant.

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 am emphatically in favour of ending the multiple publication rule and replacing it with a single publication rule, as was done in the Defamation Act 2013, for reasons expanded upon in "One Way or Another? Is it time for the introduction of the single publication rule in English defamation law?", *Contemporary Issues in Law* Vol 7 Issue 4, ISSN: 1357-0374

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

The multiple publication rule, as it currently stands, is simply untenable in the modern world. These alternatives all sek to mitigate its problems, but none do so as simply as a single publication rule, supported by a judicial discretion to hear a case after the limitation period has elapsed where to do so would be in the interests of justice. There is no good argument for unnecessary complication here.

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, as has been the case in England and Wales since 1996, is entirely sufficient.

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.

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

I don't consider that tinkering with this would provide a solution. The simple, and best, move is simply to move to a limitation period which commences on date of first publication, and ends after twelve months have passed. A claimant who fails to discover the publicationwithin that time simply cannot have been caused seriousreputational harm by it, or thy would surely have become aware. In the event that this did indeed happen, the courts could exercise their discretion to step in and agree to hear the case outside the limitation period, if they could be persuaded that ignorance of the publication was, in the circumstances, legitimate, and that it would be in the interests of justice to allow the case to go ahead once the claimant has belatedly become aware.

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

The supposed phenomenon of 'libel tourism' has been much exaggerated; there is, in my view, simply no credible evidence that the big, bad wolf of English libel law is chilling free expression around the globe. Indeed, with the renewed emphasis on sufficient connection to the jurisdiction such that there is a reputation that a claimant might fairly expect to protect in cases such as *Jameel v Down Jones* ([2005] EMLR 353) and *Don King v Lennox Lewis* ([2005] EMLR 45), any argument that an English court will simply hear any and all libel cases brought because the article in question is on the internet and therefore available in the UK, claims of 'libel tourism' are tenuous at best.

Section 9 really adds little to the existing position. One would expect a judge to consider the proportion of publication in England and Wales against that elsewhere as part of a full consideration as to whether that is an appropriate jurisdiction in which to hear the case anyhow. Fortunately, the 2013 Act stops far short of what some parties argued for, which was that a crude numbers game alone could be used to dictate whether or not a case should be heard in England and Wales. The far more sensible approach is to leave it to the judiciary to decide whether the interests of justice are best served by allowing someone to have their case heard, based specifically on publication in the jurisdiction, and sufficient evidence to

indicate that that person has a reputation to protect therein.

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 am firmly of the belief that Section 11 has been a positive change in English law. It remains to be seen in what conditions a jury will be considered necessary. Arguments about whether the judiciary are indeed sufficiently representative of "ordinary people" can be made in favour of juries (although this might perhaps be said to mask a much more fundamental argument about issues that need to be addressed with the judiciary). In practice, the great gain of Section 11 has been that an early hearing on meaning can be arranged and deliver a decision with some certainty, enabling parties to make a more informed decision as to whether to proceed to trial or sttle on the basis of that decision.

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 am currently co-writing an article on this matter, but suffice it to say here that I believe strongly that this would be an unnecessary and unwelcome interference with the Article 10 right. The implications of *Putistin v Ukraine* (App No 16882/03) [2013] ECHR 16882/03 are indeed concerning. I would agree with the conclusions of the prior investigation in Scotland, to the extent that the protection of the reputation of the deceased, insofar as that may be necessary or legitimate, is best left to other mechanisms. The notion that a Jimmy Saville type could be protected even beyond the grave concerning; more generally, however, while reputational damage to a living person is rightly a clear Article 10(2) exemption to the freedom of expression right, posthumous offence taken on behalf of that person by close relatives or descendents in my opinion simply goes too far, and would cause a distinct chill on the freedom of expression right of others. I firmly believe that current English law, under which any and all libel proceedings not completely concluded, although there may be a case for a judicial discretion on this matter. See, for example, the case of *Harvey Smith v Bobby Dha* [2013] EWHC 838, in which the High Court refused to give judgment where the claimant had died after the hearing had concluded, but prior to the issue of a judgment. In such a case considerable expenses may have already been incurred, and it might be seen as fairer to grant the judiciary the power to determine whether it woul be in the interests of justice to allow the proceedings to be concluded. In no circumstances, however, would I support a defamation action being concluded where there would not be unfair economic loss to one or other of the parties, or, indeed, where a hearing had not commenced.

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

I would prefer that this not be permitted at all, but if anyone is to be permitted to sue in defamation for the protection of an individual's posthumous reputation, it should be very strictly limited.

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

I would restrict it solely to that person's legal spouse and children.

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

I would, in the interests of protection of Article 10 rights, incorporating freedom of historical analysis, also argue for a time limit to any right to sue for posthumous defamation. Ten years would seem a reasonable limit.

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 posthumous actions for defamation are to be allowed, I do not consider such restrictions to be useful.

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

Insofar as the first three cannot come under defamation (see, e.g. the development of the concept of 'trade libel' in English law), it would make sense to review and retain. I am unconvinced of the value of 'verbal injury to feelings' – insofar as anything here falls short of the defamation standard, it would seem to me an undesirable limit on the Article 10 right. Slander on a third party, as discussed in the consultation document, could well be left to slip into history.

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

n/a

General Comments

This discussion paper has been put together to a very high standard; it has been a pleasure to read and respond to. Thank-you.

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.