

## RESPONSE FORM

### DISCUSSION PAPER ON DEFAMATION

We hope that by using this form it will be easier for you to respond to the questions set out in the Discussion Paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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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

We believe fair retort is a defence that should remain in Scots Law as it enables defendants to deny charges made to them in public without the threat of further legal action being brought against them. However, we reaffirm the existing power's restriction which states that any retort must be primarily focused on the issue of original contention and for the defence to fail if the statement was made in malice. As identified by Rosalind McInnes in *Scots Law for Journalists*: "The speaker must not pass from repudiation to the making of separate defamatory allegations against the accuser."

We are keen for alternative methods of dispute resolution to be incorporated within any reform of Scots defamation law, which can help parties resolve disputes in a timely, cost-effective and fair manner. This should include mediation and voluntary early neutral evaluation which has a high success rate in family law and in the Technology and Construction Court in England. To promote a change to a culture of engaging in these ADR practices, reform must also ensure that the court itself is accessible to anyone, regardless of their resources. This means ensuring the court uses its power to prevent wealthy bullies from abusing the court process to intimidate the other party.

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

A reformed law of defamation will be of great economic benefit to Scotland and to the United Kingdom as a whole. Companies publishing newspapers in Scotland have told us that they spend hundreds of thousands of pounds annually on legal advice to rebut legal threats. At a time where Scottish newspapers are struggling with increasing costs, which has resulted in redundancies being made across the industry, it is vital that money is spent where necessary.

Placing established common law defences into statute will reduce ambiguity and uncertainty in the law, ensuring publishers will be able to either fend off or settle legal challenges with greater efficiency. This in turn will allow resources to be spent on other activities that benefit Scottish society, whether that is more news reporting or diverse and radical publishing.

Uncertainty over liability in defamation for technology companies discourages investment. A clear law of defamation with sensible defences for web hosts, secondary publishers and 'conduits' will make Scotland a more attractive location for technology companies.

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

Communication to a third party is a vital requisite for defamation in Scots law. Without it, no measures can be enacted to discourage cases from being brought where there has been no serious reputational harm caused (see question 4, below).

Other laws, such as the Protection from Harassment Act 1997 and the Communications Act 2003, already provide adequate remedy for a person who has been sent a private message that causes upset or distress. There is no need for an additional measure in Scots defamation law.

The absence of this requisite could also discourage responsible journalism. If a private communication could trigger a defamation claim, then reporters would find themselves risking a defamation claim when they put allegations to the subject of their reporting.

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 s.1 threshold in the 2013 Act should be replicated in Scots law.** It has unquestionably expanded the space for freedom of expression.

The problem of trivial cases, where actual reputational harm was unclear and limited, was one of the central reasons for the reform of the law in England & Wales. The lack of a threshold test was a key enabler of legal threats in the name of 'reputation management'. It was the basis for many of the most bizarre and disturbing defamation cases, such as the case of *Johnny Come Home*, a novel by Jake Arnott that was the subject of a defamation claim because the name of a character in the book was the same as the *stage name* of someone who had been active in the entertainment industry a quarter of a century prior to publication.

The lack of a harm threshold also enabled the mere *threat* of a defamation action to chill freedom of expression.

The inclusion of a serious harm test at s.1 of the Defamation Act 2013 has had a considerable impact on the actions brought in England & Wales. In *Cooke v MGN Ltd* [2014] EWHC 2831 (QB) the courts affirmed the Westminster politicians' intent that claimants have to prove they had been harmed or prove that harm will result in the future.

It is crucial to note that the serious harm test at s.1 has not proved an insurmountable hurdle for those with a localised reputation. In the injunction judgment in *Brett Wilson LLP vs*

*Persons Unknown* [2015] EWHC 2628 (QB) the court made clear that the threshold of what was considered 'serious harm' was relative to the claimant. As a small firm, the claimant's reputation had been seriously harmed even though the publication was on a fringe website with a small readership.

Another important aspect of the s.1 test is that it incentivises prompt correction. In the *Cooke* case, a crucial reason why the serious harm test was deemed not to have been met was that the newspaper promptly published a correction to the news report and removed the online version. One of the main criticisms of newspapers is that they are slow to correct mistakes. Measures that encourage quick corrections, because they offer some defence against a defamation claim, are to be encouraged.

It is important to state there is a similar threshold in place in Scots Law in terms of *slander on a third party* (identified in chapter 13 of the discussion paper on Verbal Injury & Defamation), in a ruling in *Finburgh v Moss' Empires Ltd* which stated "that a party claiming to have been harmed as a result of slander on a third party has to demonstrate that the injury was of some severity; it must not have been 'merely oblique'".

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**

As it stands in Scotland the preliminary stages of defamation court hearings are dedicated to defining and agreeing on meaning alone. It is possible that the serious harm test would require an expansion of this preliminary stage, to ensure cases are only heard in court that pass this test and demonstrate a serious harm to the pursuant. Since a serious harm test is a vital modification to the law of defamation, we believe that an expansion of the time spent on preliminary stages for some cases would be acceptable. For cases that represent a grave threat to reputation, we foresee the expansion to be minimal at best as it would be easily understood that serious harm had been caused, but this modification would give scope for trivial cases to be dismissed outright and borderline cases to be debated prior to the case commencing in earnest.

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**

In European human rights law, the right to a reputation is derived from the human right to a private and family life. Defamation is considered a violation of the right to a private life because it impacts on 'personal identity and psychological integrity' (see *Pfiefer vs Austria*, ECHR 2007). Corporate bodies do not enjoy a private life and have no personal identity or

psychological integrity. **Because corporations cannot suffer psychological damage, we do not believe that for-profit companies (or any non-natural person) should be able to sue for defamation but use other measures such as anti-competitive practices legislation.**

Prior to the 2013 Act, many of the most egregious cases of abuse of the defamation law in England & Wales were brought by for-profit companies. For many years the discussion of toxic waste dumping in Pontypool, Wales by ReChem International was suppressed because of defamation threats. And when cardiologist Dr Peter Wilmshurst criticised one of NMT Medical's heart implant products, they responded by suing for defamation (it later transpired that two other doctors had been similarly silenced).

In 2010, the House of Commons Culture, Media and Sport Committee (under the chairmanship of John Whittingdale MP) took a similar view, suggesting that 'corporations could be forced to rely on the existing tort of malicious falsehood where damage needs to be shown and malice or recklessness proved.' This recognises the fact that corporations should be allowed to defend their brands, but have other means of doing so. As well as malicious falsehood, a simple 'declaration of falsity' could also be used to prevent the spread of lies or inaccuracies. Laws governing advertising, competition and business practices also govern what one company may say about its competitor. And through their PR and Marketing teams, a company may use its own right to free expression to counter negative publicity.

For small businesses, the reputation and activities of the company are inextricably linked to that of the managers and owners. In such cases, the owner is never barred from suing for defamation in person. Similarly when a large company is accused of wrongdoing in a particular department, the executive implicated (for example, the Chief Financial Officer in an allegation of corporate fraud) could also sue personally.

A further consideration is the expansion of private companies into public service provision. The Derbyshire Principle established by the House of Lords in *Derbyshire v Times Newspaper Limited [1993]* ruled that local authorities cannot maintain a defamation action against members of the public.

The Derbyshire Principle is a vital protection that should be enshrined in statutory law, but the expansion of the private sector administering a great deal of services previously delivered by local authorities has established a sizable lacuna that threatens to undermine the protections identified in the Derbyshire principle. If local authorities are unable to bring defamation actions against the public, a position we support, private companies administering the same or equitable services should similarly be restricted.

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**

As stated in our answer to Q6 we believe that bodies which exist for the primary purpose of making a profit should not be permitted to bring actions.

However, were this not to be accepted, we believe a test that calls for the pursant to prove

serious financial loss that was **substantively** caused by the defamatory statement should be included in any reform. This would be very similar to s.1(2) of the 2013 reform in England and Wales, developing a necessary threshold test that could dissuade trivial cases brought by private corporations.

As more public services are provided by private sector organisations, the protections outlined in the *Derbyshire* case are complicated and weakened. Short of making non-natural persons unable to bring defamation actions, a clarification could be made that governs the ability of non-natural persons to bring defamation actions against individuals based not on their structure or ownership, but on the services they provide. Private companies providing public sector contracts should not be able to make a defamation claim for criticism relating to delivery of those contracts. Such a measure would be formulated by reference to the end service being delivered. If it is a public service that Government (whether local, Scottish or UK-wide) is responsible for delivering, then the principle that the public should be able to freely criticise that service should be upheld, regardless of whether it is ultimately performed by a public body or whether a private company is commissioned to deliver the service.

An example of this issue is the Atos Healthcare / CarerWatch controversy. An online community of carers received legal threats from Atos Healthcare, regarding forum discussions about the company's disability payments assessments - a task they were performing on behalf of the Department for Work and Pensions. The forum was eventually shut down and many carers lost a vital support and information network. Had the Department for Work and Pensions carried out the assessments itself, the *Derbyshire* principle would have prevented it issuing legal threats to those offering criticism of its decisions.

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

A crucial aspect of defamation reform is putting well established common law principles into statute. As the discussion paper acknowledges at paragraph 4.14, leaving established legal principles in the common law creates ambiguity and confusion. Much of the defamation 'chill' occurs when legal threats are issued to people who do not have the means to retain counsel or routinely seek legal advice. Rather than wade through complex case law, they simply retract.

Clear defences set out in statute will ensure a better understanding of the law and embolden those seeking to exercise their right to free speech. Nowhere is this point more important than in the defence of truth, the first and most fundamental defence against a defamation claim.

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. We agree with the commission's tentative view that a public interest test for fair comment is unnecessary. The publication of honestly held opinions is an important part of the right to freedom of expression. Expressing critical opinions should not be subjected to a public interest test.

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. We believe that the 'honest opinion' formulation in section 3 of the Defamation Act 2013 is the best approach for this defence. Strengthening the honest opinion defence would allow social media commentators a defence when retweeting, re-posting or editing facts or opinions published elsewhere.

It would not be preferable to continue with the common law approach which was considered in the pre-legislative scrutiny of the Defamation Bill 2013 and found inadequate to protect honest opinion. A number of cases demonstrated the inadequacy of the common law approach include: *Singh v BCA* (which is not referenced in the *Spiller v Joseph* Supreme Court judgement, even though it in part prompted the Libel Reform Campaign), the *Owlstalk* case, and defamation threats against Legal Beagles.

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

(Paragraph 5.21)

### Comments on Question 11

Yes. As discussed in our answer to question 8 (above), putting well established common law principles into statute will reduce ambiguity, uncertainty and confusion. It allows the public to better understand the law. This discourages unfounded legal threats and reduces the defamation chill, whilst also allowing people who have been unfairly smeared to better understand their rights and means of redress.

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



Any new public interest defence should be worded to apply to comment as well as presentation of facts.

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

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

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. It is particularly important that defence should also be worded so as to include the final aspect, that the facts were 'reasonably believed' to be true. This would offer protection to those commenting on social media or those commenting on facts alleged by another media outlet.

It is easy to imagine cases where an allegation published in a national newspaper leads to many people commenting on social media, and columnists writing comment pieces based on those supposed facts. The assumption that those facts are true would be 'reasonable' if they appear in a prominent media outlet.

This is not to deny a person vindication. If the media outlet that initially published the allegations had its facts wrong, then it would of course be vulnerable to a defamation action itself. Moreover, the extent to which others commented on those false facts would mitigate against them regarding damaged and any 'serious harm' test. However, those who commented on those facts should not be penalised for doing so. The harm to the pursuer's reputation was done by a mistake on the part of the publisher of those facts, not those who subsequently offered comment.

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 clear statutory public interest defence should be available in cases where the author has acted responsibly, according to the type of publication. This would curb the chilling effect of libel laws and lead to cases being resolved quickly.

There is a profound public interest in freedom of expression, which is a fundamental right set out in Article 10 of the European Convention on Human Rights and the Human Rights Act. Freedom of expression has been shown to be of particular importance as a means of ensuring political accountability, advancing understanding, and achieving personal fulfilment. This is not because everything that people say is true, but because an open society tends towards noisy imperfection more than silence. Scotland needs a new effective defence that protects the public interest so citizens can defend themselves, unless the pursuer can show they have been malicious or reckless.

A public interest defence would allow the publication of speech on matters of public interest in cases where the demonstration of truth may be inappropriate. This is a principle which recognises that the public interest may be best served by the publication of uncertain information, leaving the subject of such information to respond publicly.

A statutory public interest defence would have the benefit of clarifying and strengthening the law with regard to freedom of expression. It would send a strong message to 21<sup>st</sup> century publishers (i.e. NGOs, scientists, bloggers, social media users and citizen journalists) of the points they should bear in mind when considering whether to publish.

The SLC's discussion document's comparison of the 'reasonableness' test as presented in s.4 of the Defamation Act 2013, and the *Reynolds* Defence which preceded it, omits any mention of the fact that far more people may be considered publishers now than in the past. Any defence which requires a publisher to meet criteria which impose a disproportionate burden on freedom of expression will make it inappropriate for NGOs, researchers and bloggers, who are increasingly publishers of public interest material. Any defence which is uncertain will chill public interest discussions as many publishers would rather settle claims out of court or avoid publication than face the legal uncertainty of mounting a complex and unpredictable defence. The lack of a body of case law under the *Reynolds* case law in England and Wales is both a symptom of its failings and an argument for a clear statutory public interest defence in cases where the defendant has acted responsibly, taking into account the nature of the publication and its context.

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

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**

Yes. Reportage should certainly be covered by new public interest provisions. When the respondent is a newspaper or broadcaster, 'reasonableness' will include the tone and manner of the report and how a dispute is described.

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. The responsibilities of, and protections for intermediaries and ISPs should be reviewed and clarified. One way in which reputation managers have been able to secure the removal of material critical of their clients is to threaten secondary publishers with defamation. An ISP, that has no knowledge of something published online and that has no significant legal support, will have no choice but to remove the content in question. The current E-Commerce Directive, and the principle of s.5 and s.10 of the Defamation Act 2013, acknowledge that it would be unfair for intermediaries to be instantly and fully liable for defamatory statements posted on their platforms. This approach also represents how ordinary people conceive of content posted online. Responsibility for the words rests with the author and publisher, not a social media platform or ISP.

Unfortunately, we have reservations with the way s.5 currently operates (see answer to question 20, below).

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**

#### **We have significant concerns about the operation of section 5 of the Defamation Act 2013.**

The underlying principles behind s.5 are well founded. They acknowledge that an operator of the website is not likely to be directly responsible for contentious content and that they should be afforded legal protections while they establish who is. The regulations that accompany s.5 also ensure that the author/publisher has a say in whether to defend the content, before the website operator removes it. It also offers a quick and clear method of redress for a claimant whose primary interest is not seeking damages but simply the removal of defamatory content.

Unfortunately, the 'inequality of arms' between those on the claimant side of a section 5 procedure, and those on the defendant side, means that free speech is significantly squeezed. Lawyers who have used s.5 say that the defendant (usually an individual) almost never consents to the release of their contact details to the claimant (usually a company). A section 5 notice is therefore essentially an effective take-down notice. Reputation managers can issue notices, even when there may be defences protecting the statement, and be confident it will result in the removal of the content. This is a squeeze on free speech and it disproportionately affects individual writers, to the benefit of large corporations.

For the same reasons, the procedure as currently laid out does not protect whistleblowers who want to remain anonymous.

An improvement on the current section 5 procedure would be to introduce the option of a court-based backstop to the procedure. For a fee, any party to the section 5 procedure (pursuer, respondent, website operator) could request the court to certify that the words complained of are prima facie defamatory. This would ensure that the most vexatious defamatory postings are removed swiftly; and that the worst reputation management is discouraged. It would also be a way for web companies who depend on User Generated Content (for example, Trip Advisor) to protect their business.

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**

The pace of technological change in this area presents pitfalls for the creation of legislation. Many of the current issues concerning freedom of expression in the United Kingdom have arisen due to old laws being applied to new technologies (for example, the Multiple Publication Rule, developed in the 1840s, produces counterintuitive outcomes when applied to internet publication). Hyperlinking, search engines and aggregation are all modern technological developments that could be superseded as the use of mobile 'apps' becomes prevalent. Further analysis of the distinctions between websites, web services and apps may be necessary to understand whether they undermine any powers that are to be set out in law.

As the creation of URLs can be an automated process based on text pulled from the web page or customised manually, it demonstrates a key challenge to legislators to ensure that

protections are in place that correctly identify the responsibilities of the publisher and intermediary. If the defendant is publishing on their own platform (i.e. website or intranet) it is not unreasonable to believe that they have a greater responsibility to understand how that platform utilises metadata to set hyperlinks, preview texts and thumbnails to ensure their content is published in a way that is true to the nature of the piece and cannot be presented in a manner that could threaten defamatory action. However, when content is published on third party platforms, such as social media sites, how 'foreign' algorithms may manipulate the content and metadata beyond the intent of the author, may identify a more complex picture of ultimate responsibility for the presentation of the defamatory statement.

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. We do believe, however, that further clarification is needed as to how the setting of hyperlinks falls within the remit of any new law in the manner that is highlighted above. The responsibility to set hyperlinks can fall to both intermediaries and the publishers themselves (webmasters employed in the same publication, the author on their personal blog or digital communications teams) which identifies a clear difference in terms of ultimate responsibility. When the ultimate responsibility lies with intermediaries it is important to identify where the basis for the hyperlink originates. If the hyperlink relates directly to the content produced by the original publisher the responsibility may lie not with the intermediary but with the original publisher. It would be an undue burden on the intermediaries to interrogate the validity of the content of the article that is the source of the hyperlink and so should have a defence similar to that which is available to those who host material.

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

(Paragraph 7.47)

#### **Comments on Question 23**

There is a distinction between 'responsible' and 'liable' in this instance. Search results are 'neutral' in the way that a librarian is neutral: they merely present a user with information about what has been published. Search engines should never be liable for defamatory information that appears in search results.

However, when a piece of content has been shown to be defamatory and removed from the web, it is reasonable for a pursuer to request that the digital remnants of that content be removed from the web, even if that means the search engine intermediary take proactive action to ensure removal from search results. In practice, this is already the case with the majority of search engines that de-index broken links and removed web content.

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**

Yes

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**

Yes

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**

We believe that reporting of parliamentary proceedings and judicial proceedings should retain absolute privilege.

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. In the increasingly globalised world and media environment, the proceedings of international courts and tribunals form an essential part of the public discourse and must receive the same protections as British parliamentary and judicial proceedings.

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. All such statements (like parliamentary proceedings and judicial proceedings) form part of the legal 'public record'. Fair reporting of these statements and documents should be privileged in defamation law.

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**

Yes. As discussed in our answer to question 8, there is a virtue in putting established law into statute. As more people and organisations become 'publishers' a restated list of privileged materials would significantly reduce the chill on free speech that unfounded legal threats can cause.

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 is vital that Scots Law reflects the tools and methods used to communicate in the modern age. Section 9(1) of the defamation act 1952 extended the law to "cover extracts from or abstracts of a parliamentary report broadcast by means of wireless telegraphy" and we believe it is necessary for any future reform to continue to be updated to reflect changing technologies. As more people get information about parliament through broadcast media, internet livestreams and social media platforms there is a need to ensure laws accurately protect and incorporate modern methods of communication and publication.

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**

Protection of peer reviewed science would arguably not do a great deal to reduce the chilling effect of the defamations laws on academic discussion. Only a small proportion of academic discourse happens in peer reviewed papers. The public discussion of science and evidence which researchers contribute to almost never happens in the pages of peer reviewed journals. Academic journal publishers and editors tell us that they are more likely to receive defamation threats for the news and opinion sections of the journal than the peer reviewed papers.

Until there is an effective public interest defence which enables scientists to debate issues in good faith, whatever the forum, they will continue to be chilled. A public interest defence is needed regardless of any special protection being available to the sub-group of peer-reviewed publications.

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**

Yes

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**

Yes, this will ensure that the court hearings are not manipulated by vexatious pursuers who are looking to draw out the proceedings longer than necessary. As the rejection of an offer of amends by the pursuer can be used as a defence by the defendant it stands to reason that this should not be something that is manipulated or delayed by the pursuer. However, we acknowledge that the time frame will need to accurately reflect the details of the case and any amended law should not seek to identify a too restrictive or inflexible time frame that



may close off this valuable channel for resolution beyond that of lengthy court proceedings or the seeking of financial damages.

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

(Paragraph 9.12)

**Comments on Question 35**

As an offer of amends is only currently available to defendants who acknowledge they were wrong to publish the contentious statement or have defamed the pursuer unintentionally, we believe the good faith demonstrated in offering to make amends should be met with the good faith of the pursuer in accepting their responsible offer of amends.

Consideration should be given to the idea that a pursuer should be incentivised to accept a reasonable offer of amends, perhaps with regards to damages awarded and costs ordered.

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**

No. We believe such measures to be problematic and to have serious implications for freedom of expression. Forcing someone to publish something is an infringement of free speech. As worded, s.12 of the Defamation Act 2013 could turn judges into editorial writers.

There are also pragmatic concerns with this measure. How would the mandatory publication of summary judgements work for books, which are not part of a serialised publication like newspapers? How would such mandatory publication work on Twitter, with only 140 characters?

These provisions may also cause confusion when a defendant has already made an offer of amends, or already issued a correction.

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. There is no justice or public interest in continuing to publish material that a court has declared to be defamatory.

Any law or regulations that give the courts this power should insist that any court order explicitly sets out the precise text to be removed, and the exact web link to be removed. Legislation and regulations should expressly forbid orders made under such powers to refer to publication on an issue in general terms, or to refer generally to a top-level domain. Furthermore, any such orders should not be rolled up in any order or *interdict* preventing future publication.

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. In many defamation cases, such a statement provides precisely the kind of vindication that a claimant or pursuer seeks.

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.

The transition from a 'multiple publication rule' to a 'single publication rule' was the first of the measures of the Defamation Act 2013 on which consensus was achieved. The change was recommended by the Libel Working Group (2009), the Culture Media and Sport Select Committee (2010) and the Draft Defamation Bill Joint Committee (2011). It was also present in the Lester Defamation Bill (2010) and the wording of clause 6 of the Draft Defamation Bill (2011) is *exactly* the same as the wording of s.8 of the Defamation Act 2013.

While a 'multiple publication' principle may have made sense in the era of hand-delivered pamphlets or 'poisoned pen' letters, it makes no sense in the era of hot type printing (circa 1880s) let alone the Age of the Internet (circa 1990s).

As described at paragraph 10.5 of the commission's discussion paper, the multiple publication rule allows for a perpetual resetting of the limitation clock for pieces of content that require only a single act of publication by the author. Although a page from an internet archive may be downloaded many times, it is self-evidently a single 'publication', because it derives from a single computer file or entry made on a single occasion. This is how ordinary people conceive of the process and the law should not confound common sense by counting retweets or clicks on archive links as a new publication.

The phenomenon of libel tourism relies heavily on the internet and the multiple publication rule. We believe the decline in libel tourism cases since the commencement of the Defamation Act 2013 is attributable in a large part to the introduction of the single publication

rule at s.8.

While we acknowledge the issues discussed at paragraph 10.9 of the discussion paper, concerning damage done by the defamatory material at a date significantly after publication, we agree with the suggestion made at paragraph 10.11: that s.32A of the Limitation Act 1980 “does what is necessary” to mitigate this risk so far as s.8 of the Defamation Act 2013 is concerned. We therefore agree with the commission’s suggestion at paragraph 10.11 that any similar provision in Scots law makes an analogous reference to s.19A of the Prescription and Limitation (Scotland) Act 1973.

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 - see above; we favour the replacement of the multiple publication rule with that of the single publication rule. The defence of non-culpable republication places an undue strain on the publishers and operators of website to retrospectively amend and label content to identify the fact that a challenge has been made. As the consumption of news increases there is a greater responsibility on the publishers to reflect that in their publication. At a time where conventional media outlets are struggling financially and citizen journalism is flourishing but is based on the work of volunteers or underfunded staff we believe that the responsibility to both maintain the daily editorial output and retrospectively amend previous content may place unnecessary restrictions on the press in Scotland.

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

(Paragraph 10.20)

#### **Comments on Question 41**

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**

Yes. As noted in paragraphs 10.13-14 of the Commission's document 'In Scotland, as discussed above, limitation in defamation actions starts to run only when the publication comes to the attention of the pursuer.'

We believe this to be a flawed principle. Whilst a date of publication is, by definition, a matter of public record and an easily established fact, the date of 'awareness' of it is a matter that (while not strictly subjective) is nevertheless not open to be tested. It allows a pursuer enormous leeway to start the limitation to period at a time that suits them. 'Date of awareness' becomes another matter of fact to be debated and, if necessary, proven in the courts. It therefore makes defending a defamation case additionally complex and expensive, which is in turn a chill on free speech. We recommend that any proposals to reform defamation in Scotland amend provisions on limitation, to run from the date of publication.

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. The longer the long-stop period, the greater the restrictions on freedom of expression.

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. The shorter the limitation periods, the greater space for freedom of expression.

On this aspect of the law, the Commission should also consider its interaction with any new provisions around a 'serious harm' threshold. If a pursuer took 19 years and 11 months (as para 10.14 imagines) to even notice that they have been defamed, it is highly unlikely that their reputation will have been significantly damaged to a degree that would overcome a 'serious harm' test akin to s.1 of the Defamation Act 2013.

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**

Yes. As the recent *Ahuja v Politika* case [EWHC] 3380 (QB) has shown, the problem of claimants pursuing inappropriate libel tourism cases still persists, but that s.9 of the Defamation Act has resulted in curbing such actions.

The issue of jurisdiction is an area where parity with the law in other parts of the United Kingdom is particularly important. If a foreign claimant suing a foreign defendant is barred from suing in London they should not be allowed to engage in 'forum shopping' in Edinburgh. Libel tourism caused egregious free speech violations. As such it caused significant reputational damage to the London courts (including the so-called 'Libel Terrorism' law passed by the US Congress). Scotland should legislate to ensure that Edinburgh is not similarly discredited in future.

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**

Yes. We recommend that measures similar to s.11 of the Defamation Act 2013 be introduced into Scots law - a presumption against a jury trial.

Defamation cases can be extremely expensive. Many of the issues that can escalate legal costs concern the the uncertainty over the meaning that a jury will attribute to statement. The case is effectively argued on several fronts until trial.

A judge-led system allows many questions over meaning to be settled earlier in the process, resulting in lower costs *to both claimants and defendants*.

In recent years, the courts of England & Wales have instituted far better case management in defamation claims. Meanings are decided much earlier and judges have been able to operate far more robust case management.

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.

As outlined in the discussion paper, measures that would allow proceedings to be brought on behalf of a deceased person would fundamentally alter the nature of defamation. It would discourage investigative journalism and historical research and could have prevented the reporting of the abuse perpetrated by Jimmy Saville (reporting that was thwarted during

Saville's lifetime by his reliance on libel threats against journalists and his victims).

We recognise that distress can be caused to the relatives of victims of a crime or an accident. Such distress is best remedied through press standards, regulation and editorial codes. Existing laws that prevent harassment could also be used to prevent persistent intrusion into grief.

The British Parliament debated this issue during the passage of the Defamation Act 2013 (House of Lords Hansard, 17 December 2012, column GC430). The amendment which probed the matter, tabled by Lord Hunt of Wirral, was rejected. There is therefore no prospect of such measures being introduced into the law of England & Wales. If such measures were introduced in Scotland, they would be rendered essentially meaningless by the UK-wide nature of most publications.

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**

We **strongly oppose** any measures to allow a defamation action to be brought on behalf of someone who has died.

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**

We **strongly oppose** any measures to allow a defamation action to be brought on behalf of someone who has died.

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**

We **strongly oppose** any measures to allow a defamation action to be brought on behalf of someone who has died.

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**

We **strongly oppose** any measures to allow a defamation action to be brought on behalf of someone who has died.

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 defences available for verbal and non-verbal defamation should be aligned, in particular the serious harm test. Limited verbal slander should only in the most egregious circumstances be cause for damages as a verbal apology to correct the record without the need for expensive legal action is the best course of action in these circumstances.

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**

Please see above for the answer to question 52.

**General Comments**

Reform is necessary in the light of the criticism of UK defamation laws from the UN

Committee on Human Rights in the 2008 report on the implementation of the International Covenant on Civil and Political Rights:

"The Committee is concerned that the State party's practical application of the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as "libel tourism." The advent of the internet and the international distribution of foreign media also creates the danger that a State party's unduly restrictive libel law will affect freedom of expression world-wide on matters of valid public interest."

CCPR/C/GBR/CO/6 at para 25

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.