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

We believe that many of the underlying issues in relation to defamation arise in connection with costs. This was very much the catalyst for the reviews which took place in England and Wales. However, as the reviews took place they became increasingly focused on substantive changes to the law rather than on the factors which cause costs in claims for defamation to be disproportionate to the damages that are awarded and, indeed, to be significantly higher than in most other areas of litigation. In the circumstances any reform of the law should, we would suggest, be coupled with consideration of how cases can be dealt with cost effectively. In particular introducing mechanisms for proactive case management and for the early resolution of key issues such as meaning and serious harm as well as mechanisms to dispose of exceptionally strong or exceptionally weak claims at an early stage would undoubtedly assist everybody.

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

If the costs of defamation proceedings can be controlled this is likely to be in the interests of the courts and court users.

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

We agree that a communication of an allegedly defamatory imputation to a third party should become a requisition of defamation in Scots law. There is, on the face of it, no substantive good reason why publication to the pursuer should be actionable and, indeed, in our experience the existence of a right to bring a claim in relation to such a publication causes evidential issues which are unwarranted in circumstances where the reputation of the person concerned will not have been harmed.

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, we agree that a statutory threshold should be introduced requiring a certain level of harm to reputation before an action for defamation may be brought.

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

No, if a communication to a third party is to become a pre-requisite of defamation in Scots law we do not consider any other modifications to the law to be required.

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, we believe that bodies which exist for the primary purpose of making profit should continue to be permitted to bring actions for defamation. Many such entities (at least 95%) are small and medium sized businesses whose very existence could be threatened by a defamatory publication. For example, any business that manufactured a product would potentially face ruin if the product was the subject of a defamatory review in a consumer publication that was widely relied upon by purchasers of the product. There is plainly a risk that publishers would actively lower their standards in writing about corporations were corporations unable to pursue claims. This would potentially lead to an increase in the number of untrue and defamatory statements that were published about corporations. There is, on the face of it, no public interest at all in the publication of untrue defamatory statements about any individual or organisation (albeit that there may be particular circumstances where such publication would be protected from an action where it is in the public interest to protect freedom of expression).

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

No, we do not consider that there should be a provision governing the circumstances in which defamation actions can be brought insofar as the alleged defamation relates to trading activities. There are a number of entities which seek to raise funds through what might be described as trading activities. However, this should not mean that they are treated in the same way as entities that trade purely for profit. There is plainly a difference between a company that manufactures a product and which has shareholders and employees and an unincorporated association that fundraises through a car boot sale.

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, we consider that the defence of truth should be encapsulated in statutory form. The current law of defamation in Scotland is complex and arcane and there is no single place where an individual or organisation can find it set out in clear terms. This cannot be in the interests of the public. That is particularly the case in circumstances where so many people publish so much material in a personal capacity. Many charities, clubs and other organisations communicate by email and have websites and those responsible for them would undoubtedly benefit from a clear explanation of the law of defamation in the form of a statute. This will make the law more accessible and understandable to all concerned.

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 that the defence of fair comment should no longer require the comment to be on a matter of public interest. It seems to us that this is in the wider interest of freedom of expression.

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 consider that it should be a requirement of the defence of fair comment that the author honestly believed in the comment or opinion he or she expressed. This would seem to be at the heart of the defence. It would seem unfair on an individual who has been defamed by another individual that they have no recourse against an individual who had no honest belief whatsoever in the opinion they were stating.

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, we agree that the defence of fair comment should be set out in statutory form (see 8 above).

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

No, we do not consider that there should be any other changes to the defence of fair comment in Scots law.

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, we consider that any statutory defence of fair comment should make clear that the fact or facts on which the comment is based must provide a sufficient basis for the comment. The essence of the defence is that a reader would be able to consider the relevant facts and reach a conclusion different to that of the author.

14. Should it be made clear in any statutory provision that the fact or facts on which the comment is based must exist before or at the same time as the comment is made?

(Paragraph 5.21)

Comments on Question 14

Yes, the statute should make clear that the fact or facts on which the comment is based must exist before or at the same time as the comment is made. It would appear unfair on a pursuer for a defender to be able to take advantage of facts which came into existence at a later date which had no bearing whatsoever on the person who made the statement.

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, the statutory defence of fair comment should be framed to make it available where the factual basis of the opinion expressed was true, privileged or reasonably believed to be true.

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

(Paragraph 6.15)

Comments on Question 16

Yes, there should be a statutory defence of publication in the public interest in Scots law. The very nature of the defence makes this desirable.

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, we consider that any statutory defence of publication in the public interest should apply to expressions of opinion as well as statements of fact. Again, the underlying rationale is that any such publication must be in the public interest and if it is it should not matter whether it is a statement of fact or an expression of opinion.

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, we consider that a statutory defence of publication in the public interest should include a provision as to reportage. There is plainly a public interest in fair, balanced and neutral reporting of disputes between parties where the dispute concerned is on a matter of public interest.

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, there should be a full review of the responsibility and defences for publication by internet intermediaries. The role played by such intermediaries is central to the issue of how to deal with publications on the internet / by electronic means. Such intermediaries have a range of roles and there should be careful consideration of whether the roles they undertake (particularly where they do so for profit) should come with any form of liability / responsibility for the publication of material where they are intrinsic to the publication.

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, a defence for website operators along the lines of section 5 of the Defamation Act 2013 would be helpful in addressing the issue of the liability of intermediaries. However, careful consideration would need to be paid to how that section would work. The regulation that accompanies section 5 is extremely cumbersome and in practice is much less used in England and Wales than the former practice of issuing *"take down"* notices. In this respect consideration needs to be paid to the interests of those who are defamed on the internet. In particular, there have been numerous incidences of extremely unpleasant publications being made on the internet by anonymous sources and / or *"trolling"*. It seems to us to be extremely unfair on any claimant that they must engage with the author of any such publication who may be seeking to upset and / or provoke them in circumstances where a simple mechanism to ask an intermediary to take down highly defamatory and / or unpleasant material would enable justice to be served quickly, effectively and at proportionate cost.

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, ideally the responsibility and defences for those who set hyperlinks, operate search engines or offer aggregation services should be defined. However, there may be significant challenges in defining where liability lies for such specific instances.

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

Subject to clarification as to what will constitute setting a hyperlink, we consider that it will be sensible for intermediaries who set hyperlinks to be able to rely on a defence similar to that which is available to those who host materials.

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

(Paragraph 7.47)

Comments on Question 23

No, we do not consider that intermediaries who search the internet according to user criteria should be responsible for the search results. On the face of it the search results will simply be the result of a mechanical exercise.

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

Whilst we do not consider that intermediaries who search the internet according to user criteria should be liable for search results, in the event that it is decided that such intermediaries should be responsible for the search results we consider that they should be able to rely on a defence similar to that available to intermediaries who provide access to internet communications.

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, intermediaries who provide aggregation services should be able to rely on a defence similar to that which is available to those who retrieve material.

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, we do not 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.

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

We agree that absolute privilege 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. This would provide a clear and consistent treatment of such material.

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, we agree that the law on privilege should be modernised to extend qualified privilege to cover communications issued by bodies such as legislatures or public authorities outside the EU or statements made at press conferences or general meetings of listed companies anywhere in the world.

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

We agree that it would be of benefit to restate the privileges of the Defamation Act 1996 in a new statute. This is in order to make the law clear and accessible (see our response to question 8).

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

We agree that it would be sensible to review Scots law in relation to qualified privilege for publication of parliamentary papers (or extracts thereof).

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

Yes, we think it is necessary to widen the privilege in section 6 of the 2013 Act for peer reviewed statements in scientific or academic journals. Consideration should be paid to protecting other publications, particularly in circumstances where there are relatively few claims (as far as we are aware) in relation to peer reviewed journals and scientific discussion and debate is not limited to publications in such journals. Conferences in particular are times when such discussion and debate takes place.

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, we agree that there is no need to consider reform of the law relating to interdict and interim interdict.

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

(Paragraph 9.12)

Comments on Question 33

Yes, we consider that the offer of amends procedure should be incorporated in a new Defamation Act (again, for the reasons set out in our response to question 8 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

Yes, there would appear to be sense in introducing a rule that the offer of amends procedure be amended to provide that the offer must be accepted within a reasonable time or otherwise be treated as being rejected.

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

(Paragraph 9.12)

Comments on Question 35

Yes, we consider that there would be sense in considering whether, in the event that a requirement for serious harm is introduced, the making of an offer of amends would involve an admission that serious harm has been caused or is likely to be caused to the reputation of the claimant. If this is the case then it may act as a deterrent to defenders considering making offers of amends which would clearly not be in the public interest.

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, we agree that it would be appropriate for the courts to have the power to order an unsuccessful defender in defamation proceedings to publish a summary of the relevant judgment.

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, we consider that the court should be given a specific power to order the removal of defamatory material from a website or the cessation of its distribution. If this were not the case then much of the benefit of bringing a successful claim would be lost.

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 law should provide for a procedure in defamation proceedings which would allow a statement to be read in open court. Again, this seems to us to be an important element in a successful pursuer obtaining vindication.

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, we 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. This has proved extremely effective in England and Wales and provides proper protection for those who publish material in different formats and / or those who provide access to archive materials. It also prevents meritless claims being pursued in relation to minor publications.

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

Whilst we do not consider that the multiple publication rule should be retained, in the event that it is retained, we agree that it should be modified to introduce a defence of non-culpable republication.

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

(Paragraph 10.20)

Comments on Question 41

Yes, we consider that the limitation period should be reduced to less than three years. On the face of it, any pursuer who has suffered damage to their reputation would be aware of it

from a relatively early stage and if their true concern is that there has been such damage to their reputation then they should be expected to act quickly to bring a claim and remedy that damage. One has to question why a pursuer who is aware of a publication and that harm has been done or is likely to be done to their reputation would not take any action in relation to it save for tactical purposes. In this respect it is clear to us that any form of publication tends to be much more significant as at the moment of publication as news or comments are a perishable commodity. Those who publish are likely to be prejudiced in defending any claim if it is pursued some years after the original publication. Sources may have disappeared, records may not have been kept and other material that might have assisted in the defence of the claim may not be available. In the circumstances, the longer the delay between the publication and any claim, the more difficult it is for a defender to defend the claim. Too many pursuers make a tactical decision to wait before pursuing a claim for this reason.

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, the limitation period should run from the date of publication subject to the discretion of the court to override it. This provides for a very clear start point for any claim and it seems to us that the necessary elements of the cause of action should arise at the date of publication (which is when any harm is likely to start) rather than date of knowledge on the part of the pursuer. In addition, a limitation period that is tied to the knowledge of the pursuer invites pursuers who are close to the limitation period to give dishonest evidence about the date when they became aware of a publication. It also means that there is little or no certainty about the date. In particular if the pursuer's date of knowledge is used defenders are not in a position to know what limitation period they face and have relatively little prospect of successfully challenging a date of knowledge.

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, we consider that the longstop period should be reduced to less than 20 years on the basis that reputation is something that can be instantly harmed by a publication and to allow a claim to be pursued up to 20 years after the date of publication makes little or no sense.

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, we would favour reducing the limitation and prescriptive periods even if the multiple publication period is to be retained.

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, we consider that it would be desirable to introduce a new threshold test for establishing jurisdiction in defamation actions equivalent to section 9 of the 2013 Act in Scots law. Whilst the effect of the threshold is modest given the wider EU and treaty obligations that exist there is nonetheless attraction in ensuring that pursuers do not forum shop and to avoid claims with little or no connection to Scotland being pursued in Scotland.

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 consider that the existing rules on jury trial should be modified. In particular, modifications should be made to enable key issues to be determined at an early stage. This will assist the parties in determining central issues at an early stage which may result in more claims being concluded at an early stage. It will also inevitably save costs in the form of both court costs and costs for the parties and will result in more effective and faster justice. It also has the potential benefit of there being fully explained decisions on key points which will assist publishers, pursuers and those advising them in understanding the law.

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, we do not consider that statutory provision should allow an action for defamation to be brought on behalf of someone who has died in respect of statements made after their death. The cause of action of defamation is so closely associated with the individual concerned that there is little or no attraction allowing claims to be brought after the person concerned has died. That is particularly the case bearing in mind the additional complexities that would arise if such a claim were allowed to be pursued in relation to who would have the entitlement to pursue the claim and in relation to the difficulty that would be faced for

defenders in circumstances where the primary witness (or the person likely to be the primary witness) was no longer available to be questioned or cross-examined.

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

Whilst we do not consider that claims should be able to be pursued on behalf of a person who has died, if it is decided that a claim can be pursued on behalf of a person who has died we consider that there should be a restriction on the parties who may competently bring an action for defamation on their behalf.

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

Yes, if there is to be a restriction it should limit the parties to people falling within the category of "relative" for the purpose of section 14 of the Damages (Scotland) Act 2011.

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

Yes, there should be a limit as to how long after the death of a person a claim could be pursued. We suggest that should be a maximum of five years.

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 do not consider that the pursuit of a claim should be restricted according to the circumstances in which the death occurred or whether the defamer was a perpetrator of the death.

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

In practice none of the causes of action identified are regularly pursued and in our view they are not important in practice and should not be retained.

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

Whilst we do not consider that the claim of verbal injury should be retained in statutory form, if it is retained we consider that it would assist to identify the categories in which that would be possible so that the law is clear.

General Comments

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.