

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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In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gsi.gov.uk. Comments not on the response form may be submitted via said email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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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

No

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

Lack of reform will almost certainly economically prejudice the Scottish media industry through libel tourism, given its the current longer time limits afforded by Scots law and other disparities which tend to favour a pursuer in Scotland.

3. Do you agree that communication of an allegedly defamatory imputation to a third party should become a requisite of defamation in Scots law?

(Paragraph 3.4)

Comments on Question 3

Yes

4. Should a statutory threshold be introduced requiring a certain level of harm to reputation in order that a defamation action may be brought?

(Paragraph 3.24)

Comments on Question 4

Yes

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

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

We would endorse the Scottish Law Commission’s suggestion that there should be additional restrictions before such actions may be brought by such bodies

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

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

Yes

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

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

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

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. This is a very elusive area of the law, but the difficulties are more of interpretation than of substance.

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

No

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

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

(Paragraph 6.15)

Comments on Question 16

Yes

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, it should.

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

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

The debate around the adequacy of Section 5 might inform a clearer provision for Scots law

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

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

No – it seems to us that they may be differently situated so as not to attract liability at all in some cases

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

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

We do not consider that that should require a defence

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

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

Yes. As the Commission observes, "The already complicated statutory provisions on qualified privilege have not been made easier to follow." In the age of citizen journalism, access to justice may involve ready knowledge of the law almost as much as the vindication in litigation of legal rights.

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

Yes – would favour Lord Lester's original proposals

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. Peer review is indeed well understood, but it is very limited in its scope, excluding at least as much theoretical writing as it includes. If, as per the famous dictum in the 1919 case of *Abrams v United States*, “The best test of truth is the power of the thought to get itself accepted in the competition of the market”, then peer review is a very crude gatekeeper to the market. The difficulty in setting the parameters for a privilege of this type is conceptually no greater than, eg, that involved in deciding whether copyright subsists in a work, an exercise which rarely troubles the judiciary.

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

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

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

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

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

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

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

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

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 - both

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, it would be desirable

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

Would favour abolition of jury trials in defamation cases. Of course, no fact finder is infallible, but there are grounds to suggest that, in defamation cases, juries can be peculiarly and floridly suggestible – one thinks of eg *Grobbelaar*, or the need of both the English Court of Appeal and the European Court of Human Rights to interfere on the matter of jury damages on Article 10 grounds. In addition, defamation law, especially in the developing defence of responsible journalism, but also in areas such as levels of meaning, is increasingly legally technical.

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. This has been fully and recently considered.

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

Yes, subject to the view expressed at No.47 above

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, subject to the view expressed at No.47 above

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, subject to the view expressed at No.47 above – one year

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

Yes

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

BBC Scotland has not found them to be important in practice, but if they are to be retained, theoretical clarification would be welcome

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

This would be helpful for clarity, even allowing for the inevitability of some post-codification test cases

General Comments

The SLC paper is appreciated for the inciviveness, thoughtfulness and thoroughness with which it sets out the current state of Scots defamation law. We very much hope that it will result in legislation, but even on its own merits, it is a valuable contribution to the understanding of Scots law in this area. We are indebted to the Commission for its efforts in this area.

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.