

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

«InsertTextHere»

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

We believe that in an evolving media operating in an environment disrupted by technology, publishers, with falling sales and increasingly fragile financial models, are at heightened risk from defamation complaints. Publishers are less able to defend themselves because of the financial risk, and stories are more likely to be spiked to avoid potential action. Even if a publisher is confident they can defend an action, the potential legal cost involved is a barrier. This means that public interest journalism is at serious risk, which further harms the financial model of publishers when they are less able to break stories relevant to their audiences. A recent report from Optimal Economics estimated that the Scottish newspaper industry alone is worth £1bn per year to the Scottish economy. Reforming defamation law in Scotland would strengthen the financial position of publishers, and help protect their contribution to the wider economy.

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. This would help avoid more trivial defamation actions being brought against publishers less able to defend themselves. The threat of legal action, we believe, is being used by wealthy individuals and corporations to curb public interest journalism and compromise freedom of speech. CommonSpace is a very small publisher, but with an audience approaching 150,000 unique users each month our content is having an impact on wider discourse. *[Four lines of text deleted as confidential]* From speaking to other media professionals, it's clear to us that this is commonplace, and the threat of legal action over relatively minor issues is enough on some occasions to prevent publication of stories. As CommonSpace's audience grows, we will become more vulnerable to this type of action, and as a small publisher with few resources this could be a real threat to our continued existence. A serious harm test would help give us some protection.

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

«InsertTextHere»

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

No, we do not agree. Companies with significant financial resource can use defamation law as a tool to try and control media coverage of their operations. It's vital and in the public interest that publishers are able to scrutinise companies, particularly larger and more powerful ones, vigorously. However, the financial resources available to them compared to the dwindling financial resources available to publishers means that there is a chill effect. The risk of legal action for publishers who know they may be targeted by companies well equipped for a long court case becomes enough to prevent publication. If individuals within companies believe their reputations have been harmed because of media coverage, we believe they should take legal action personally, as an individual, rather than under a company banner. Companies should seek clarification of defamatory material through press regulators and complaints processes, but not through courts.

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

«InsertTextHere»

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.

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. Setting this out in statutory form will clarify the law for all parties involved.

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

«InsertTextHere»

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.

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

(Paragraph 6.15)

Comments on Question 16

Yes, we believe this is very important.

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

«InsertTextHere»

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

(Paragraph 7.33)

Comments on Question 19

Yes. For example, those seeking to shut down publication of information may target ISPs or platform providers which are not officially connected to the publishing brand itself. This can be problematic particularly for smaller internet publishers and blogs – often investigative

journalists will create their own blogs to publish some of their work – and in Scotland this has been an issue already.

In 2011, journalist Phil Mac Giolla Bháin wrote about an incident in which his website was taken offline after complaints lodged by Rangers ‘stakeholders’. Mac Giolla Bháin, at the time, was investigating the Rangers Tax Case. The Rangers story is one in which many legal threats were issued to journalists working on it, and this extended to online journalism. Targeting web hosting companies was one way in which reporting could be closed down by bypassing the journalist/publisher. In traditional media, it would be akin to threatening newsagents or delivery drivers with legal action to avoid the release of the material in dispute.

More information here (note: Mac Giolla Bháin himself is actually based in the Republic of Ireland, but his reporting in recent years has focused most heavily on issues in Scotland and so is relevant to this discussion): <http://www.scotzine.com/2011/09/a-failed-attempt-to-censor-an-investigative-journalist/>

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

«InsertTextHere»

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

Legal guidance and clarification at least is needed in this area.

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

«InsertTextHere»

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

«InsertTextHere»

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

«InsertTextHere»

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

«InsertTextHere»

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 judicial and parliamentary proceedings should be protected by 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.

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, for the purposes of clarification and for greater understanding of the law around defamation. This is particularly important for online publishers, many of which do not have substantial legal resources.

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

«InsertTextHere»

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

«InsertTextHere»

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

«InsertTextHere»

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

(Paragraph 9.12)

Comments on Question 33

«InsertTextHere»

34. Should the offer of amends procedure be amended to provide that the offer must be accepted within a reasonable time or it will be treated as rejected?

(Paragraph 9.12)

Comments on Question 34

«InsertTextHere»

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

(Paragraph 9.12)

Comments on Question 35

«InsertTextHere»

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

«InsertTextHere»

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

We have some concerns about this idea. There have been previous occasions where defamation actions against writers or publications have been successful, but it later emerged that the 'defamatory' material was correct (for example: <https://www.theguardian.com/sport/2013/aug/25/lance-armstrong-settles-sunday-times>). There is a risk that courts being given direct powers of content removal could serve to entirely shut down a wider conversation that may be in the public interest. In terms of content distribution, defamatory material can be 'distrubuted' on social media by individual, and often anonymous, users, so how far would the courts' power stretch when it comes to online publishing? How would these powers work in practice with emerging technologies and evolving methods of communication?

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

«InsertTextHere»

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

We believe the 'multiple publication rule' should be amended to a 'single publication rule' to reflect the nature of online media and technology. The multiple publication rule leaves online

publishers vulnerable to legal threats in a way that newspapers would not have been previously, and so it should be reformed.

40. Alternatively, if you favour retention of the multiple publication rule, but with modification, should it be modified by: (a) introduction of a defence of non-culpable republication; or (b) reliance on a threshold test; or (c) another defence? (We would be interested to hear suggested options if choosing (c)).

(Paragraph 10.20)

Comments on Question 40

«InsertTextHere»

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

(Paragraph 10.20)

Comments on Question 41

Yes.

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, we believe time periods should be as short as is reasonably possible.

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

«InsertTextHere»

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

«InsertTextHere»

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

We strongly believe that defamation law should not be reformed to include provisions for taking legal action on behalf of someone who has died. This would be a threat to investigative and public interest journalism.

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, although we strongly believe it should not be made possible at all to take a defamation action 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

Yes, although we strongly believe it should not be made possible at all to take a defamation action 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

«InsertTextHere»

51. Do you agree that any provision to bring an action for defamation on behalf of a person who has died should not be restricted according to:

- (a) the circumstances in which the death occurred or;
- (b) whether the alleged defamer was the perpetrator of the death?

(Paragraph 12.36)

Comments on Question 51

«InsertTextHere»

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

«InsertTextHere»

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

«InsertTextHere»

General Comments

«InsertTextHere»

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.