

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.

Please note that information about this Discussion Paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

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.

Name: John McLellan
Organisation: Scottish Newspaper Society
Address:
Email address:

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, the project is already admirably comprehensive

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

The current law as it affects digital publication and re-publication is an inhibitor in a key business area, and against reforms elsewhere the longer time allowed for action remains an encouragement for libel tourists.

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

Absolutely. Given the accuser already holds the accused in low esteem, or believes something to be untoward, it must follow that for harm to be caused it must be communicated.

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, but perhaps a series of tests would work better than one catch-all definition.

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

Not qualified to comment on wider implications for Scots law

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

There are obvious attractions in limiting access to defamation action, but there could be confusion about the status of charities and other not-for-profit groups

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

Establishing a clear link between a damaging AND wrongful statement and real loss which could only have been caused by the statement is essential if problems elsewhere in the company are not passed off as the result of the statement

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. Public interest introduces significant subjectivity.

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, otherwise it would be malicious.

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, for the sake of clarity

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

It's very difficult to pin down what will always be a matter of interpretation

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. There is difficulty in putting the burden of proof of facts onto a commentator

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, again for the sake of clarity

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, especially qualified privilege

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, interpretation and analysis is increasingly important for news businesses

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 is important to be able to cover debates and disputes effectively

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 is a lack of clarity in this area of law

20. Would the introduction of a defence for website operators along the lines of section 5 of the Defamation Act 2013 address sufficiently the issue of liability of intermediaries for publication of defamatory material originating from a third party?

(Paragraph 7.39)

Comments on Question 20

As 19 above. Section 5 has not brought the absolute clarity it was hoped

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. As above, responsibilities and defences are unclear

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

Not so sure, given hyperlinking is a deliberate act

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

n/a

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

Unsure

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. Anything which aids clarity would be of value to those operating without the benefit of immediate legal advice

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 certainly seems sensible to extend privilege to parliamentary publications

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

If published through a recognised academic or scientific vehicle, it seems strange to exclude books and leaving the decision about extending privilege to the courts on a case by case basis is an invitation to chill. The practical impact on government resources, as opposed to consistency, does not seem to be a good basis for legislation in this area.

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

Agreed

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. Such case law as exists shows a need for clarity to prevent abuse, as observed by Eady

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

News publishers are already used to such a procedure under IPSO regulation so the small number of defamation actions would not present a significant additional burden in principle. But it would be important to understand what would constitute a summary, because it would be unreasonable if the summary length was disproportionate in relation to the offending statement.

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

There are considerable difficulties in this area because of the effect of aggregation and republication. It would only be possible if a safeguard that republication elsewhere beyond the control of the subject of the order did not result in prosecution for contempt.

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. Essential in the digital age when the current position is that access to stories via search engines and retweets reset the legal clock

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

A combination of the answer to Q39 with the back-up of options a and b

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

(Paragraph 10.20)

Comments on Question 41

Yes. To one year to bring Scotland into line with England and Wales.

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. 20 years in the digital age seems very long indeed.

44. Would you favour alteration of either or both of the time periods discussed in questions 41 and 43 above even if the multiple publication rule is to be retained?

(Paragraph 10.20)

Comments on Question 44

Yes

45. We would welcome views on whether it would be desirable for a rule creating a new threshold test for establishing jurisdiction in defamation actions, equivalent to section 9 of the 2013 Act, to be introduced in Scots law.

(Paragraph 11.4)

Comments on Question 45

Yes. Data is readily available to demonstrate extent of dissemination.

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

It would be unwise to rule out jury trial completely, for the reasons laid out by Justice Rares, but a presumption against jury trial as in the 2013 Act should not be dismissed. Especially when actions are brought by famous people, unlike a criminal trial it cannot be guaranteed that a jury comes to the court without preconceptions. The difficulties involved in the criminal trial of Coronation Street star William Roache serve as a reminder. Further, the technical issues raised by analysis of language and definitions of the public interest are increasingly complex.

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. The absence of the main witness and the impossibility of the individual to feel the effect of adverse publicity should rule this out altogether. The upset of relatives is understandable in certain circumstances, but it is impossible for them to suffer real reputational damage by association any more than if the subject were alive, and remedies exist elsewhere to correct errors of fact.

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

As 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

As 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

As above

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)

As above

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

This has made little, if any difference to the operation of, or actions against, news publishers. And to a great extent the difference is only historic. Clarity one way or another would be useful.

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

As above

General Comments

The SNS is very grateful for the opportunity to contribute to the review and has been thoroughly impressed by the openness and depth of understanding the SLC has brought to the process. The discussion paper has been an extremely valuable tool in bringing together the arguments and options available and we very much look forward to the eventual outcome.

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.