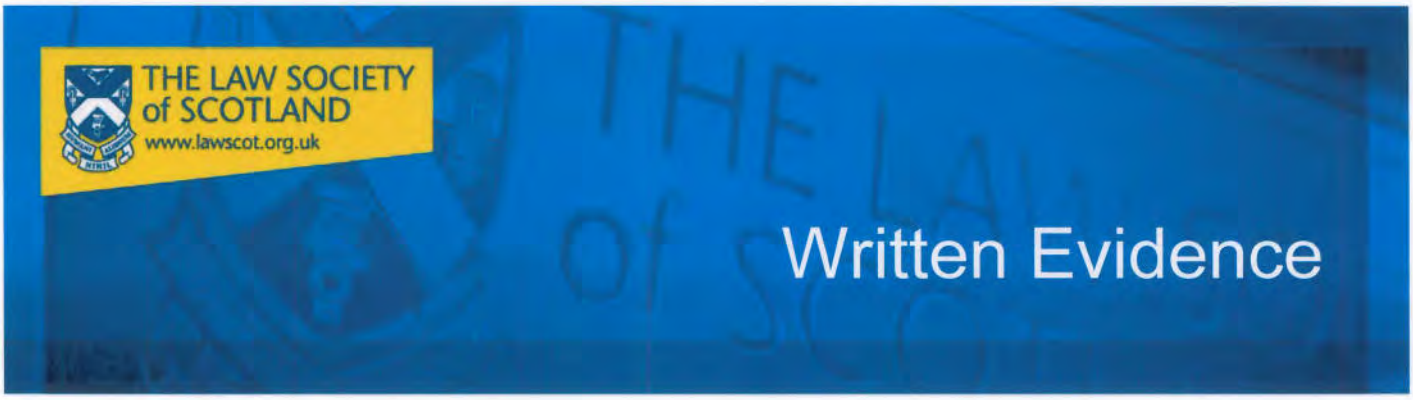

Scottish Law Commission Discussion Paper on Defamation

The Law Society of Scotland's response

July 2016

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's legal profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective legal profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

We welcome the opportunity to consider and respond to the Scottish Law Commission's discussion paper on defamation, which we believe is a positive step towards clarification of the law, particularly in light of new technologies that allow widespread communication.

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.**

We welcome the Scottish Law Commission's review of defamation law. At a stage that substantive changes have been brought about in England and Wales through the Defamation Act 2013, and have been considered by the Northern Ireland Law Commission, we believe that it is helpful to consider ways in which the law of defamation in Scotland could be modernised. There has already been a move towards convergence of defamation law north and south of the border,[1] and we believe that this area merits further consideration at report stage by the Commission.

As the discussion paper notes, this is a challenging project, in part because there are so few defamation cases in Scotland, and in part because of the large volume (and costs) of defamation cases in England and Wales. We believe that it is also challenging because of the changing nature of communications, particularly social media, online forums and other

[1] *English defamation reform: a Scots perspective*, Elspeth Reid, S.L.T. 2012, 18, 111-114

technological developments, which have transformed the scope and reach of communications overall.

We believe that the broad approach taken to the project by the Scottish Law Commission is appropriate, though we would suggest that consideration be given to the funding of defamation actions, particularly funding for legal aid.

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.**

There is likely to be an economic impact to any reform of defamation law in Scotland. However, as we would not anticipate significant variation from the number of cases currently brought, we do not believe it would be significant.

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

We believe that, as a matter of general principle, communication to a third party should not become a requisite of defamation in Scotland. Though this would be consistent with other jurisdictions and promote simplicity, we believe that defamation is not simply a loss to reputation but can also involve severe hurt to feelings and that to require communication to a third party could eliminate any remedy for this aspect of the wrong.

As the discussion paper notes, cases involving the application of *McKay v. M'Cankie*[2] have been rare and in such circumstances, we believe that flexibility should be retained. The subject of a defamatory statement may suffer financial loss, for instance, by resigning from their employment in the belief that a defamatory statement had been seen by others. Circumstances in which this could arise might include a defamatory notice left in an office which only the subject found, or a comment made to a subject's social media page which the subject deleted before it was seen by other users. We appreciate the overlap between civil and criminal law, though there are limitations to the latter, particularly in recovery from any economic loss.

We also believe that, as a remedy, defamation should protect not only loss of reputation but also personal feelings. As Lord Deas stated in *McKay v. M'Cankie*, "The law of Scotland on this point differs, I understand, from the law of England in recognising a man's right to damages for injury done to his feelings—an injury which may be very deep indeed." Through social media and the ability for communications to 'go viral', it is possible to reach an extremely wide audience and to involve people far outside the expected scrutiny of public life. Though often the two elements are conjoined, situations in which there is significant injury to feelings and limited harm to reputation, or vice versa, could occur.

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

[2] (1883) 10 R 537

By comparison with England and Wales, there are a proportionately small number of defamation cases in Scotland. Notwithstanding the extremely limited availability of legal aid for such actions in Scotland, this suggests that there is not a significant issue around actions being raised to remedy minimal harm.

There is a balance to be found - as discussed in *Jameel (Yousef) v Dow Jones & Co Inc.*[3] – between the right of freedom of expression as found in Article 10 of the European Convention on Human Rights and the right of protection of individual reputation. From an access to justice perspective, our concern would be that a threshold would deter legitimate claims. There may also be practical challenges around preliminary hearings to assess whether significant harm has occurred.

A pragmatic approach around the deployment of existing court procedures to deter vexatious claims may be the most appropriate response, and we argued similarly in response to the Courts Reform (Scotland) Act 2014 and its introduction of a permission stage for judicial review at the Court of Session, again because we did not see evidence of vexatious claims being brought in our jurisdiction.

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?**

No. As stated above, we do not believe that communication to a third party should become a requisite of defamation in 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?**

We are aware of developments in defamation law reform in Australia, which have limited the rights of profit-making bodies in defamation actions.[4] The issue of whether such bodies are able to bring actions for loss of reputation raises a number of issues which merit further consideration. A significant requirement of access to justice is equality of arms, and actions brought by profit-making bodies could risk this principle, as was found in *Steel and Morris v. United Kingdom*[5] in which the European Court of Human Rights stated, "At the time of the proceedings in question, McDonald's economic power outstripped that of many small countries (they enjoyed worldwide sales amounting to approximately $30 billion in 1995), whereas the first applicant was a part-time bar-worker earning a maximum of £65 a week and the second applicant was an unwaged single parent. The inequality of arms could not have been greater."

We know, however, that many profit-making businesses, however, are either SMEs (under 250 employees) or micro-businesses (under 10 employees) and that defamatory statements about a profit-making company could generate significant economic harm. The Australian approach has been to remove title for any profit-making body save a micro-business and this could be a means to achieve more effective equality of arms. Equally, the availability of legal aid (the lack

[3] [2005] EWCA Civ 75.
[4] For instance, *Corporations' right to sue for defamation: an Australian perspective*, David Rolph, Ent. L.R. 2011, 22(7), 195-200
[5] [2005] E.M.L.R. 15

of which was found to breach human rights in *Steel and Morris*) could be a means to address such inequality.

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?**

As stated above, we believe that further consideration be given to this issue. There may also be an overlap between defamation and other actions, for instance, verbal injury could be explored.

8. **Do consultees consider, as a matter of principle, that the defence of truth should be encapsulated in statutory form?**

The defence of truth, as the discussion paper notes, does appear to be operating successfully in Scots law. There may be some benefits to placing this defence on a statutory footing, especially if there is codification of defamation law in Scotland. As the discussion paper also considers placing other defences on a statutory footing, there is sense in doing so for the defence of truth.

9. **Do you agree that the defence of fair comment should no longer require the comment to be on a matter of public interest?**

We do not believe that the public interest requirement should be retained. As the discussion paper notes, there has been broadening flexibility around the public interest test in case law, with the advent of social media and to promote consistency between jurisdictions, we believe that this requirement should be removed.

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?**

We consider that the requirement for honest belief be a requirement. This is consistent with an overall approach that values freedom of expression, but requires some responsibility in its use.

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

Yes, as the defence of fair comment would vary from the existing law in Scotland, placing it on a statutory footing would be necessary.

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?**

We do not have any additional comments on the defence.

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?**

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?

Similar to our view that honest belief be a requirement for the defence, we believe that the fact or facts on which the comment is based must exist before or at the time of the comment.

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?

Yes.

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

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?

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?

We are not convinced that there should be a statutory provision regarding reportage. Instead, we believe that the defence of reportage should be omitted from legislation, and developed at common law.

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

There are a wide range of internet intermediaries, with different roles, responsibilities and relationships with internet users. We believe that a review may assist in clarifying the law in this area, to ensure that it is comprehensive, clear and also durable in light of future developments, such as the ways in which intelligent digital agents may build interpretation onto presentation of search results, or the advancement of virtual reality.

There may also be interplay between defamation law and data protection regulation, specifically the right to be forgotten and the categories of internet intermediaries that may fall within the scope of these provisions, which could usefully be considered as part of a review.

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?

Yes, pending the review suggested above. There may be some practical challenges, which could be resolved on a case-by-case basis. These might include situations in which it was impractical for the operator to remove the material, such as services which draw across user data and other material from services like Facebook. With the speed at which some defamation actions are raised, there may also be instances in which litigation may have commenced in a timescale shorter than it would take a reasonable operator to remove defamatory material.

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?

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?

Yes.

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

Yes.

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?

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?

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?

No. We believe that the current system of absolute privilege is a requirement for effective judicial and parliamentary processes.

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?

Yes, we believe that absolute privilege should apply to these proceedings, for the same reasons as our previous answer.

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?

Yes. This would promote consistency with England and Wales and other jurisdictions.

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?

There may be merit in stating the particular types of judicial proceedings to which absolute privilege applies and those to which qualified privilege may apply (such as Parole Board hearings, determinations by adjudication officers of an applications for social security benefits and the like).

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?

With many parliaments, including those at Holyrood and Westminster, looking to increase accessibility and promote engagement, for instance, through streaming proceedings, we believe that clarifying the extent of parliamentary privilege would be helpful and that absolute privilege should apply to any media or documentation published with the authority of the relevant parliament.

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?

We support the opportunity for freedom of expression within the academic and scientific community, and believe that qualified privilege should be available. The coverage of peer-reviewed statements in scientific or academic journals appears practical enough to meet this aim. As the discussion paper notes, a registration scheme may not be a practical alternative.

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.

We believe the current law relating to inderdict and interim interdict operates satisfactorily.

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

We can see benefits to the incorporation of an offer of amends procedure in a new Act. One of the requirements of defamation proceedings, in particular, is the ability to rectify any wrong promptly and affordably. This procedure can, in the appropriate circumstances, address these requirements.

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?

We note the judgments referred to in the discussion paper, and support the proposition that an offer of amends must be accepted within a reasonable time. We do not think a specific period should be stipulated, as what constitutes a reasonable period may vary from case to case.

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

There may be merit in considering the interplay between the offer of amends procedure and the 'two-step' approach to the quantification and mitigation of damages in defamation actions.

36. Should the courts be given a power to order an unsuccessful defender in defamation proceedings to publish a summary of the relevant judgement?

We believe that there should be sufficient powers for the courts to resolve defamation disputes practicably. One frequently observed criticism of redress in defamation actions is that any apology printed is far shorter and less prominent than the original defamatory statement. There are a number of means by which this could be addressed, one of which would be an order to publish a summary of the relevant judgment. It may not, however, be conducive to effective resolution of a defamation action for the court to specify the detail of such a published summary. In addition, there may be issues in the terms of such an order contravening freedom of expression.

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?

We believe that this would be an effective remedy in the resolution of defamation actions. There may need to be considerations around the jurisdiction of the publication and the degree of control that the party has over such material.

38. Should the law provide for a procedure in defamation proceedings which would allow a statement to be read in open court?

As part of the overall settlement process, there may be benefit to a procedure for allowing a unilateral statement to be read in open court. Bearing in mind the discussion around whether this was a competent step following the introduction of the offer of amends regime in England and Wales[6], we believe that it should be made clear in statute that this is permissible in Scotland, and subject to judicial discretion to ensure that the statement is fair and consistent with an approach to resolve the defamation dispute.

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?

As the ability to republish information has significantly increased with new technology, we believe that republication should not give rise to a new limitation period. This view is contingent on the retention of a three year period initially, for the reasons stated below.

[6] For instance, *Winslet v Associated Newspapers Limited* [2009] EWHC 2735 (QB)

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)).

We do not favour the retention of the multiple publication rule.

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

We do not believe that there should be further reduction of the limitation period for defamation actions. There has been a gradual reduction in limitation periods for defamation in England and Wales, from six years, to three years, to one year. As HHJ Richard Parkes stated in *Frank Otuo v The Watchtower Bible and Tract Society of Britain*[7], "The rationale of those reductions is clear. Time is of the essence in defamation actions, and the claimant will normally be anxious – and will be expected to be anxious — to obtain an apology or correction at the earliest possible moment, in order to undo the damage to his reputation."

We do maintain that there is an obligation on parties to litigation to mitigate any economic loss, and it may be, with longer limitation periods, arguments could be advanced that a party had failed to do so in bringing an action late within a limitation period. We do not, though, see significant issues around delayed defamation actions in Scotland. There may be situations in which a defamatory statement may not be discovered for a significant period (for instance, contained in an employment reference). As the discussion paper notes, this issue had been considered by the Law Commission of England and Wales in 2001, with a recommendation (though unimplemented) that the limitation period extend from one to three years, in part as the former created challenges for claimants in preparing their cases.

Though we do not agree with this approach, if a reduction in the limitation period were pursued, we believe that the court should have the discretion to permit otherwise time-barred claims if good grounds are shown (similar to the equitable exception in England and Wales contained in s32A of the Limitation Act 1984).

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?

We have some sympathy for the argument that between the three year limitation period, the 20 year long-stop and limitation commencing from the date of knowledge by the claimant, that there may be issues with uncertain liability in Scotland.

The date of original publication may be the most appropriate stage from which the limitation period should run. The ability for a defamatory statement to be republished through social media and in doing so, likely to renew the limitation period, does create some uncertainty. A discretionary power to disapply this time period in cases in which the claimant became aware at a later date outside the limitation period (such as with an employment reference) would be required to ensure access to justice.

[7] [2015] EWHC 509 (QB)

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?

The discussion paper highlights the effect of the long-stop prescriptive period and the uncertainty that it can potentially create. Equally, this same long-stop applies to all obligations in Scotland, and we refer to our response to the Scottish Law Commission's discussion paper on prescription: we suggested that there was not significant difference between Scotland and other jurisdictions (for instance, England and Wales, where the long-stop is 15 years). On that basis, we do not believe that there should be a reduction in the time period.

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?

No.

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.

Scotland is not a jurisdiction that has faced 'libel tourism'. Indeed, as the discussion paper notes, the number of cases overall is very small. We believe that it is unlikely to increase dramatically even after new legislation and, on that basis, we do not think that specific rules around establishing jurisdiction are required.

46. We would welcome views on whether the existing rules on jury trial in Scotland should be modified and if so, in what respects.

We believe that there are a number of benefits to jury trials in defamation proceedings, not least that issues around injury to feelings and loss of reputation are often best addressed by a representative cross-section of society. The Courts Reform (Scotland) Act 2014 introduced civil juries for personal injury actions at the new national personal injury court and, as the impact of this change is reviewed following implementation, there may be opportunity for wider reflection on the role of juries in civil litigation in Scotland.

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?

In our response to the Scottish Government consultation, *Death of a Good Name: Defamation and the Deceased*, we stated that, until such stage as there was a comprehensive review of defamation law in Scotland, we did not believe that there should be an extension of action to the estate of a deceased. As this discussion paper marks the commencement of that review, we believe that this is a suitable juncture to consider whether such an extension be made. There may also be potential, on similar reasoning, for considering the scope of defamation law for individuals lacking capacity.

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?

We believe that there should be a restriction on the parties who may raise a defamation action on behalf of a deceased. We do not believe that this should be extended to business or professional relationships.

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?

This seems sufficiently inclusive to reflect close personal ties in contemporary society.

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?

We do not think that there should be any different limitation period for claims brought following the death of a person. There may be ways in which the length of time since the death of the person affects the defamation action, though, including the level of compensation for injury to feelings and for economic loss from reputational damage.

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?**

No. We consider such a provision could be arbitrary or create confusion.

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:
- **a. Slander of title;**
- **b. Slander of property;**
- **c. Falsehood about the pursuer causing business loss;**
- **d. Verbal injury to feelings caused by exposure to public hatred, contempt or ridicule;**
- **e. Slander on a third party.**

We believe that there is a role for these categories of verbal injury. We note the discussion around *convicium*, and prefer the analysis contained in the discussion paper and respectfully disagree with Professor Walker. The advent of social media has created communications platforms across which exposure to public hatred, contempt and ridicule are possible. The consequences of this exposure can be severe, emotionally and financially. Though there may be criminal sanctions, it is important that civil remedies also exist. For exposure to public hatred, contempt or ridicule, we believe that the threshold should be placed high, possibly similar to the notions of being ostracised raised by Lord Wheatley in *Steele v. Scottish Daily Mirror*[8].

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.

[8] 1970 S.L.T. 53

Particularly to clarify the category of verbal injury to feelings caused by exposure to public hatred, contempt or ridicule, we believe that establishing these categories of verbal injury in statutory form would be useful.