RESPONSE

by the Senators of the College of Justice

to the Scottish Law Commission Discussion Paper on Defamation

(Discussion Paper No 161)

Foreword:

Most of the questions listed in the Discussion Paper are questions of policy, which are often contentious and strike at the heart of the balance between the right to protection of one's reputation from damage based on false pretences, on the one hand, and the right to freedom of expression, on the other, both being protected to a qualified degree by Articles 8 and 10 ECHR.

As is appropriate, we do not hold or wish to express a view on questions of policy, nor do we wish to make extra-judicial statements on what the current law is, how any proposed provisions would be applied by the courts in Scotland or, indeed, on the requirements, as we see them to be, of the European Convention on Human Rights.

Therefore, we have sought to restrict out answers to those questions where our experience may be of assistance in making the current or reformed law of defamation in Scotland more workable in practice.

Question 3 (paragraph 3.4): *Do you agree that communication of an allegedly defamatory imputation to a third party should become a requisite of defamation in Scots law?*

While we recognise that the present rule is anomalous if the purpose of the law is to protect against and compensate for damage to reputation and we note the consequent scope for abuse, as illustrated by the facts in *Ewing v Times Newspapers Limited* [2010] CSIH 67, we respectfully suggest this is a question of policy. We do, however, recognise that the introduction of a required level of reputational harm, discussed at question 4, would in effect also require imputation to a third party.

Question 4 (paragraph 3.24): *Should a statutory threshold be introduced requiring a certain level of harm to reputation in order that a defamation action may be brought?*

Our impression is that defamation actions are relatively rare in Scotland. Certainly there is no question of a large number of defamation actions becoming a problem such as that in England alluded to at paragraph 3.5 of the Discussion Paper. However, without expressing a view on the matter, having regard to the English cases of *Jameel v Dow Jones* [2005] QB 946, *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 and *Lachaux v AOL (UK) Ltd* [2015] EWHC 2242, which are discussed in the Discussion Paper, we can understand (1) that it may be thought desirable for the law to fix a threshold below which an imputation is to be held too trivial or any likely consequent damage too minor to justify an action for defamation; and (2) that currently Scots law may not do that sufficiently clearly. We therefore would accept that there is reason to consider introducing a statutory threshold. However, regard would have to be had to the English experience and the criticism that there has been of section 1(1) of the 2013 Act. That criticism includes the suggestion that the new threshold has in fact increased the cost of litigation by reason of the introduction of a preliminary discrete issue hearing on "likely to cause serious harm" at which evidence is or may be led. Moreover while we note the legislative judgement in England that *Jameel* did not go far enough, in order to give a full exploration of the issues, we would suggest that SLC's work should take into account of the possibility of there being no statutory threshold test and the Scottish courts' treatment of a *Jameel*-inspired submission to the effect that (1) Article 10 ECHR may require defamation actions to be dismissed where "so little is at stake" (paragraph 3.6) and/or (2) the test set out in that case is sufficient to ward off "mere ridicule" etc (paragraph 3.19).

We would agree that consideration of procedural innovation alongside the introduction of a "preliminary" test of this nature would be desirable, it being borne in mind that our procedure already offers the mechanism of requiring a case to be pled to an appropriate degree of specification and then examining the pleadings (including in cases which may later be determined by a jury) at a debate on relevancy.

Question 6 (paragraph 3.37): *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?*

As we understand it, section 1(2) of the 2013 Act is a statutory threshold, additional to that discussed in question 4 above, for defamation actions brought by profit-

making bodies, namely, that serious financial loss is required to have been inflicted by the reputational damage.

In paragraphs 3.25 to 3.28 of the Discussion Paper, there is discussion regarding whether bodies corporate, including profit-making bodies, actually have what is described as a reputation or form of honour, in contrast to what might be described as their purely commercial reputation, damage to which would be reflected only in economic terms. By limiting defamation actions brought by profit-making bodies to circumstances in which they have suffered serious financial loss, section 1(2) implicitly resolves that discussion in England and Wales: where damage to the reputation or honour only of a profit-making body has been inflicted, there is no action in defamation; in other words, the UK Parliament has decided that a profit-making body is not capable of being defamed unless it has economic consequences, thus it has no free-standing "moral reputation" or honour, damage to which attracts a remedy in law.

We respectfully suggest that the nature of the reputation of profit-making bodies, whether "moral" and "commercial" or only "commercial", is a matter of policy on which we can express no view.

What can be pointed out here is that section 1(2) does not go so far as to discontinue the right of profit-making bodies to bring actions for defamation in all circumstances, which is what question 6 asks.

Should any proposed reform prevent defamation actions by profit-making bodies, then care should be taken to avoid an unintended consequence whereby individuals whose reputation has also been damaged by defamatory statements made about a profit-making body are prevented from pursuing a personal action in defamation.

Question 8 (paragraph 4.15): *Do consultees consider, as a matter of principle, that the defence of truth should be encapsulated in statutory form?*

We believe that the current *veritas* defence works well and there is no reason to bring about the "resetting" effect that codification may have. As the SLC's approach project is not to comprehensively codify Scots defamation law (paragraph 1.18), it would seem appropriate that those aspects of the law which are working well are left as they are.

Question 19 (paragraph 7.33): *Should there be a full review of the responsibility and defences for publication by internet intermediaries?*

In short, the answer to this question is yes. We do not consider, as judges, that we are best-placed to offer a view on how the law might be modernised to reflect new and developing methods of communication, especially social communications. We do hold the view, however, that a review focusing on how the principles underlying current defamation law ought to be applied to modern communication methods is overdue and welcome.

In principle, the proper approach to any attempt to modernise the law would include consideration of how the law might be drafted to future-proof against further inevitable developments in this area.

There are two particular issues in the discussion paper which are worthy of comment:

First, a theme in the discussion is an apparent contradiction, whereby an internet intermediary which takes greater responsibility for editing material posted by others on its website, to prevent defamatory comments, are more likely to be found responsible for any defamatory statements which do "slip through the net", as it were, because they can be seen to have played a role in the publication of the material. There seems at least to be an argument that there is an injustice in rewarding those who do act less diligently in preventing defamatory statements appearing on their websites and de-incentivising those who would otherwise be minded to tackle them.

Second, while any review as proposed will clearly have as its focus the circumstances in which an internet intermediary can or should be found responsible for defamatory material posted by others, it would seem logical to also focus on the question of what positive obligations there are on internet intermediaries when they are not held directly responsible. Such obligations may include the obligation to remove defamatory statements following a request by the defamed party or, with reference to the TripAdvisor case, to disclose the identities of those who may be held responsible.

Question 26 (paragraph 8.9): *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?*

Regarding judicial proceedings, no. We consider that the existing absolute privilege in judicial proceedings is appropriate and helpful to the court.

If judges, advocates, solicitors or witnesses have to bear in mind the law of defamation when speaking in court, this might result in an unnecessary chilling effect on submissions, evidence and the general ability of the court to examine and explore issues and evidence. The ultimate detriment would be to the administration of justice.

The common law offence of perjury, although aimed at preserving the administration of justice rather than avoiding undue damage to reputation, gives sufficient protection against lying in court. To apply the civil law of defamation would represent duplication. Moreover, it is appropriate that lying in court is dealt with under the criminal law rather than the civil law of defamation, whereby someone may be found to have lied in court on the balance of probabilities. It is desirable to avoid the inconsistent interaction of the relevant burdens of proof.

As regards parliamentary proceedings, while we are aware of existing debate regarding the potential to circumvent the law on privacy and defamation in statements in Parliament, this is a matter of constitutional policy on which we would not wish to comment.

Question 27 (paragraph 8.12): *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; courts and lawyers, particularly in appellate cases and in circumstances where consideration is being given to developing the common law, should be able to draw upon the widest possible range of sources of law, whether binding, persuasive or demonstrative.

At present, it would seem that useful sources of law, including court reports from former Commonwealth countries, such as Canada and New Zealand, which have considerable commonality with the Scottish legal system, would not be privileged. To give one example, it is understood that the Canadian case, *Meads v Meads* 2012 ABQB 571, has been cited in the Scottish courts. To leave this court report as susceptible to an action in defamation has the potential to stymie its legitimate use as a source of law in this country.

Question 33 (paragraph 9.12): *Should the offer of amends procedure be incorporated in a new Defamation Act?*

For the reasons given in the Discussion Paper, we would agree that, should a new Defamation (Scotland) Bill be introduced, it would ideally contain provision for an offer of amends procedure.

Question 34 (paragraph 9.12): *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?*

There seems to be no good policy reason to require an answer promptly, without giving pursuers the chance to fully consider the terms of the offer. It would seem sensible that pursuers are given a reasonable time to consider their options before deciding to accept an offer of amends. Judges would be able to take into account what is a reasonable time in the circumstances, including the pursuer's conduct subsequent to the offer being made, but also the fact that the offer had not been withdrawn by the defender.

On the face of it, however, it seems unjust to allow a pursuer to continue litigation for a long time only to then accept the offer of amends, which may include terms relating to compensation and expenses. However, section 2(6), in our view, does provide for procedural equality between the parties, in that if a pursuer does not accept and continues with the litigation, hoping the offer will remain open, the defender may withdraw that offer at any time.

Question 35 (paragraph 9.12): *Are there any other amendments you think should be made to the offer of amends procedure?*

In the circumstances described, should an offer of amends be rejected (or left open until the judgment), it would seem sensible for the offer and its terms to be factored into decisions of expenses, but this would not likely require to be addressed in primary legislation.

Question 45 (paragraph 11.4): *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.*

First, we concur with the view that "libel tourism" has not presented itself as an issue in Scotland, but that does not warrant dismissal of the idea of a threshold test relating to jurisdiction.

On such a provision, we offer the following comment.

In purely numerical terms, it is likely that any material published in Scotland is likely to have been published more often in England and Wales, akin to the example given at paragraph 11.3 vis-à-vis England and Wales on the one hand, and Australia on the other. In these circumstances, we would not want to see numerical factors such as this taken into account vis-à-vis Scotland and England and Wales as, in almost all circumstances, publication will have occurred in England and Wales several times more often than in Scotland. This is a matter of population size rather than of the locus of reputational damage. Rather than being "most appropriate in all the circumstances", it would represent an effective usurpation of the Scottish jurisdiction and bar pursuers from seeking to protect their "Scottish reputation".

It seems unavoidable that, given the specific nature of the UK's legal systems and the circumstances in which a defamation action arises, in the vast majority of cases an action ought to be permitted to be brought in each of the separate UK jurisdictions.
That said, we would not rule out the notion of one of the English, Scottish or NI courts being most appropriate and thus having exclusive jurisdiction, in certain limited circumstances – for example, where the defamatory material was published in a local newspaper only in hard copy. The difficulty arises where the defamed party has a reputation in all of the jurisdictions and, although the publisher is a local newspaper with readership generally otherwise confined to one jurisdiction, the article is posted online and arouses interest wherever the defamed party has a

reputation, including other jurisdictions. In such circumstances, it would seem unfair to bar actions for defamation in any of the jurisdictions.

All of the other factors taken into account in the English case law in applying section 9 thus far, as described in the paragraph 11.3, would seem sensible if such a rule was introduced

In conclusion, a sensible general rule would be that unless it could be proven that the publication caused no or disproportionately small (even taking into account population size) reputational damage in Scotland, relative to any other jurisdiction, then the Scottish courts would have jurisdiction. In this regard, the SLC may wish to assess the impact of the current law of *forum non conveniens* in such situations.

Question 46 (paragraph 11.13): *We would welcome views on whether the existing rules on jury trial in Scotland should be modified and if so, in what respects.*

As a matter of generality we would see the Civil Courts Review to have endorsed jury trial as a means of inquiry in actions for damages. Moreover, we would respectfully agree with the view of Justice Steven Rares narrated at paragraph 11.12 of the Discussion Paper: namely, that the issues that go to the "heart of a defamation trial" i.e. whether something said is true or whether it constitutes fair comment, "are best determined by a cross section of ordinary citizens bringing to bear their experience of life". We would accordingly favour there being no change to the current position, i.e. trial by jury unless special cause is shown (see paragraph 11.5).

Question 52 (paragraph 13.40): *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.*

We would support the SLC's intention to assess the continuing practical utility of verbal injury. We share the view that there may be a continuing role for the business categories, although clearly the position adopted on this issue will have to be consistent with that adopted on the issue raised in questions 6 and 7.

Question 53 (paragraph 13.40): *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.*

There are uncertainties in this area of the law. There would be merit in clarification in statute.

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