Collated responses to

Discussion Paper on Defamation (DP No 161)

Consultation period ended: 17 June 2016

This document collates the responses to the above Discussion Paper. The closing date for the responses was 17 June 2016. Comments have been copied and pasted to follow the relevant question and any general comments have been added into the section at the end of this document. The paragraph number which follows each question directs the reader to the relevant section of the Discussion Paper.

List of individuals/bodies/groups who submitted responses

Individuals

- Christian Angelsen
- Francis Berry
- Dr Paul Bernal, Lecturer in Information Technology, Intellectual Policy and Media Law, University of East Anglia Law School
- Dr Stephen Bogle, Lecturer in Private Law, University of Glasgow School of Law
- Advocate John Campbell, South Africa
- Professor Eric Clive, University of Edinburgh
- Campbell Deane, Solicitor, Bannatyne, Kirkwood, France & Co
- Dr Eric Descheemaeker, University of Edinburgh
- Roddy Dunlop QC
- Sameen Farouk
- Dr David Goldberg
- Professor George Gretton, University of Edinburgh
- Graeme M Henderson, Advocate
- Dr Brooke Magnanti
- Professor Elspeth Reid, University of Edinburgh

- Sibyl (Member of the public, Australia)
- Dr Simon Singh, Science writer
- Ursula Smartt, Lecturer in Media Law, University of Surrey; author of *Media and Entertainment Law*
- Professor Paul Spicker, Emeritus Professor of Public Policy, Robert Gordon University
- Gavin Sutter, Senior Lecturer in Media Law, Queen Mary University of London
- Robert Templeton
- Margaret and James Watson
- Mark Whittet, Executive Director, Scottish Energy News Ltd

Campaign groups

- Libel Reform Campaign
- Supporters of Libel Reform Campaign (general response)

Insurance interest

- Aviva

Law firm

- BLM

Media and media-related organisations

- BBC Scotland
- Tom Brown, Journalist
- CommonSpace (Digital news service)
- Google
- National Union of Journalists ("NUJ")
- Scottish Newspaper Society ("SNS")

Publishing bodies

- The Publishers Association/Publishing Scotland (Joint response)

Representative bodies (legal)

- Faculty of Advocates
- Law Society of Scotland
- Senators of the College of Justice
- Sheriffs' Association (nil response)

Questions and responses

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	
Paul Bernal	No obvious omissions.
Stephen Bogle	No given my understanding of the resources and time available to the SLC – along with the need for a relatively swift reform of defamation – I do not think anything else needs to be covered. Possibly a statement of verbal injuries would be useful.
Eric Clive	If the threshold proposal does not go through then other reforms, such as a cap on damages other than those for proved patrimonial loss, would be worth considering but if the threshold reform goes through that should do the job.
Campbell Deane	Yes. Any consideration of Defamation law requires to consider the practical problems presently facing practitioners so far as the issue of meaning is concerned. At present, the matter which comes to the fore at debate, is whether the article is capable of bearing the defamatory meaning plead by the Pursuer. That remains a debate point. The level of meanings used in England (Chase level meanings 1 to 3) are not regularly plead in terms of Scots Law. For example following the principles in Lewis –v- Telegraph, the article meant that 1. A was guilty of a criminal offence. 2. there were grounds to suspect A of committing a criminal offence and 3. there were Grounds to investigate that A had committed a criminal offence. Each clearly carry a different, albeit defamatory meaning. In Scotland the practice is simply to aver that the words complained of are capable of bearing a defamatory meaning and then averring that meaning. Under the English CPR rules it is open to a judge to determine the level of meaning attributed to the statement complained of. The difficulties in the Scottish procedure can be seen for example in the recent case of Cayzer –v- Times Newspapers where the Inner House (overturning the decision of the Lord Ordinary on meaning) held that the article was capable of bearing a defamatory meaning but went no further as to what the actual meaning of the article was. This leaves parties no further forward when moving to proof particularly where more than one meaning is pled arising from the article. It is submitted that should such a procedure be established in Scotland then that would benefit both parties to the litigation in clarifying at debate stage, firstly whether the article was capable of bearing a defamatory meaning, secondly the level of that meaning and thirdly what the

	meaning of the article was.
Roddy Dunlop	N/A
Sameen Farouk	I believe such [defamation] claims should be made through a specialist court/tribunal where the person being sued has the right to bring in a counter-claim. In particular, the counter-claim must also be able to bring in a third party which may be where the matter of contention was itself published. This matters because the resolution to a dispute may be with the legal person publishing the claim which results in injury or harm to a firm. I ask this because I want to see the courts relieved of this pressure. I also think it is important for the Law Commission to recognise that at least some of these claims are likely to emerge from social media or platforms for discussion online on news sites, particularly local newspapers. **[***Remainder of paragraph deleted as confidential***]**. The court should also seek to have a direction in order to reach its decisions on the basis of the information that the person had available to them at the time that they had made remarks which would cause serious injury. The question is what information would have been publicly available (outside of the firm or public body's own materials) that would or could have been used by a reasonable person. In doing so, the court is forced to look into whether such claims are being repeated elsewhere and prior to the person being sued.
Graeme Henderson	The central issue that this paper has not addressed is why the English Courts provide specialist courts and procedure for this aspect of the Law and the Scots Courts do not. The Scots Courts have undertaken significant reforms in relation to the processing of personal injury claims. The Court of Session has devised a set of Rules to speed personal injury claims through the Court. Such Rules have been replicated in the Sheriff Court. It seems clear that the framers of the Rules were well aware that Defamation actions are to be categorized as personal injuries. Court of Session Practice note number 2 of 2003 makes it clear that it is not intended that actions of Defamation should be included. A similar interpretation is likely to be made to the analogous Sheriff Court Rules. Whilst the Sheriff Court Rules provide Summary Cause Rules for small claims this simplified procedure is not open to Defamation actions. I understand that, if such an action is raised in the Summary Cause, it will be immediately transferred to the Ordinary Cause Rolls. This is in marked contrast to the Statutory provision which enables the Courts of England and Wales to hold Summary Trials. This provision was not extended to Scotland. There is no explanation for this difference in treatment between claimants seeking damages for personal injuries. Someone with a sprained wrist will be provided with a Rolls Royce service. The Court will provide them with a timetable setting out when each step of their case will take place.

	By way of contrast someone who has a significant Defamation claim has no means of knowing when their case will finally resolve. The situation is likely to be remedied by the introduction of a specialist court dealing with these issues. Other procedural reforms Were a specialist Court to be created it would be more likely to introduce bespoke procedural rules to deal with a number of obvious problems in need of a solution; • The Court is likely to introduce fast tracking rules. • The Court may well introduce rules for dealing with spurious claims. At the moment a Defender may well encounter significant costs in dealing with a party litigant with limited resources. The Defender faces the expense of endless continuations, amendments and the lodging of documents. • Unlike England there is no practice of providing affidavits, and other evidence, in relation to interim interdict applications. This matter is likely to be revisited. With the advent of Section 12 of the Human Rights Act the Court requires to consider whether or not one the applicant is likely to establish that publication should not be allowed. It does not seem satisfactory that this should be decided on submissions. • I have encountered situations where the Court appears to have been unaware of right of the Defender to be heard in interim interdict proceedings. A specialist Court is likely to be well aware of this issue. • In the event that the Court is minded to grant an application for interim interdict, in the absence of the Defender, it may well devise rules for reporting what was said and the basis for the granting of the application. • A specialist Court is likely to consider devising rules confirming the locus of certain parties to be heard. • If an application is made to restrict media reporting the application will trigger an order requiring service on the media. Despite this there is no express right, in the Rules, for the media to appear. This position could be clarified. • It is not unknown for one Pursuer to raise several actions against several publishers arising out of the publication of similar material. Consideration should be given to case management. At the moment one newspaper could apply for a sist without other defenders being able to comment. For example should one newspaper that have its case sisted only if it agrees to contribute to the costs of another? • There is no reason why the Court should not devise rules setting out a time limit by which an offer of amends must be accepted. This appears to have been introduced in England without requirement to alter the statutory provision. This involves a different solution to that proposed in question 34.
Ursula Smartt	Why does the Scottish Parliament not adopt the wording (in total) of the whole Defamation Act 2013?
Gavin Sutter	The existing scope is comprehensive, and I believe covers all the key issues raised with regards to the English Defamation Act 2013. I would consider it a shame that a codification of Scots defamation law is off the

	table, albeit for understandable reasons. I did consider it an opportunity missed when the English Act did not at least consolidate the existing statutory provisions that remain unchanged alongside the new measures in one single statute, even leaving all the rest to common law.
Robert Templeton	I would like to see the Commission's opinion on the Anti-SLAPP law in the USA and its potential implementation in Scotland.
Campaign group	
Libel Reform Campaign	We believe fair retort is a defence that should remain in Scots Law as it enables defendants to deny charges made to them in public without the threat of further legal action being brought against them. However, we reaffirm the existing power's restriction which states that any retort must be primarily focused on the issue of original contention and for the defence to fail if the statement was made in malice. As identified by Rosalind McInnes in Scots Law for Journalists: "The speaker must not pass from repudiation to the making of separate defamatory allegations against the accuser." We are keen for alternative methods of dispute resolution to be incorporated within any reform of Scots defamation law, which can help parties resolve disputes in a timely, cost-effective and fair manner. This should include mediation and voluntary early neutral evaluation which has a high success rate in family law and in the Technology and Construction Court in England. To promote a change to a culture of engaging in these ADR practices, reform must also ensure that the court itself is accessible to anyone, regardless of their resources. This means ensuring the court uses its power to prevent wealthy bullies from abusing the court process to intimidate the other party.
Insurance interest	
Aviva	We believe that many of the underlying issues in relation to defamation arise in connection with costs. This was very much the catalyst for the reviews which took place in England and Wales. However, as the reviews took place they became increasingly focused on substantive changes to the law rather than on the factors which cause costs in claims for defamation to be disproportionate to the damages that are awarded and, indeed, to be significantly higher than in most other areas of litigation. In the circumstances any reform of the law should, we would suggest, be coupled with consideration of how cases can be dealt with cost effectively. In particular introducing mechanisms for proactive case management and for the early resolution of key issues such as meaning and serious harm as well as mechanisms to dispose of exceptionally strong or exceptionally weak claims at an early stage would undoubtedly assist everybody.
Law firm	
BLM	We believe that many of the underlying issues in relation to defamation arise in connection with costs. This was very much the catalyst for the reviews which took place in England and Wales. However, as the reviews took place they became increasingly focused on substantive changes to the law rather than on the factors which cause costs in claims for defamation to be disproportionate to the damages that are awarded and, indeed, to be significantly higher than in most other areas of litigation. In

	the circumstances any reform of the law should, we would suggest, be coupled with consideration of how cases can be dealt with cost effectively. In particular introducing mechanisms for proactive case management and for the early resolution of key issues such as meaning and serious harm as well as mechanisms to dispose of exceptionally strong or exceptionally weak claims at an early stage would undoubtedly assist everybody.
Media and media-related organisations	
BBC Scotland	No.
NUJ	No.
SNS	No, the project is already admirably comprehensive.
Representative bodies (Legal)	
Faculty of Advocates	The current consultation exercise offers a wide-ranging consideration of the law relative to defamation. It is not suggested there are any other aspects that ought to be considered at this stage.
Law Society of Scotland	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 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 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.

[1] English defamation reform: a Scots perspective, Elspeth Reid, SLT 2012, 18, 111-114

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	
Paul Bernal	No comment.
Stephen Bogle	I'm afraid I'm not much help here.
Eric Clive	The likely economic impact would be small but beneficial. Defamation actions are wasteful of resources.
Campbell Deane	I consider that the proposed reforms will impact economically on those practitioners and Counsel representing Pursuers (and indeed Defenders) on the pretext that any threshold proposed will reduce significantly the likelihood of proceedings being either raised or indeed contemplated in Scotland. As the Consultation Paper highlights, there is a limited level of Scottish authority so far as Defamation is concerned but that is mostly because there is a limited amount of litigation in Scotland in this field and certainly an insignificant level of litigation in comparison to that conducted in England. It should not be forgotten that unlike in England where the expenses regime is prohibitive for most claimants the same does not apply in Scotland. Notwithstanding that and indeed since *John –v- MGN*, with the disparity between awards in England and Scotland narrowing, litigation in defamation remains at low level in Scotland. It is submitted that by unifying the law in the two jurisdictions that such a proposal will further delimit the amount of litigation in this field in Scotland.
Roddy Dunlop	I doubt there will be any significant impact, given the low volume of defamation claims seen annually in Scotland.
Graeme Henderson	The discussion of economic impact, in the discussion paper, appears to be confined to the inconvenience of publishers. It should be noted that most British newspapers publish an Irish edition. In any event the economic impact of a change in Defamation law may prove to be difficult to assess.
Gavin Sutter	n/a
Ursula Smartt	Given that libel actions have reduced considerably since the coming into force of the new Act (England & Wales) – this has already had a positive impact on 'libel tourism' in the High Court/ London. I can provide no example (for my current version of the textbook 3rd ed.) as settled case law given the substantial threshold of the 'serious harm' test ((s1(1) Def. Act 2013). All anecdotal cases have settled out of court (i.e. non-reported court actions – e.g. *Niall Horan (of 'One Direction') v Express Newspaper group (Daily Star)* Dec. 2015; Serrano Garcia (*Jose Antonio)* v Associated Newspapers Limited (2014)). The worst case is that of Mr Ewing, serial

	litigant and 'libel tourist' who took his action/s to other UK courts after being unsuccessful in England and Wales (see: *Ewing (Terence Patrick) v Times Newspapers Ltd* [2010] CSIH 6; [2008] CSOH 169 Outer House, Court of Session, Edinburgh; *Ewing (Terence Patrick) v Times Newspapers Ltd* [2013] NICA 74; [2011] NIQB 63, High Court of Justice in Northern Ireland, Queen's Bench Division, *Belfast Ewing (Terence Patrick) v Times Newspapers Ltd* (2014) Claim No. 2013 – E -42 – In the Supreme Court of Gibraltar, Judgment of 17 November).
Campaign group	
Libel Reform Campaign	A reformed law of defamation will be of great economic benefit to Scotland and to the United Kingdom as a whole. Companies publishing newspapers in Scotland have told us that they spend hundreds of thousands of pounds annually on legal advice to rebut legal threats. At a time where Scottish newspapers are struggling with increasing costs, which has resulted in redundancies being made across the industry, it is vital that money is spent where necessary. Placing established common law defences into statute will reduce ambiguity and uncertainty in the law, ensuring publishers will be able to either fend off or settle legal challenges with greater efficiency. This in turn will allow resources to be spent on other activities that benefit Scottish society, whether that is more news reporting or diverse and radical publishing. Uncertainty over liability in defamation for technology companies discourages investment. A clear law of defamation with sensible defences for web hosts, secondary publishers and 'conduits' will make Scotland a more attractive location for technology companies.
Insurance interest	
Aviva	If the costs of defamation proceedings can be controlled this is likely to be in the interests of the courts and court users
Law firm	
BLM	If the costs of defamation proceedings can be controlled this is likely to be in the interests of the courts and court users.
Media and media-related organisations	
BBC Scotland	Lack of reform will almost certainly economically prejudice the Scottish media industry through libel tourism, given the current longer time limits afforded by Scots law and other disparities which tend to favour a pursuer in Scotland.
CommonSpace	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.
NUJ	The Scottish media industry is already under considerable pressure with continuing job losses and falling circulation among most newspapers. The current defamation law in Scotland means there is a risk of libel tourism, particularly since reform in England and Wales with the Defamation Act 2013 has led to other disparities which tend to favour pursuers in Scotland including the degree of harm and the lack of single publication rule. Failure to reform defamation law will create further economic prejudice to the Scottish media industry.
SNS	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.
Representative bodies (Legal)	
Faculty of Advocates	The Faculty of Advocates shares the view of the Scottish Government that the legal sector in Scotland should be assisted in contributing to the economic growth of the nation. It is therefore a shared objective that Scotland be a strong forum for litigation, including in the area of defamation. The current low volume of cases accordingly undermines not only the development of the law but diminishes the prospect of Scotland being taken seriously as a centre of excellence in matters relating to defamation. It is accordingly our hope that any reforms will specifically consider how that critical current issue can be addressed. In a sense, the Scottish problem is exactly the reverse of that which recent reform in England addressed; in England there was a concern that there were too many cases whilst in Scotland there is uniform acceptance that there are far too few.
Law Society of Scotland	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?

(Paragraph 3.4)

Comments on Question 3	
Paul Bernal	Yes. Private communication between two parties does not fulfil what is generally understood to be defamation anywhere else in the world, and should be dealt with through different laws.
Stephen Bogle	I do not think this is necessary. There is a particular wrong here which I do not think either the Protection from Harassment Act 1997 nor the Communications Act 2003 sufficiently protects. The DP highlights in para 3.4 the potential inadequacy of the 1997 Act or the 2003 Act to remedy what a defamation action presently can do. Although the DP rightly notes that this action is rarely raised, it does not cause too much confusion nor is it leading to a flood of litigation. It would appear to be unnecessary to require that a statement be made to a third party. Plus I think any future Bill, proposed by the SLC which included this sort of amendment to the present law, would attract unnecessary debate in Parliament and distract from the main task of the DP: to deal with more pressing issues such as the threshold test, internet communications, etc. Moreover, to require third party communication also introduces the difficult question of who is a third party, what is a sufficient communication and whether it is necessary for a third party to hear, understand or acknowledge the communication? In sum: I don't think a *MacKay* action is particularly troublesome; I don't think it causes any difficulty in practice; and I think it caters for a particular wrong not covered for elsewhere in the law.
Eric Clive	Yes.
Campbell Deane	In principal, it seems inherently sensible that an allegedly defamatory imputation to a third party should be necessary. However it would be possible to envisage a situation where a communication is sent by party A to party B which is defamatory of party B. Party B may be under a legal duty to pass that information on to a third party who would become aware of the defamatory imputation which would have only been passed between party A and party B. There would in those circumstances be publication by party A only to one party which would mean it was not actionable. That would seem inequitable where a duty exists to advise others of the defamatory material.
Roddy Dunlop	Absolutely. The archaic provisions under Scots law which countenance a claim for solatium where publication is to the pursuer alone are indefensible in a modern legal system. Such provisions fail to give appropriate weight to (a) the fundamental purpose of defamation, which is to protect reputation (which ex hypothesi is not affected by a publication to the pursuer alone); (b) Article 10 rights (which include the right to shock or offend); and (c) the need for proportionality, which suggests that even in the case of third-party publication a small number of recipients may mean that the costs of a claim in defamation is "not worth the candle" [or even the wick]: cf. *Jameel v Wall Street*; *Ewing v Times Newspapers*. In the event of repeated baseless accusations being made to the pursuer alone for malicious purposes, other remedies are available, such as under anti-harassment legislation. There is, now, no need for the law of

	defamation to respond to such circumstances, and several cogent reasons why it should not.
George Gretton	I would agree, but would suggest that the doctrine in question is not part of the law of defamation, because it is not about harm to reputation – to fama. But see further my response to questions 6 and 7.
Graeme Henderson	There is no reason in principle why the Law of Scotland should be altered. The fact that other jurisdictions do not permit such a claim arises out of differing views on the nature of Defamation. In a Jurisdiction where the claim is based on an economic loss (right to reputation) there has to be a communication to a third party to trigger this wrong. The Scottish position is that Defamation is a claim based on injury to feelings. An injury to the feelings of the Pursuer can arise where only the Defender is present. The situation is best explained by TB Smith "Short Commentary of the Law of Scotland." (page 725) In practice the maker of a statement to a Pursuer in private will sometimes be protected by other means. In practice the maker of the statement may told the Pursuer something that the maker has a duty to convey to them. The recipient of the statement may well have an interest to her what the maker has to say to them. The issue of privilege may well arise.
Ursula Smartt	Yes.
Gavin Sutter	Wholly and unreservedly. That defamation should extend to protecting mere self-esteem in the absence of publication to a third party is at best quaint. I should think also that, were such a case to be considered in light of Article 10 of the European Convention on Human Rights, it would be found wanting. Conceptually, as defamation is, broadly speaking, understood to be about the protection of an individual's reputation, it is inconsistent to encompass within its ambit situations in which no publication to another party in whose eyes the subject's reputation can be maligned.
Robert Templeton	Not for the purpose you suggest. I do not see the purpose of fundamentally changing the law in such a conceptual way simply to placate social attitude to the action. The fact that you can bring an action against someone for solatium does not bring about a social harm. It does not allow the significant threat of an action of defamation, patrimonial loss, and therefore should be of little concern. It is better not to fiddle with the law on the conceptual level unless there is a valid concern. The reason for the two heads of claim is an historical one, and it is one which could be usefully re-employed as discussed in answer to question 40. From an internet perspective this conceptual basis has no effect as is illustrated by the case of *Evans & Sons v. Stein & co.* As the International regulation of defamation was specifically excluded by the Rome II Regulations for non-contractual obligations, S.13 of the Private International Law Act 1995 excludes defamation from the choice of law provisions of the Act meaning the common law still applies in the UK. This means that the double actionability rule still applies as decided in *McElroy v. McAllister*. The delict will occur where the defamatory material

	is downloaded (where the material was distributed and where the injury is felt - Longworth v Hope 3 M 1865 1049, per Lord Deas, p. 1057, cited by Lord Hope in *Berezovsky v Michaels and Another* [2000] 1 W.L.R. 1004. At p. 1026). It could be argued that in order to limit the possibility of a claim the solatium aspect of the delict should be removed. However I am not aware that this is a problem or even a potential danger, as the main drive for the action is the patrimonial loss, and this cannot be founded in Scotland where the only head claimed is hurt feelings. I suppose that it is possible someone might argue that the Scottish courts have jurisdiction based on the solatium aspect of a claim. However I would expect that the Commission would require evidence that this was a either a likely scenario or current problem.
Campaign group	
Libel Reform Campaign	Communication to a third party is a vital requisite for defamation in Scots law. Without it, no measures can be enacted to discourage cases from being brought where there has been no serious reputational harm caused (see question 4, below). Other laws, such as the Protection from Harassment Act 1997 and the Communications Act 2003, already provide adequate remedy for a person who has been sent a private message that causes upset or distress. There is no need for an additional measure in Scots defamation law. The absence of this requisite could also discourage responsible journalism. If a private communication could trigger a defamation claim, then reporters would find themselves risking a defamation claim when they put allegations to the subject of their reporting.
Insurance interest	
Aviva	We agree that a communication of an allegedly defamatory imputation to a third party should become a requisition of defamation in Scots law. There is, on the face of it, no substantive good reason why publication to the pursuer should be actionable and, indeed, in our experience the existence of a right to bring a claim in relation to such a publication causes evidential issues which are unwarranted in circumstances where the reputation of the person concerned will not have been harmed.
Law firm	
BLM	We agree that a communication of an allegedly defamatory imputation to a third party should become a requisition of defamation in Scots law. There is, on the face of it, no substantive good reason why publication to the pursuer should be actionable and, indeed, in our experience the existence of a right to bring a claim in relation to such a publication causes evidential issues which are unwarranted in circumstances where the reputation of the person concerned will not have been harmed.
Media and media-related organisations	

BBC Scotland	Yes.
CommonSpace	Yes.
Google	In line with our views on the desirability of commonality in the defamation laws of the UK, we strongly support the proposal that communication of an allegedly defamatory imputation to a third party should become a requisite of defamation in Scots law, and that a statutory threshold should be introduced requiring a certain level of harm to reputation in order that a defamation action may be brought.
NUJ	Yes.
Representative bodies (Legal)	
Faculty of Advocates	No. On balance, we are not sufficiently persuaded by this proposal without further consideration at the Report stage. This proposal would represent a significant change to the long-established principle of Scots Law that the essence of defamation is injury to self-esteem which is actionable in its own right. The First Division in *Mackay v M'Cankie* made plain that the law in Scotland was different from that in England and in our view that position should not be readily departed from without a more compelling basis for reform. Whilst it may be correct for the Discussion Paper to note that there are no recorded cases in recent times, that is not to say that the issue does not arise in practice. After all, most defamation cases in Scotland resolve without proof or trial and are not reported. Albeit in small numbers, we have experience of cases in which a remedy has been successfully sought arising from, for example, private correspondence. We acknowledge that such cases are rare but the fact that they still exist requires us to consider what the original justification for the existing law was, and whether it has any useful application in the modern era. We share the view (Discussion Paper at para 3.4) that in fact the principle may have direct applicability in an online age, most notably in the context of emails. The ease and frequency of direct, private communication has massively increased in recent years. The law has often struggled to keep pace with that increased electronic communication. In other words, we wonder whether the *Mackay* principle might be something which (after a long period of relative irrelevance) is now more relevant than it has been. If so, abolishing that means of a pursuer seeking remedy would seem odd. We note the reference to a possible alternative remedy in the form of the Protection from Harassment Act 1997, but that (as the Paper notes) requires a 'course of conduct' which may not always be present. Equally, s. 127 of the Communications Act 2003 is potentially a higher bar to overcome ('grossly offensive') and in any event is a criminal and not a civil sanction.

Law Society of Scotland	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.
Senators of the College of Justice	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.
SNS	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.

[2] (1883) 10 R 537.

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	
Paul Bernal	Yes, though this may not be easy. The 'serious harm' threshold in the Defamation Act 2013 has not, as yet, produced the clarity that some hoped. If Scotland does something similar, it should be with better and clearer guidelines.
Stephen Bogle	Yes, there is a clear need for a threshold test. That being so, the question is whether this should be a procedural test or a test of substantive law. As noted in the DP, in English law the threshold test developed out of the abuse of process test; however, in time it has migrated into the substantive law and is now necessary for establishing defamation in English law (s 1 (1) Defamation Act 2013). For the reasons discussed on 21 October 2015 at the Glasgow Forum for Scots Law on defamation, I think Scots law should be careful about introducing a threshold test into the substantive law. Eric Descheemaeker has given very strong reasons to explain why English law has taken a wrong turn here (see 'Three Errors in the Defamation Act 2013' (2015) Journal of European Tort Law 24-48 which the DP references on p 20, fn 41). The DP's analysis from para 3.20 to 3.24 is spot on. I'm in complete agreement that "there may in principle be scope for the introduction in Scots law of a threshold test. Nevertheless, the criticism that has been expressed of the threshold test in England and Wales should not, of course, be lost sight." (Para 3.24). The SLC has a real opportunity to improve upon and learn from the English experience without necessarily repeating the same mistakes.
Eric Clive	Yes. This is an extremely important reform. At present defamation actions can be raised or threatened by those who have suffered no actual distress and suffered no actual loss. They can cause real distress and real loss to alleged defamers who have no or minimal culpability.
Eric Clive (supplement to his original response, following seminar at University of Edinburgh on 22 April – declarator of falsity as a possible complement to any statutory threshold)	**Introduction** Prompted by the excellent conference on 22 April I would like to offer this supplementary comment on the idea of providing expressly that it is competent for a person to seek and obtain a declarator of the falsity of any harmful statement published about that person by another. **A declarator of falsity: advantages** This would complement a stiff "serious harm" threshold very well. One of the defects of the present Scottish law on defamation is that it can facilitate gold digging actions – or threats of action –by those who are not really offended or harmed but who see a chance of extracting money. A "serious harm" threshold would be an answer to this problem. It should apply to all pursuers, not just corporate bodies, because gold diggers may often be individuals. And preferably it should be a high threshold, not one which could be watered down by a too ready application of proof by inference. The drawback would be that such a threshold might leave some genuinely aggrieved pursuers unprotected. Take the example of a

young man who has trained hard over years, and made sacrifices, in order to attain a high level of athletic performance. He is accused, entirely falsely, of using illegal performance-enhancing drugs. Let us suppose that he could not prove serious harm or the likelihood of it. Maybe he has been injured in a crash and is now out of athletics. Maybe his employer simply does not believe the allegations and stands fully by him. Whatever the reason, there is no loss and no serious harm. But there is a genuine hurt and grievance. It would be unfortunate if he had no redress at all and if those who made the allegation could stand by it and repeat it. So it would be very useful if he could obtain a declarator of the falsity of the allegations.

The availability of such a remedy might well in itself prompt an apology and retraction. People faced with a threat of a defamation action will be inclined to take legal advice and, if possible, put up some defence. They will not want to face a large award of damages. People faced with the prospect of a declarator of falsity would not have the same need to defend.

I was recently involved in the drafting of the Apologies (Scotland) Bill introduced by Margaret Mitchell MSP which became the Apologies (Scotland) Act 2016. The Act expressly excludes defamation actions from its scope, because of the special provisions on apologies in the defamation legislation. The research for that Bill showed than many people who suffer from some negligence (e.g. medical negligence) just want an apology and recognition that their complaint is justified and accepted. It seems probable that the same applies to many people who have been defamed, especially if the culpability of the defamer is negligible or non-existent. As with the Apologies (Scotland) Act, the hope would be that damaging and unnecessary litigation could be avoided.

The availability of a simple declaratory of falsity would also sit well with a strengthening of the defences in defamation actions, especially perhaps with a significant strengthening of the defence of fair comment. It might also, depending on how it was constructed, serve to fill any gaps caused by a tidying up of the law on verbal injury.

Grounds

The ground of action could be the publishing of a false and harmful statement about the pursuer. There would be a harm threshold (to discourage unnecessary litigation) but not a serious harm threshold. As even innocently published damaging falsehoods should be correctable perhaps there should be no requirement to prove intention or negligence.

Burden of proof

The pursuer could be expected to bear the burden of proving falsity and harm.

	Limitations It should perhaps be provided expressly that it would not be competent to claim damages in any such action. This would be the essence of the proposal. **Defences** The present absolute and qualified privileges could be defences (because of the high value of absolute freedom of speech in parliaments, courts etc) but not fair comment or public interest. **Other matters** Other matters (jurisdiction, procedure, expenses etc.) could be regulated as in defamation actions. **Alternative approaches** An alternative approach would be to stick with defamation actions (rather than introducing a new type of stand-alone declarator) but to link the serious harm threshold and the defences of fair comment and public interest to, and only to, any conclusion for damages. So, for example, the threshold requirement might read "In an action for defamation a person may not obtain damages for any defamatory statement unless its publication has caused or is likely to cause serious harm to that person's reputation". The fair comment provision might read "In an action for defamation a person may not obtain damages for any defamatory statement if the defender shows that the following conditions are met". And similarly for the public interest defence. Somewhere in the legislation (either in the relevant sections or separately) it could be made clear that a person could obtain a declarator of the falsity of the defamatory statement founded on. This could even appear along with a provision on statements in open court (as mentioned in question 38 in the SLC Discussion Paper) in a bit on non-damages remedies. Yet another possibility would be to express the serious harm threshold as a cap on damages. "In an action for defamation a person may not obtain damages exceeding £300 for any defamatory statement unless its publication has caused or is likely to cause serious harm to that person's reputation". The figure is arbitrary but would be designed to discourage actions brought for money rather than vindication. The Scottish Ministers could be given power to vary any figure set. The advantage of this approach is that it would address the mischief of gold-digging actions by those who have not suffered serious harm without requiring any new remedies or procedures and without going further than is required to address the mischief.

	Conclusion The details of any solution along the above lines would clearly need to be carefully considered but the main point is that the idea of restricting the availability of damages while allowing some scope for merely vindicatory remedies might be worth pursuing as a way of achieving a suitable balancing of interests.
Campbell Deane (initial thoughts following defamation law seminar at University of Edinburgh on 22 April)	**[***Comments withheld as confidential***]**
Campbell Deane (Formal response to DP)	No. If a threshold test is brought in to play, such as serious or significant harm to reputation, then the question of harm which was previously a matter of Proof under Scots Law, now becomes a threshold test, which is substantially weighted in favour of the Defender rather than the Pursuer. In short, if a Pursuer is in a position to establish that material published of and concerning him is capable of bearing a defamatory meaning, then at present under Scots Law that is sufficient for the Pursuer to take matters to Proof (subject to relevant and specific averments of loss) and is a matter which weighs in the balance for a Defender in deciding whether to proceed with litigation or offer to settle. To amend that position by placing a threshold of serious harm puts the onus on the Pursuer to fund and adduce considerable evidence prior to commencing litigation (or indeed making complaint) as to the question of serious harm. This is all the more so where the Pursuer is simply reacting to material which has been published of and concerning him. It is simply not equitable to force the Pursuer in those circumstances to overcome a further barrier. There seems to be a belief that Pursuers are actively seeking out litigation which has never been my experience so far as Defamation law is concerned in Scotland. The more common position is where an individual feels genuinely aggrieved as a result of a publication of material of and concerning them. The publisher has made that decision to publish. Ultimately at proof the pursuer will require to prove loss. There is no reason why that hurdle should be introduced at the start of litigation. Indeed such a hurdle sits obliquely with existing Regulatory Practice by way of the Editor's Code of Practice under the IPSO regime. Once the Regulator is satisfied that the Complaint falls within IPSO's remit and raises a possible breach of the Editors' Code of Practice it is not for the complainer to satisfy IPSO that a story is in some way materially inaccurate or breaches the code. It is for the newspaper to establish that it has not breached the Code by responding to the complaint. Whilst

	accepting that the Regulator has no interest in defamatory material (rather material breaching the Code), what is proposed by way of onus (hurdle) by way of reform makes it more likely that those who consider that they have been defamed would use the Regulator to consider their complaint not on the basis of Defamation but on the basis of a regulatory breach which would not provide any financial compensation to the complainer.
Roddy Dunlop	A requirement for substantial harm, similar to that now applicable in England, would in my view be appropriate. The problems discussed above re proportionality mean that it is difficult to justify a legal system which allows claims to be made where no substantial harm has resulted.
George Gretton	Section 1 of the 2012 Act naturally appeals to me, given my views – see above – about the law of defamation. Nevertheless I struggle with its logic. For delict in general we do not say that minor harm is unactionable. If the delict of defamation merits retention (which in my view it does not) then why should it be different in this respect from delict in general? If harm is minor, that should be reflected in the quantum of damages, as happens in delict claims in general. (And cf breach of contract claims.)
Graeme Henderson	I do not consider that a threshold test ought to be introduced into the law of Scotland. The Scottish Courts have not experienced the level of spurious claims that the Courts south of the border have required to endure. The introduction of a threshold test would add another procedural obstacle to the resolution of a dispute between the parties.
Gavin Sutter	Yes. The test in Section 1 is one of the great advances of the Defamation Act 2013 in England and Wales. (It may be of interest to Scots lawyers to note that in requiring at least the likelihood of harm to reputation be established, it marks a significant, if still only partial, dissolution of the difference between libel and slander in English law.) In requiring a claimant to actively satisfy the court that there is at least the likelihood of serious harm to reputation, it can help to avoid unnecessary and vexatious cases much more simply than requiring the defence to go through with an application to strike out on the same basis. It helps defamation law ensure an equitable balance between the right to reputation and freedom of expression, in line with the Convention rights. On this basis, it is laudable that Westminster went beyond the bare minimum of making this apply only in cases of a significant inequality of economic arms, apply it to all cases. (Article 1(2), of course, makes clear that this encompasses the sort of situation as was, regrettably, seen *in McDonald's Corporation v Steel & Morris* ([1997] EWHC QB 366; popularly known as the 'Mclibel trial'). Bean J, in *Midland Heart v MGN & Trinity Mirror* ([2014] EWHC 2831 (QB)), stated: "I do not accept that in every case evidence will be required to satisfy the serious harm test. Some statements are so obviously likely to cause serious harm to a person's reputation that this likelihood can be inferred. If a national newspaper with a large circulation wrongly accuses someone of being a terrorist or a paedophile, then in either case (putting to one side for the moment the question of a prompt and prominent apology) the likelihood of serious harm to reputation is plain, even if the individual's family and friends knew the allegation to be untrue. In such a case the matter would be taken no further by requiring the claimant to incur the expense of commissioning an opinion poll survey, or to produce a

	selection of comments from the blogosphere which might in any event be unrepresentative of the population of 'right thinking people' generally." As Bean J's shrewd analysis here makes clear, this is no significant burden upon those with a serious case to bring. It should, of course, be recognised that while a welcome change to the law in theory, in practice it does seem to have created an extra layer of expensive hearings, so the continual, underlying problem of the sheer expense of fighting a libel action in English law will not be mitigated any by this provision in many cases.
Ursula Smartt	The 'serious harm' test (as per s1(1) DA 2013) should be introduced. Since the 2013 Act has been in force, English courts have regularly struck out potentially trivial cases at first hearing on the basis that they are an abuse of process because they do not meet the s 1 'serious harm' threshold test. In *Cooke v Mirror Group Newspapers Ltd* [2014] EWHC 2831 (QB), Bean J accepted that evidence is admissible and may be necessary on the issue of whether serious harm to reputation has been or is likely to be caused (at paras 37 – 39).
Campaign group	
Libel Reform Campaign	Yes. **The s.1 threshold in the 2013 Act should be replicated in Scots law**. It has unquestionably expanded the space for freedom of expression. The problem of trivial cases, where actual reputational harm was unclear and limited, was one of the central reasons for the reform of the law in England & Wales. The lack of a threshold test was a key enabler of legal threats in the name of 'reputation management'. It was the basis for many of the most bizarre and disturbing defamation cases, such as the case of *Johnny Come Home*, a novel by Jake Arnott that was the subject of a defamation claim because the name of a character in the book was the same as the stage name of someone who had been active in the entertainment industry a quarter of a century prior to publication. The lack of a harm threshold also enabled the mere threat of a defamation action to chill freedom of expression. The inclusion of a serious harm test at s.1 of the Defamation Act 2013 has had a considerable impact on the actions brought in England & Wales. In *Cooke v MGN Ltd* [2014] EWHC 2831 (QB) the courts affirmed the Westminster politicians' intent that claimants have to prove they had been harmed or prove that harm will result in the future. It is crucial to note that the serious harm test at s.1 has not proved an insurmountable hurdle for those with a localised reputation. In the injunction judgment in *Brett Wilson LLP vs Persons Unknown* [2015] EWHC 2628 (QB) the court made clear that the threshold of what was considered 'serious harm' was relative to the claimant. As a small firm, the claimant's reputation had been seriously harmed even though the publication was on a fringe website with a small readership.

	Another important aspect of the s.1 test is that it incentivises prompt correction. In the *Cooke* case, a crucial reason why the serious harm test was deemed not to have been met was that the newspaper promptly published a correction to the news report and removed the online version. One of the main criticisms of newspapers is that they are slow to correct mistakes. Measures that encourage quick corrections, because they offer some defence against a defamation claim, are to be encouraged. It is important to state there is a similar threshold in place in Scots Law in terms of slander on a third party (identified in chapter 13 of the discussion paper on Verbal Injury & Defamation), in a ruling in *Finburgh v Moss' Empires Ltd* which stated "that a party claiming to have been harmed as a result of slander on a third party has to demonstrate that the injury was of some severity; it must not have been 'merely oblique'".
Insurance interest	
Aviva	Yes, we agree that a statutory threshold should be introduced requiring a certain level of harm to reputation before an action for defamation may be brought.
Law firm	
BLM	Yes, we agree that a statutory threshold should be introduced requiring a certain level of harm to reputation before an action for defamation may be brought.
Media and media-related organisations	
BBC Scotland	Yes.
Tom Brown (Journalist)	No objection to a statutory threshold. (As with the other matters to which he has no objection (fair comment, public interest and truth), this seems to be from the point of view of principle and of avoiding situations where a story which is widely published in other jurisdictions cannot be published in Scotland).
CommonSpace	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.
Google	As well as helping to ensure effective and appropriate use of court resources, the introduction of an appropriate threshold test can be expected to discourage those who might seek to use defamation law: to suppress legitimate criticism; to stifle those who would seek to remind readers of facts of genuine public interest that the subject in question

	might find uncomfortable; or, to stamp out online expressions of heartfelt opinion about the actions or policies of those in the public sphere. Even if the subject is not so discouraged, the introduction of such a threshold test, as well as effective court procedures to dispose of trivial claims at an early stage, would greatly assist to halt the progress of any such claims and thus diminish their adverse effects. Just as the rights of individuals to express themselves online should be afforded appropriate protection against those who would seek to misuse the law, so individuals who are genuinely the subject of unlawful defamatory content should be able to take timely and effective action against those responsible for authoring and posting that content, in order to secure the required vindication in the courts. The *Brett Wilson LLP v Persons Unknown* case illustrates how courts can address issues of noncompliant or anonymous authors, and help ensure that those who are defamed can secure vindication.
NUJ	Yes. The NUJ strongly supports the proposal to include a test of substantial harm. Those with money or power often threaten defamation actions to force a publisher, particularly one with limited funds, to withdraw at a very early stage from publishing true but defamatory material. Having to prove substantial harm should reduce these routine attempts to intimidate journalists or publishers with limited funds.
SNS	Yes, but perhaps a series of tests would work better than one catch-all definition.
Representative bodies (Legal)	
Faculty of Advocates	No. There is no clear reason in principle why there ought to be any threshold of harm for defamation actions. There is no such threshold in Scotland at present, and it is not suggested that this has created any particular difficulty, or led to a number of de minimis claims being raised. In fact, as previously noted, the greatest difficulty facing the development of Scots Law in this area is having too few cases, not too many. The application of s.1(1) of the Defamation Act 2013 has already raised significant issues in England, and such a test would add a layer of complexity, and consequently cost, to any court action. We are firmly of the view that such a provision would be unnecessary and inappropriate for Scottish law.
Law Society of Scotland	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.

[3] [2005] EWCA Civ 75.

	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.
Senators of the College of Justice	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 *Jamee*l 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.

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	
Paul Bernal	No comment.
Stephen Bogle	See my answer to question 3 above.
Eric Clive	No
Campbell Deane	It has been suggested by others, that rather than introduce a serious harm test as a threshold test, that a new defence (rather than a threshold test) is created whereby it would be a defence to show that there was no serious harm. That would place the onus on the Defender to prove that there was no serious harm and take the expense and expenditure in proving that matter away from the Pursuer and transfer it onto the Defender. The benefit of so doing form a Pursuer's perspective is that if this were introduced as a separate defence, then if the Defender wished to avail itself of a section 2 defence, and offer amends under the 1996 Act, then they would require, prior to the submission of the defences (including no serious harm) to decide whether they would wish to avail themselves of a discount by proceeding by way of amends or alternatively by continuing to defend the proceedings incorporating a defence of no serious harm. This would differ from the position in England, where presently the Defender can proceed by application in relation to serious harm, but at the same time reserve their position under the offer of amends procedure so that if unsuccessful in relation to the threshold test, they still can obtain a discount. Such a provision in England seems heavily weighted to the Defender.
Roddy Dunlop	A requirement that there be publication to a third party with consequent substantial harm to reputation would, it seems to me, suffice.
Graeme Henderson	For the reasons explained earlier a test based on harm to reputation is alien to the Law of Scotland. There is no reason why the law should not remain one based upon personal injury and not economic loss.
Ursula Smartt	Without being too obvious and telling the Scottish Law Commission about its own laws, the main difference between English and Scots defamation law is that an offending statement may not necessarily be defamatory and forms part of delict (Roman law). Scots law then refers to 'hurtful words', and is similar to German or French law in this respect i.e. being essentially harmful to the character, honour or reputation of the affected person ('the pursuer') because it is 'derogatory' or 'disparaging' or 'demeaning' or 'calumnious' in the eyes of the reasonable person. It is then more akin to 'malicious falsehood' (or 'malice') in English law or a slander of title. Whilst English law makes the distinction between libel and slander, Scots law does not make this distinction, making 'defamation' a separate delict amounting to 'verbal injury' or *convicium*. Present Scottish

	law centres on the ('defamatory') statement which must be false and must lower the defamed in the estimation of right thinking members of society. There is also a separate delict of 'invasion of privacy' in Scots law, linked to Article 8 ECHR, in which the making of a statement may give rise to liability to an attack on someone's reputation. These variables (the delict and the privacy aspect, should be brought under one 'law' of defamation in order to assess damages if proved. Since there has been little precedent set by the Scottish courts to put a precise figure on 'injured reputation' or 'hurt feelings', Scottish judges can at times find it problematic to assess the seriousness of an account for damages in relation to the defender.
Gavin Sutter	Something which Scots lawmakers may wish to clarify if they go down this path of legislation is the exact point in time at which the court is to consider the appropriate one to use for the purpose of analysing whether serious harm to reputation has occurred or could be likely to occur. To date there have been three reported cases on Section 1(1). In the first, *Cooke & Midland Heart v MGN & Trinity Mirror* ([2014] EWHC 2831 (QB)), Bean J held that there were two logical options – the date of issue of the claim, or the date of the trial / proceedings on the preliminary issue of serious harm. Bean J opted for the former. In *Lachaux v Independent Print, Evening Standard* [2015] EWHC 2242 QBD, however, Warby J preferred the view that the appropriate point in time to determine this matter was when the issue appeared before the court, thus meaning that the status of a publication could change from defamatory to non-defamatory between publication and time of the hearing (or, potentially, vice versa). One would raise concerns as to whether this might, in fact facilitate an unscrupulous publisher in publishing defamatory material, later to be followed up, in the event that a libel writ is issued, with an apology designed to dilute the impact of the original article such as to render it no longer 'serious harm'. Given the degree to which the tabloid press in Britain has historically managed the bane and antidote test in order to publish scandalous rumours while remaining on the right side of the libel law by balancing them out with an equally firm denial, it is certainly conceivable that Warby J's preferred interpretation could be open to abuse. Notably, while it all happened prior to the issue of the writ, Bean J in *Cooke* & *Midland Heart*, in finding a lack of 'serious harm', took into consideration the fact that the defence had published an apology (which, indeed, had greater prominence and was much more likely to be found online than the original, allegedly defamatory, piece) which helped to reduce the likely harm done to reputation beneath the 'serious' level. It is easy to see how this could play out were Warby's standard to be used. In *Theedom v Nourish Training Ltd* ([2015] EWHC 3769 (QB)), HHJ Moloney QC referred to this as "an unresolved question of law" – one which he did not consider relevant in the immediate case, and so elected not to address. For the avoidance of confusion, it would be beneficial for any Scottish legislation to take a clear position on this issue. In respect of this issue, it would be worth reviewing this alongside the Offer of Amends defence (Defamation Act 1996 Ss2-4), on the basis that the defence is designed to assist a defendant who has genuinely attempted to resolve a situation with an unreasonable claimant. One would be inclined to argue that if this defence might be available, it would seem conceptually inconsistent to decline to permit the defence to argue that in a given set of circumstances their subsequent actions in attempting to put the matter right could not be considered as having mitigated any harm to reputation.

Robert Templeton	The heads of claim have essentially coalesced anyway, so this probably would not have any foreseeable effect to keep or remove it, other than as discussed in Q3.
Campaign group	
Libel Reform Campaign	As it stands in Scotland the preliminary stages of defamation court hearings are dedicated to defining and agreeing on meaning alone. It is possible that the serious harm test would require an expansion of this preliminary stage, to ensure cases are only heard in court that pass this test and demonstrate a serious harm to the pursuant. Since a serious harm test is a vital modification to the law of defamation, we believe that an expansion of the time spent on preliminary stages for some cases would be acceptable. For cases that represent a grave threat to reputation, we foresee the expansion to be minimal at best as it would be easily understood that serious harm had been caused, but this modification would give scope for trivial cases to be dismissed outright and borderline cases to be debated prior to the case commencing in earnest.
Insurance interest	
Aviva	No, if a communication to a third party is to become a pre-requisite of defamation in Scots law we do not consider any other modifications to the law to be required.
Law firm	
BLM	No, if a communication to a third party is to become a pre-requisite of defamation in Scots law we do not consider any other modifications to the law to be required.
Media and media-related organisations	
SNS	Not qualified to comment on wider implications for Scots law.
Representative bodies (Legal)	
Faculty of Advocates	No. The traditional approach in Scotland has been whether an offending statement is one that would have a tendency to lower a person in the estimation of others, and it is submitted there is no reason to alter this approach. There is no demonstrated need to introduce a further test based on harm.
Law Society of Scotland	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?

(Paragraph 3.37)

Comments on Question 6	
Paul Bernal	Yes, though potentially under different terms, limiting the situations in which the relevant business can sue.
Stephen Bogle	Yes, but it may be that improved clarity and definition with regards to verbal injuries is preferable. Clarity with regard to verbal injuries - which I think the DP's report has already done - would allow profit driven organisations a more refined, focused and appropriate claim formulation. Paras 3.29-3.34 give a good overview of the difficulties faced by profit driven organisations when they pursue their claims through a defamation action rather than as a particular verbal injury. I found Elspeth Reid's analysis at the SLC defamation event in April very helpful here; I think Elspeth demonstrated clearly the economic pedigree of verbal injuries and their close relationship to claims for economic loss which given them an advantage over defamation actions.
John Campbell	John Campbell's response was relevant only to questions 6 and 7. See the chapter and article to which he refers us in his email of 30 March 2016 (copies are saved on the G-drive in the "Responses" folder). The thrust of these is that, given that the function of defamation law is to protect *reputation,* it should not cover a claimant's wounded feelings, business losses or aspersions on the defendant's conduct. Damages for these matters should be sought via other causes of action more appropriate than defamation.
Eric Clive	No
Campbell Deane	Yes.
Roddy Dunlop	Yes. There can be no justification for excluding companies or the like from claims in defamation.
Sameen Farouk	Defamation should be restricted specifically to cases where the victim is not a corporate entity. Many often make use of publicity officers or reputation management firms. Some are a little more aggressive than others. They have every right to protect their name or brand but they cannot do so in a way in which redress through the courts is lopsided and lengthy and thereby cuts off a free exchange of views
George Gretton	(Covering questions 6 and 7) I offer no direct answers. But there may be a case for limiting defamation claims to patrimonial loss – in effect, extending s 1(2) of the 2013 Act to all defamation claims There is a link here with the issue raised in Q3. Should there be damages for non-patrimonial loss? Or not? If "yes", why abrogate the rule in Mackay v McKankie? If "no" why continue to allow it in ordinary defamation claims? Which is it?

	I would add that a claim for patrimonial loss should have to be proved, not presumed, as is true of delictual actions in general.
Graeme Henderson	Yes. It should be noted that, so far as I am aware, the largest sum of damages awarded by a Scottish Court in Defamation matters arose out of a claim by an insurance company. There is no reason why the maker of defamatory statement should not be liable in damages for the economic consequences of that statement.
Ursula Smartt	This question addresses 'injury to business reputation'. Many people tend to think of defamation law in connection with someone's conduct or character in their personal life. This may be because common law in the past tended to focus on *individual* litigants. Recent case law has allowed for defamation actions in relation to corporate reputations and companies' ability to sue for defamation for injury to their business reputation. Presently, the basic principle remains: the tort of defamation exists to protect against blatantly untrue damaging statements which can potentially ruin a company's business acumen and international standing (English and Welsh law – see: *Derbyshire County Council v Times Newspapers Ltd and Others* [1993] AC 534). It was held in *Jameel No 3* (2007) that a corporation *can* sue for defamation on its reputation and may recover damages without proof of special damage (i.e. economic loss). By a majority of three to two, the Law Lords agreed that reputation is a thing of value and applies equally to companies as to individuals (see: *Jameel (Mohammed) v Wall Street Journal Europe Sprl (No 3)* [2007] 1 AC 359). I would agree with Baroness Hale (dissenting in *Jameel No 3*) - quoted the constitutional writer Weir - that a 'company has no feelings' which "might have been hurt and no social relations which might have been impaired" (at para 154). If trading corporations and large conglomerates are permitted to sue in defamation (as is the case in English law) they should only be able to do this in law in respect of an attack on their *business reputation* and not any other reputation (e.g. performing charitable duties – for this would simply be an indirect way to protect the company's business reputation). I would contend that the company has to show *actual* loss (under the 'serious harm test') and be able to prove special damage.
Gavin Sutter	Yes. No fair-minded person wishes to see any rerun of *McDonald's Corporation v Steel & Morris* ([1997] EWHC QB 366), however, it would seem rather unfair to block a private, for-profit company from being able to sue where it had a legitimate grievance as regards damage to its reputation.
Robert Templeton	It could be argued that they have just as much if not more of an interest in defending themselves against defamatory comments. However this is at its heart a political question. There is no legal reason why these bodies should be treated differently. Companies which are run for profit almost exclusively exist on the back of their reputation, it is conceivable that to remove this provision would be damaging to them, unless there was an argument that different legal heads were more appropriate or could be formed for their specific purposes.
Campaign group	
Libel Reform Campaign	In European human rights law, the right to a reputation is derived from the human right to a private and family life. Defamation is considered a violation of the right to a private life because it impacts on 'personal identity and psychological integrity' (see *Pfiefer vs Austria*, ECHR 2007).

	Corporate bodies do not enjoy a private life and have no personal identity or psychological integrity. Because corporations cannot suffer psychological damage, we do not believe that for-profit companies (or any non-natural person) should be able to sue for defamation but use other measures such as anti-competitive practices legislation. Prior to the 2013 Act, many of the most egregious cases of abuse of the defamation law in England & Wales were brought by for-profit companies. For many years the discussion of toxic waste dumping in Pontypool, Wales by ReChem International was suppressed because of defamation threats. And when cardiologist Dr Peter Wilmshurst criticised one of NMT Medical's heart implant products, they responded by suing for defamation (it later transpired that two other doctors had been similarly silenced). In 2010, the House of Commons Culture, Media and Sport Committee (under the chairmanship of John Whittingdale MP) took a similar view, suggesting that 'corporations could be forced to rely on the existing tort of malicious falsehood where damage needs to be shown and malice or recklessness proved.' This recognises the fact that corporations should be allowed to defend their brands, but have other means of doing so. As well as malicious falsehood, a simple 'declaration of falsity' could also be used to prevent the spread of lies or inaccuracies. Laws governing advertising, competition and business practices also govern what one company may say about its competitor. And through their PR and Marketing teams, a company may use its own right to free expression to counter negative publicity. For small businesses, the reputation and activities of the company are inextricably linked to that of the managers and owners. In such cases, the owner is never barred from suing for defamation in person. Similarly when a large company is accused of wrongdoing in a particular department, the executive implicated (for example, the Chief Financial Officer in an allegation of corporate fraud) could also sue personally. A further consideration is the expansion of private companies into public service provision. The *Derbyshire* Principle established by the House of Lords in *Derbyshire v Times Newspaper Limited* [1993] ruled that local authorities cannot maintain a defamation action against members of the public. The *Derbyshire* Principle is a vital protection that should be enshrined in statutory law, but the expansion of the private sector administering a great deal of services previously delivered by local authorities has established a sizable lacuna that threatens to undermine the protections identified in the *Derbyshire* principle. If local authorities are unable to bring defamation actions against the public, a position we support, private companies administering the same or equitable services should similarly be restricted.
Insurance interest	
Aviva	Yes, we believe that bodies which exist for the primary purpose of making profit should continue to be permitted to bring actions for defamation. Many such entities (at least 95%) are small and medium sized businesses

	whose very existence could be threatened by a defamatory publication. For example, any business that manufactured a product would potentially face ruin if the product was the subject of a defamatory review in a consumer publication that was widely relied upon by purchasers of the product. There is plainly a risk that publishers would actively lower their standards in writing about corporations were corporations unable to pursue claims. This would potentially lead to an increase in the number of untrue and defamatory statements that were published about corporations. There is, on the face of it, no public interest at all in the publication of untrue defamatory statements about any individual or organisation (albeit that there may be particular circumstances where such publication would be protected from an action where it is in the public interest to protect freedom of expression).
Media and media-related organisations	
BBC Scotland	We would endorse the Scottish Law Commission's suggestion that there should be additional restrictions before such actions may be brought by such bodies.
CommonSpace	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.
Google	We support the proposal that bodies trading for profit should continue to be permitted to bring actions for defamation, and that such actions should also be subject to a statutory threshold of harm, as well as appropriate restrictions where the defamation relates to trading activities. Increasingly, businesses find it commercially advantageous to have an engaging online presence and to maintain effective communication with their current and prospective customers. A business' online presence and reputation can be an important aspect of its current commercial potential. Accordingly, if, for example, a rival business is damaging another business' reputation by deliberately publishing defamatory comments, the impacted business should be able to bring a claim in defamation against that rival business to prevent further damage. Equally, however, where a customer of a business experiences bad customer service, or has otherwise been significantly let down by that business, the individual concerned should be able to express online his or her genuine opinions without fear of his or her legitimate criticism being suppressed by a meritless claim brought, or threatened, by that business.
NUJ	No. Corporations have the ability to protect their brands and trading positions but should be able to sue only if they are able to prove financial damage. Corporations are already able to exert a range of influences on journalists and publishers and corporations have a range of other legal

	remedies. Their individual staff and executives would still be able to sue in their own personal right if they wish. In addition, any organisation such as a private company providing services to the public on behalf of local or central government should not be able to bring defamation actions.
SNS	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.
Law firm	
BLM	Yes, we believe that bodies which exist for the primary purpose of making profit should continue to be permitted to bring actions for defamation. Many such entities (at least 95%) are small and medium sized businesses whose very existence could be threatened by a defamatory publication. For example, any business that manufactured a product would potentially face ruin if the product was the subject of a defamatory review in a consumer publication that was widely relied upon by purchasers of the product. There is plainly a risk that publishers would actively lower their standards in writing about corporations were corporations unable to pursue claims. This would potentially lead to an increase in the number of untrue and defamatory statements that were published about corporations. There is, on the face of it, no public interest at all in the publication of untrue defamatory statements about any individual or organisation (albeit that there may be particular circumstances where such publication would be protected from an action where it is in the public interest to protect freedom of expression).
Representative bodies (Legal)	
Faculty of Advocates	Yes. In many cases the only remedy that a commercial enterprise will have is to raise an action for defamation. It is noted that the largest award of damages in Scotland for defamation involved an insurance company and a newspaper. There is no good reason why an insurance company whose business has suffered as a result of a defamatory article should not be entitled to recover.
Law Society of Scotland	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."

[4] For instance, *Corporations' right to sue for defamation: an Australian perspective* David Rolph, Ent L R 2011, 22(7), 195 – 200.
[5] [2005] EMLR 15.

	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 of which was found to breach human rights in *Steele* and *Morris)* could be a means to address such inequality.
Senators of the College of Justice	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.

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	
Paul Bernal	Yes – to ensure that defamation law does not limit genuine criticism of traders, products and so forth.
Stephen Bogle	I think the SLC would be prudent to explore this further. We need to avoid the chilling effect of organisations with large resources using the threat of a defamation action to stifle criticism or negative opinions. Of course such organisations, in spite of whatever restrictions might be introduced with regard to their use of defamation actions, could still pursue an action by way of verbal injury.
John Campbell	Defamation actions by such parties should not be capable of being brought in the first place.
Eric Clive	Not necessary
Campbell Deane	Yes they should require to show loss (as they presently need to by averments and at proof) in Scots law however that loss need not have to be significant. Loss should include in those circumstances costs incurred in brand reputation management and restoration.
Roddy Dunlop	Having initially been attracted to a requirement, such as that applicable under English law to show actual or potential serious financial loss, I have come to the view that this is overly-prescriptive. If a requirement for "substantial harm" is already being introduced as a threshold for any claim, it seems to me that this would suffice to protect against unmeritorious corporate claims. The law could then develop incrementally in a way which would not impose unnecessary hurdles on a corporate pursuer. Whilst in many or even most cases, one would expect a corporate claimant to be able to show an actual impact on trading receipts, so requiring in every case would not cater for situations such as those where multiple effects on trading profitability are in play, nor for situations where the corporate pursuer was newly formed and thus had no demonstrable trading ability.
Graeme Henderson	No. This would introduce a further complication into the law of Defamation that is uncalled for.
Ursula Smartt	The idea that loss of reputation has such a high-perceived monetary effect on a company libelled formed part of the discussion when the Defamation Bill/s in Australian legislatures were discussed. In 2005, the federal Government in Australia passed legislation preventing corporations (other than not-for-profit organizations or small businesses of fewer than ten people) from suing for defamation (see: Defamation Act 2005 (Australia) as at 15 October 2015).
Paul Spicker	Para 3.27 the Discussion Document notes 3.27, that "In Scotland it has been held expressly that a voluntary association which nonetheless has a reputation that is valuable in economic terms has title to bring an action for defamation in appropriate circumstances. ... There seems little reason why wholly not-for-profit organisations should not also be regarded as having a reputation as a form of honour." There are no questions in the

	document directly relating to these issues. The first part of this - interpreting damage in economic terms - is inadequate to protect the reputation of non-profit organisations, considered in the second part. Clubs, societies, charities and bodies such as mosques and synagogues are no less likely to be concerned about their reputation and good name because of the implications that loss of reputation will have for their social role. Suggesting that groups are murderous, that they sponsor terrorism or are in the pay of foreign powers has the potential to be very damaging. This does reflect indirectly on questions 4, 6 and 7. It is a matter of concern that the current law relating to defamation seems to privilege economic interests over the issues of honour and reputation that the law is ostensibly meant to defend.
Gavin Sutter	Yes. In my view, Section 1 of the Defamation Act 2013 is a good standard in this regard. The Scottish Parliament might, however, wish to consider setting the bar somewhat higher. For instance, requiring proof of actual financial loss as a result of the alleged defamation, or at least an actual financial loss which could reasonably be attributed to the alleged defamatory publication, as distinct from merely the possibility of such.
Campaign group	
Libel Reform Campaign	As stated in our answer to Q6 we believe that bodies which exist for the primary purpose of making a profit should not be permitted to bring actions. However, were this not to be accepted, we believe a test that calls for the pursant to prove serious financial loss that was substantively caused by the defamatory statement should be included in any reform. This would be very similar to s.1(2) of the 2013 reform in England and Wales, developing a necessary threshold test that could dissuade trivial cases brought by private corporations. As more public services are provided by private sector organisations, the protections outlined in the *Derbyshire* case are complicated and weakened. Short of making non-natural persons unable to bring defamation actions, a clarification could be made that governs the ability of non-natural persons to bring defamation actions against individuals based not on their structure or ownership, but on the services they provide. Private companies providing public sector contracts should not be able to make a defamation claim for criticism relating to delivery of those contracts. Such a measure would be formulated by reference to the end service being delivered. If it is a public service that Government (whether local, Scottish or UK-wide) is responsible for delivering, then the principle that the public should be able to freely criticise that service should be upheld, regardless of whether it is ultimately performed by a public body or whether a private company is commissioned to deliver the service. An example of this issue is the Atos Healthcare / CarerWatch controversy. An online community of carers received legal threats from Atos Healthcare, regarding forum discussions about the company's disability payments assessments - a task they were performing on behalf of the

	Department for Work and Pensions. The forum was eventually shut down and many carers lost a vital support and information network. Had the Department for Work and Pensions carried out the assessments itself, the Derbyshire principle would have prevented it issuing legal threats to those offering criticism of its decisions.
Insurance interest	
Aviva	No, we do not consider that there should be a provision governing the circumstances in which defamation actions can be brought insofar as the alleged defamation relates to trading activities. There are a number of entities which seek to raise funds through what might be described as trading activities. However, this should not mean that they are treated in the same way as entities that trade purely for profit. There is plainly a difference between a company that manufactures a product and which has shareholders and employees and an unincorporated association that fundraises through a car boot sale.
Law firm	
BLM	No, we do not consider that there should be a provision governing the circumstances in which defamation actions can be brought insofar as the alleged defamation relates to trading activities. There are a number of entities which seek to raise funds through what might be described as trading activities. However, this should not mean that they are treated in the same way as entities that trade purely for profit. There is plainly a difference between a company that manufactures a product and which has shareholders and employees and an unincorporated association that fundraises through a car boot sale.
Media and media-related organisations	
BBC Scotland	Yes.
Google	Yes – see answer to question 6 above.
NUJ	Yes.
SNS	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.
Representative bodies (Legal)	
Faculty of Advocates	Yes There may, as the Discussion Paper notes, be cases where manufacturers sue scientists or scientific journalists for publishing material that calls the efficacy of products into question. There is merit in exploring whether this, in fact, is an issue that produces a 'chilling effect' on legitimate discussion of commercial products. We would, however, wish to examine closely any such proposal in order to ensure that the balance of rights between the parties was adequately addressed in any legislation.

Law Society of Scotland	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?

(Paragraph 4.15)

Comments on Question 8	
Paul Bernal	Yes. This is one of the most important areas.
Stephen Bogle	I agree that there appears no evident problems with the common law position. But there may be some coherence in giving it statutory footing given the overall project. However, in doing so the Bill should be careful not to replace the existing law or indeed introduce any new terminology or complex wording. If it is decided to put things into a statute: the simpler, the better. A wording which maintains the status quo would be preferable to anything which introduces uncertainty or new understandings - the latter would be most unwelcome.
Eric Clive	Not necessary but may be desirable.
Campbell Deane	I agree that there are no gaps or shortcomings in the defence of veritas at common law but the encapsulation of the common law in a statutory form would make sense provided it was as a matter of principle not unwieldy.
Eric Descheemaeker	As noted in the DP the defence of truth/veritas operates successfully in Scotland. The position taken by s 2(3) of the 2013 Act is welcome but it is not an innovation: it simply restates the earlier position as defined by s 5 of the Defamation Act 1952 and the common law. It could be translated into the Scottish Act, except of course for the word "seriously" if, as is to be hoped, the Act does not follow the English (counter-) model on this point. The main debate in the field concerns whether it is right that it should be for the defender to prove the truth of the sting of the statement rather than for the pursuer to prove its falsity. The recent English Act retained the historical position, which is that falsity is presumed from the publication of the defamatory statement. In principle this makes sense if we believe that the interest protected by the wrong of defamation is reputation (Lat. existimatio = reckoning), i.e. the way others think of us, rather than – as has been suggested in the common-law world – deserved reputation. This is the historical position of Scots law and it is entirely defensible; accordingly no change is suggested on this point. The current debate about the "Chase level 1, 2 and 3" meanings is exactly the sort of things that we do not want to put on a statutory footing; it is part of the natural development of the common law. The one change the Scottish Act could profitably operate is to abolish s 8 of the Rehabilitation of Offenders Act 1974, which removes the defence of justification (truth/veritas) in respect of the malicious publication of spent convictions. Not only is this incompatible with a basic tenet of the law; it has the absurd consequence that a person sentenced for an offence is in a better position than someone who was

	never taken to court and condemned for it. (For a fuller discussion, see E. Descheemaeker, "Veritas non est defamatio'? Truth as a Defence in the Law of Defamation", 31 Legal Studies (2011), 1).
Roddy Dunlop	It probably makes sense to update the law and terminology, moving away from *veritas* and towards substantial truth.
Graeme Henderson	My answer to this, and much of the remainder of the questions, is that I see little merit in attempting to formulate the usual defences, which are available in Defamation actions in Statutory form. As was submitted at the outset there is no climate of change in Scotland. In any event the suggestion that a Statutory restatement will assist the Law of Scotland is misconceived. It would be open for the law of veritas to be restated in a Statutory provision. The precise form that it would take would be a matter for debate. The Commission could scour the Commonwealth and beyond looking for various versions of this defence. Whatever the wording of the statute was there would inevitably be issues of interpretation that would require to be tested in the Courts.
Ursula Smartt	Absolutely. Before an alleged defamatory statement can be considered 'defamatory', defences of truth in form of 'honest opinion' and publication on matters of 'public interest' should be formulated and incorporated in statute. This means the still-existent Reynolds defence should be abolished (common law). There should also be the introduction of greater protection for operators of websites.
Gavin Sutter	Yes, however, I would strongly advise against styling it as a defence of 'Truth'. I have grave reservations about the notion that a court can determine 'the truth' on a mere balance of probabilities; I would be much more comfortable with the defence being styled as one of 'fact', or perhaps 'provable fact'. Leave 'truth' to the philosophers, and perhaps the theologians. Whether something is 'proven fact' or 'substantial proven fact' seems much more appropriate in a civil court on a matter of private law. Other than my reservations about naming, the defence laid out in Section 2 of the Defamation Act 2013 is a good one, and its encapsulation in statutory form does it no harm.
Campaign group	
Libel Reform Campaign	A crucial aspect of defamation reform is putting well established common law principles into statute. As the discussion paper acknowledges at paragraph 4.14, leaving established legal principles in the common law creates ambiguity and confusion. Much of the defamation 'chill' occurs when legal threats are issued to people who do not have the means to retain counsel or routinely seek legal advice. Rather than wade through complex case law, they simply retract. Clear defences set out in statute will ensure a better understanding of the law and embolden those seeking to exercise their right to free speech. Nowhere is this point more important than in the defence of truth, the first and most fundamental defence against a defamation claim.
Insurance interest	

Aviva	Yes, we consider that the defence of truth should be encapsulated in statutory form. The current law of defamation in Scotland is complex and arcane and there is no single place where an individual or organisation can find it set out in clear terms. This cannot be in the interests of the public. That is particularly the case in circumstances where so many people publish so much material in a personal capacity. Many charities, clubs and other organisations communicate by email and have websites and those responsible for them would undoubtedly benefit from a clear explanation of the law of defamation in the form of a statute. This will make the law more accessible and understandable to all concerned.
Law firm	
BLM	Yes, we consider that the defence of truth should be encapsulated in statutory form. The current law of defamation in Scotland is complex and arcane and there is no single place where an individual or organisation can find it set out in clear terms. This cannot be in the interests of the public. That is particularly the case in circumstances where so many people publish so much material in a personal capacity. Many charities, clubs and other organisations communicate by email and have websites and those responsible for them would undoubtedly benefit from a clear explanation of the law of defamation in the form of a statute. This will make the law more accessible and understandable to all concerned.
Media and media-related organisations	
BBC Scotland	Yes.
Tom Brown (Journalist)	No objections to this.
Google	In the interests of assisting with legal certainty, and with a view to increasing consistency throughout the defamation laws of the UK, we support the proposal that the defences of truth, fair comment and public interest should be encapsulated in statutory form.
CommonSpace	Yes.
NUJ	Yes.
Representative bodies (Legal)	
Faculty of Advocates	No. There is no clear reason in principle why this defence requires to be placed in statutory form. There is no suggestion of any difficulty in the operation of this defence in Scotland. The law is currently clear and understood by parties, their legal advisers and the courts. Creating additional scope for confusion and re-interpretation does not seem to us to be justified.
Law Society of Scotland	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.
Senators of the College of Justice	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.
SNS	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	
Paul Bernal	Yes. It would be better to remove the often confusing and unnecessary debate over what actually constitutes the public interest.
Stephen Bogle	What the DP says in para 5.11 is persuasive; I agree.
Eric Clive	Yes
Roddy Dunlop	Yes. Whilst the concept of public interest is broadly interpreted in the law as it stands, there is no obvious reason why it is a necessary part of the defence of honest comment. Parties should be able to comment freely on private matters as well as public ones, as long as they do so honestly.
Eric Descheemaeker	As often this question is best addressed by going back to first principles. Historically fair comment arose (like many other defamation defences) from the need to rebut to presumption of malice: an incrimination would not be malicious if it was a fair (i.e. honest) take on a matter of public interest; otherwise it would be regarded as gratuitous. If this is the paradigm adopted then the removal of the requirement makes no sense. On the other hand, if we believe that the law of defamation should not be, and evidently no longer is, based on malice then the basis for the defence – if it is to be retained at all – must be different. Arguably the best (if not only) such justification is that fair comment operates quasi ex veritatis: honesty (i.e. genuineness) is to comment what truth is to primary facts. If this (the freedom to reason) is the reason why honestly held statements are protected, then the requirement of public interest is illogical. It should indeed be removed.
George Gretton	Yes
Graeme Henderson	In my experience the Courts have accepted that the "public interest" threshold, in this defence, is so low that it is seldom a hurdle to any defender. I can see little practical purpose in its abolition.
Ursula Smartt	Yes. See my comment at para 8 above.
Gavin Sutter	I found this a regrettable change to the defence when it transitioned to the defence of Honest Opinion in Section 3 of the Defamation act 2013. The standard of public interest required – see, for example, London Artists v Littler ([1968] 1 All ER 1075), in which the mere fact that the general public were being invited to buy theatre tickets for a show which the publication in question suggested might not go ahead owing to a strike involving several key performers was considered to satisfy the public interest test – was so low that it was not an onerous burden upon the defence.
Campaign groups	

Libel Reform Campaign	Yes. We agree with the commission's tentative view that a public interest test for fair comment is unnecessary. The publication of honestly held opinions is an important part of the right to freedom of expression. Expressing critical opinions should not be subjected to a public interest test.
Insurance interest	
Aviva	Yes, we agree that the defence of fair comment should no longer require the comment to be on a matter of public interest. It seems to us that this is in the wider interest of freedom of expression.
Law firm	
BLM	Yes, we agree that the defence of fair comment should no longer require the comment to be on a matter of public interest. It seems to us that this is in the wider interest of freedom of expression.
Media and media-related organisations	
BBC Scotland	Yes.
CommonSpace	Yes.
NUJ	Yes. The publication of honestly held opinions is an important part of the right to freedom of expression. Expressing critical opinions should not be subjected to a public interest test.
SNS	Yes. Public interest introduces signficant subjectivity.
Representative bodies (Legal)	
Faculty of Advocates	No. The concept of public interest has expanded significantly, and it is submitted that, in consequence, there is no significant restriction in most cases where showing public interest is a requirement. Nevertheless, there remains a need to balance the right to freedom of expression with the right to protect a private reputation. Without the requirement of public interest, it becomes much more difficult for a party subject to comment on a purely private matter to prevent, or seek damages in respect of, that comment. The Discussion Paper draws on the Joint Committee support for this abolition. That is worth analysing. That Committee notes '69. We support the Government's proposal to place the defence of honest opinion on a statutory footing, subject to the following amendments: a) The term "public interest" should be dropped from the defence as an unnecessary complication. The law's protection of the right to personal privacy (which is another aspect of Article 8 of the ECHR) and

	confidentiality are now well established and can be used to prevent people from expressing opinions on matters that ought not to enter the public domain. In this respect, the public interest test no longer serves a useful purpose. It also creates the potential for confusion with the identically worded, but narrower, public interest test under the draft Bill's defence of responsible journalism in the public interest.' The second aspect of that – the risk of confusion with the public interest provisions in the rest of the legislation, is of course not relevant at this stage as there is no draft bill to analyse. The principal justification for the abolition appears therefore to be that a separate action would be possible for a breach of privacy. That, however, seems to be a convoluted means of providing what appears to be accepted as a necessary protection for the Article 8 right to reputation. Scotland has nothing approaching the developed remedy in privacy law which often dovetails with English defamation actions. Furthermore, the justification appears to make no logical sense standing that the critical question for the Court in any such privacy action will be whether there was a 'public interest' in the publication of private matters which justifies the breach of the reasonable expectation of privacy. Given the inevitable overlap between defamation and privacy, it is not at all clear to us why the removal of the 'public interest' aspect of a fair comment defence is justified on the basis of an alternative remedy which itself relies upon consideration of that 'public interest'. The defence of fair comment, with its current requirement that the comment be on a matter of public interest, may apply in a defamation case where there is no question of privacy at all. The fact that protection of privacy involves considerations of public interest is, therefore, no reason to say that public interest should not be part of the defence of fair comment in general. The logical and consistent position seems to us to be the maintenance of the public interest requirement within a fair comment defence, recognising the ability of the courts to expand that necessarily elastic concept to fit the passage of time, the range of matters considered as being in the public interest and the specific facts of any case. The alternative appears to offer too little protection for those about whom defamatory statements have been made who thereafter require to prove a reasonable expectation of privacy and the absence of a dominant public interest in order to succeed in a privacy claim.
Law Society of Scotland	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?

(Paragraph 5.12)

Comments on Question 10	
Paul Bernal	I would recommend not, because determining 'honest belief' may be very difficult indeed, and add to the confusion, time and cost involved in a case.
Stephen Bogle	It certainly should be a requirement. What the DP says in para 5.12 is persuasive: I agree that there is an appropriate balance struck.
Eric Clive	This is likely to cause difficulty if the publisher is not the author – e.g. if a blogger allows a comment to appear on his or her bloggpage. At the very least something like the provision in section 3 of the 2013 Act would be necessary.
Eric Descheemaeker	Yes. This is an analytical necessity: if fairness means honesty (which it always has) then a fair comment must by definition be honestly held. To put the same point in a slightly more forceful way, if comment is a personal take on primary facts that are "out there" then it is only comment if it is honestly believed. A "comment" that is not believed by the defender to be true is no comment at all; just words stringed together (possibly in order to injure the pursuer).
Roddy Dunlop	Yes. Absence of honest belief in general would deprive the defence of fair comment of any legitimacy. A system of law which allowed malicious imputations to be advanced merely on the basis that they were comments rather than assertions of fact would not strike the correct balance between Articles 8 and 10.
Graeme Henderson	I agree that the issue of honesty should remain although it creates problems.
Ursula Smartt	The common law defence of 'fair comment' should be replaced by a statutory defence of 'honest opinion'. This would broadly simplify and clarify these defence elements, but does not include the previous requirement for the opinion to be on a matter of public interest.
Gavin Sutter	As in English law, this should be the core of the defence.
Campaign group	
Libel Reform Campaign	Yes. We believe that the 'honest opinion' formulation in section 3 of the Defamation Act 2013 is the best approach for this defence. Strengthening the honest opinion defence would allow social media commentators a defence when retweeting, re-posting or editing facts or opinions published elsewhere. It would not be preferable to continue with the common law approach which was considered in the pre-legislative scrutiny of the Defamation Bill 2013 and found inadequate to protect honest opinion. A number of cases demonstrated the inadequacy of the common law approach include: *Singh v BCA* (which is not referenced in the *Spiller v Joseph* Supreme Court judgement, even though it in part prompted the Libel Reform Campaign), the *Owlstalk* case, and defamation threats against

	Legal Beagles.
Insurance interest	
Aviva	Yes, we consider that it should be a requirement of the defence of fair comment that the author honestly believed in the comment or opinion he or she expressed. This would seem to be at the heart of the defence. It would seem unfair on an individual who has been defamed by another individual that they have no recourse against an individual who had no honest belief whatsoever in the opinion they were stating.
Law firm	
BLM	Yes, we consider that it should be a requirement of the defence of fair comment that the author honestly believed in the comment or opinion he or she expressed. This would seem to be at the heart of the defence. It would seem unfair on an individual who has been defamed by another individual that they have no recourse against an individual who had no honest belief whatsoever in the opinion they were stating.
Media and media-related organisations	
BBC Scotland	Yes.
CommonSpace	Yes.
NUJ	Yes.
SNS	Yes, otherwise it would be malicious.
Representative bodies (Legal)	
Faculty of Advocates	No. Honesty of belief in the comment will always be of great assistance to the party relying upon the defence where it applies. It will, presumably, assist greatly with each of the other requirements of the fair comment defence. The question, however, is not whether an honest person could have held the opinion, but rather whether in any particular case the party relying on the defence did in fact honestly hold that view. We consider that question more problematic and make reference to the case of Massie v McCaig as an example of how the difficulties might emerge. In that case, there was a dispute on the meaning of the statements made. The defender (an elected councillor) contended that he did not defame the pursuer, a position the Inner House rejected. He thereafter succeeded in establishing a defence of fair comment. But had there been a requirement that the defender honestly believed in the meaning ultimately accepted by the Inner House, he could not have succeeded. He openly conceded that he did not hold the view which the Inner House decided was the meaning of his statement. By contrast, the comment

	would likely have been one which an honest person could have held. Section 3(5) of the 2013 Act would, it is thought, have produced a different result to that reached by the Lord Justice Clerk, and now Lord President. We find it difficult to reconcile that position with the policy intention of supporting free comment and accordingly consider the ability to defeat a defence of fair comment by the pursuer showing that the defender did not in fact hold that opinion not to be a measure we can support.
Law Society of Scotland	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?

(Paragraph 5.21)

Comments on Question 11	
Paul Bernal	Yes – to add clarity and context. See also the responses to questions 8-10.
Stephen Bogle	Yes I agree that it should be set out in a statutory form - but this will be a difficult task! I don't think the 2013 Act got it right as para 5.13 to 5.19 rightly say. Again however there is an opportunity for the SLC to improve upon and learn from the mistakes of the 2013 Act. The DP raises the right issues and it seems possible to offer a wording which will not fall foul of the same interpretation problems with regard to s 3 of the 2013 Act.
Eric Clive	Yes.
Eric Descheemaeker	Yes. Changes from the current common law must be made and are the sort of changes which a statute is well (probably best) placed to achieve.
Campbell Deane	(Covering questions 11-15) It is becoming more apparent at practitioner level that a defence of fair comment will be advanced by a Defender as one of the defences to the fore. Indeed in most pleadings it is standard practice that Defenders are riding several horses at the same time eg veritas, qualified privilege and fair comment are commonly run together. The main difficulties that arise for the Defender so far as the fair comment defence is concerned (and where the Pursuer is able to successfully defeat the defence) is where it is arguable that the underlying facts are not true and where the comment is not based on a matter of public interest. Accordingly, if fair comment no longer required to be either on a matter of public interest or the underlying facts not true then it would lead to significant issues at proof and in pleading. For example (i) a matter of public interest is a Reynolds requirement and (ii) the substantial truth is part of veritas. Neither would be required however under fair comment if delimited as above. From a practitioner perspective, the real difficulty arises in establishing whether or not what has been said is in fact comment or fact. Unlike in England a common sense approach seems to be adopted as to whether what was said was comment or fact or mixed comment and fact. It is also difficult at times to establish the underlying facts on which a comment is based. There appears to have evolved into general pleading principles, the proposition that any time an individual is quoted within an article, that their quote is a comment. In short if an individual is asked by a publication for comment then there is a genuine held belief that that comment will always be fair comment.

	On that basis, in practical terms the boundaries appear to have become blurred with the law as it presently stands and there seems to be a belief that any quote in response to a matter is fair comment even where that quote contains facts rather than comments. Accordingly if a statutory defence of fair comment is to be introduced then it would require to state that the fact or facts on which it is based provide a sufficient basis for the comment and must be in existence at the time where the comment is made.
Roddy Dunlop	This would be of some assistance. The precise boundaries of the defence of fair or honest comment are presently in some doubt, following the decision of the Inner House in Massie v McCaig. In particular, it is presently unclear as to whether or not the requirements of the defence under English law (*Joseph v Spiller*) are echoed under Scots law. Given the lack of case law in Scotland on this particular defence (prior to Massie the last appellate decision was in Wheatley, in 1927), codification would be sensible and helpful.
Graeme Henderson	No. See answer 8. The reformulation is likely to create uncertainty. To some extent the Scottish position has been clarified by *Massie v McCaig.*
Ursula Smartt	See above in para 10. 'Fair comment' should be abolished and put on a new statutory comment of 'honest opinion'. There could then be an additional safeguard in law which would make certain conditions: **Condition 1**: that the statement complained of was a statement of opinion; **Condition 2**: that the statement complained of indicated, whether in general or specific. terms, the basis of the opinion; and **Condition 3**: that an honest person could have held the opinion on the basis of any fact which existed at the time the statement complained of was published or anything asserted to be a fact in a privileged statement published before the statement complained of.
Gavin Sutter	I believe it would be a useful exercise, making the law more accessible to non-lawyers.
Campaign group	
Libel Reform Campaign	Yes. As discussed in our answer to question 8 (above), putting well established common law principles into statute will reduce ambiguity, uncertainty and confusion. It allows the public to better understand the law. This discourages unfounded legal threats and reduces the defamation chill, whilst also allowing people who have been unfairly smeared to better understand their rights and means of redress.
Insurance interest	
Aviva	Yes, we agree that the defence of fair comment should be set out in statutory form (see 8 above).
Law firms	
BLM	Yes, we agree that the defence of fair comment should be set out in statutory form (see 8 above).

Media and media-related organisations	
BBC Scotland	Yes.
Tom Brown (Journalist)	No objection to this.
CommonSpace	Yes. Setting this out in statutory form will clarify the law for all parties involved.
Google	Yes.
NUJ	Yes.
SNS	Yes, for the sake of clarity.
Representative bodies (Legal)	
Faculty of Advocates	Yes. There is a benefit in having a clear statement as to the terms of the defence, however the nature and extent would require to be carefully considered.
Law Society of Scotland	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?

(Paragraph 5.21)

Comments on Question 12	
Paul Bernal	No comment.
Stephen Bogle	No.
Eric Clive	Much will depend on how the statutory defence is framed. I would like to see something quite general, not linked to facts set out in the statement etc., and focussing on the whole substance of the comment, so that if the comment as a whole is fair the defence would apply.
Eric Descheemaeker	The first thing to note is that the DP is absolutely right to retain the label of "comment" rather than "opinion": as explained at some length elsewhere (E. Descheemaeker, "Mapping Defamation Defences", 78 Modern Law Review (2015), 641), this is what the defence has always been about in English law (from which Scots law lifted it); indeed, even after the 2013 Act, it is not limited to opinions in the sense of assertions of non-falsifiable matter. The defence was and remains concerned with authoritativeness rather than falsifiability: matter that is represented as true by the very fact that it is asserted must be justified (in the sense of the veritas defence); on the other hand matter that can be seen to be the defender's take on prior facts ("primary facts") is comment and need not be so justified
Roddy Dunlop	The primary doubt left open by Massie v McCaig is as to whether "malice is part of the equation" (2013 SC 343 at [30]). Resolution of this question is not assisted by the fact that in the subsequent opinion in *Massie* ([2013] CSIH 37, at [7]), the Inner House asserted that nothing said previously was in conflict with the decision in *Joseph v Spiller*. With respect, it is difficult to understand that assertion: Joseph makes it clear that malice (in the sense of dishonesty) would defeat the defence, whereas in Massie the indication was that "malice is not part of the equation". It may well be that when the Division said that "malice is not part of the equation", it had in mind malice in the sense of an intent to injure, and not in the sense of dishonesty. If that is so then it is correct to say that there is nothing in Massie which is dissonant from what was said in Joseph, and that animus iniurandi will not defeat the defence (in either jurisdiction), but that dishonesty will. It respectfully seems to me that this ought to be clarified, and that the clarification should follow the development of the lines in Joseph: a dishonest comment is actionable, but an honest comment is not – even where it was made with the intent to hurt.
Graeme Henderson	It would help if the name of the Defence was rebranded to reflect on modern usage of the English language. This could be achieved judicially.

Gavin Sutter	I am unclear as to the exact position in Scots law, however I find it regrettable that the English law did not take the opportunity to vary the position from requiring that the defendant prove the fact on which his opinion relies, or rely on a narrow category of privileged statements. It would seem preferable, in this case (and especially bearing in mind online publication, and the vast range of publications in that forum being by those who are not professional journalists with duty lawyers to hand) to instead require that an honest opinion be accompanied by a reasonable belief that the opinion expressed is based on fact. This would seem more conceptually consistent with the nature of the honest opinion defence.
Campaign group	
Libel Reform Campaign	Any new public interest defence should be worded to apply to comment as well as presentation of facts.
Insurance interest	
Aviva	No, we do not consider that there should be any other changes to the defence of fair comment in Scots law.
Law firms	
BLM	No, we do not consider that there should be any other changes to the defence of fair comment in Scots law.
Media and media-related organisations	
BBC Scotland	No. This is a very elusive area of the law, but the difficulties are more of interpretation than of substance.
NUJ	Any new public interest defence should be worded to apply to comment as well as presentation of facts.
SNS	It's very difficult to pin down what will always be a matter of interpretation
Representative bodies (Legal)	
Faculty of Advocates	One aspect which might be worthy of further consideration is to resolve the impact of malice in Scots Law. The Lord President (then Lord Justice Clerk) in Massie appears to have reaffirmed that the impact of malice is different when considering qualified privilege and, by contrast, fair comment. At paragraph 30 of the judgement, it is put thus "Interestingly, and distinguishing the defence from that of qualified privilege, malice is not part of the equation ... Presumably, the reasoning is that if something is "fair comment" derived from true fact, the fact that it is maliciously made has no relevance. The comment may be made maliciously and be intended to lower the pursuer in the estimation of right thinking people. However, as in the case of a successful plea of veritas, the statement made, whatever the motive of its maker, ceases to be actionable." That would plainly run counter to the decision in Joseph v Spiller . That case held that malice (in the sense of intent to injure) would not defeat fair comment but malice (in the sense of dishonesty) would

	Thereafter, however, the Second Division refused leave to appeal to the Supreme Court noting that "Nothing in its opinion on the nature of fair comment in Scots law is in conflict with the decision in Joseph v Spiller or with the additional authorities cited by the pursuer at the hearing on leave to appeal …" That might be thought to raise the possibility that the Second Division was dealing with malice only in the sense of intent to injure, but the same judgement of the Court continued: "Although the court was not persuaded that a subjective "honest belief" in the comment was a requirement of the defence, that was a relatively minor part of the reasoning which led to the court's ultimate decision to recall the interim order. That reasoning focussed on the terms of section 12(3) of the 1998 Act and on the balance of convenience pending final disposal. Both aspects highlight the interlocutory nature of the decision made." A subjective honest belief would be required if the law of Scotland was to have been that as set out in Joseph v Spiller. We would make two points about that 1 there is a need to clarify the law in this area 2 the fact that *Joseph v Spiller* may not be the law in Scotland should inform the present process and perhaps offer a basis for being reluctant simply to follow legislation adopted in England to give effect to a case which seems to have been only partially adopted in Scotland.
Law Society of Scotland	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?

(Paragraph 5.21)

Comments on Question 13	
Paul Bernal	I don't believe this should be a requirement, though it could be noted that it might help the use of the defence. If the facts upon which the comment is made are 'common knowledge', for example, it should not be necessary to state them in order to get the defence. This is particularly important in relation to defamation on social media systems such as Twitter where the length of a comment is very limited. 'Fair comment' should be a defence available for tweeters – commentary is one of the most important uses for social media, and Twitter in particular.
Stephen Bogle	This is certainly something worth considering. In the case of *Clark v Norton* [1910] VLR 494 at 499 there was a useful formulation of what fair comment is: "something which is or can reasonably be inferred to be deduction, inference, conclusion, criticism, remark, observation, etc." (This was an Australian case decided by Cussen J which Descheemaeker quotes in Mapping Defamation Defences, MLR (2015) 641-671, 652). Here the important point is the use of the word "reasonably". Determining the reasonableness of the comment seems to be what the court is being asked to do. It might be better to stick to that terminology – "reasonably" - rather than the terminology of sufficiency. Arguably, the term "sufficient" or "sufficiency" has a sense of quantity or size or sum of resources which may be misinterpreted to mean that there needs to be a quantity of individual facts or a large amount of evidence, i.e. there was lots of individual facts or stats or different pieces of evidence which lead x to make y comment. I think that would detract from the original meaning of "reasonably" which is related to an assessment of degree or moderation or commonality with regard to the matter under consideration, i.e. x observed a situation or circumstance or read something which may be a singular instance or difficult to quantify in terms of numbers or individual facts; but nonetheless, in spite of this, the comment made was a reasonable deduction or induction based on what was observed or read etc.
Eric Clive	No. This is too restrictive.
Eric Descheemaeker	(Covering 13-15) 13-15. The first question immediately raises the issue of the relationship between the comment and its basis. In English and Scots law the requirement emerged that (i) there should be a visible factual basis to the comment (either through direct reference or because these facts are already widely known) and that these facts should be true, or more accurately protected by a defence (which could also be qualified privilege). This requirement conflates analytically separate issues and creates much confusion. The existence of a basis of fact that should be known

	to, or knowable by, the recipient simply works out what it means for the incrimination to be recognisable as comment. If it is an obvious opinion (*example* deleted *as confidentia*l) the requirement is superfluous, but if it is a fact it is crucial to ascertain whether it is a primary fact that must go to justification (" X stole my laptop") or a secondary fact that only needs to be honest to be protected (e.g. I have previously asserted the following three primary facts: "my laptop disappeared"; "only X was around when it happened"; "he blushed the next time I saw him"). In practice, in the context of "traditional" media against whom most actions are brought in the UK, the same defender would have stated both the facts – assumed to be defamatory themselves – and the inference drawn from them. This explains why fair comment as it has evolved really conflates two layered defences: one for the underlying facts (justification, privilege etc) and one for the comment properly so called. Analytically these can and should be distinguished. There is no reason why the comment should be based on explicitly stated facts, even less so that these facts should be true or otherwise protected; the only necessity is that the statement should be recognisable as derivative from some pre-existing facts "out there". The best stance for the law to take would be as follows: (primary) facts, if and when they are asserted by the person who also comments on them, must be defended according to the provisions that relate to them (e.g. truth, privilege, responsible journalism); the comment itself – insofar as it is recognisable as such – only needs to be honest to be protected. A key question is how to deal with commentators who (as is common for instance on social media) do not themselves assert facts. There are logically four possibilities: i. an explicit reference is provided (e.g. hyperlink); ii. no source is given but the facts relied upon are generally known or knowable, e.g. because they are in the news; iii. neither of the above applies but the statement is nonetheless recognisable as comment; iv. neither of the above applies and the statement is not recognisable as comment. On (i) and (ii) the current law (before and after the Defamation Act 2013) is that those facts must be defended in and by themselves for the defence of fair comment/honest opinion to apply. This strikes me as absurd both in terms of logic (how could one's comment encompass another's statement of fact?) and of justice (it makes the commentator responsible for the facts relied upon, putting him in a worse position than the primary asserter of those facts; by so doing it also removes much of the usefulness of the defence). The best course of action, as mentioned above, would be to remove the necessity of underlying facts from the defence: these would only need to be defended if and when they are in fact asserted. Failing this, at the very least the law should make it easier to defend those primary facts. The suggestion made in the NI Consultation Paper, i.e. to extend the

	protection to facts reasonably believed to be true (§3.39) is a good one, especially if it is coupled with a generous judicial interpretation whereby a non-professional journalist is prima facie justified in relying on facts provided by others. Requiring only honest belief in the truth would give the defence effectively the same teeth as the uncoupling of facts and comment argued for above. Scenario (iii) makes the same point even clearer: as the law stands it seems that such bare comment ("X is a disgrace to human nature") necessitates the proof – or other protection – of facts sufficient to hold the opinion; in other words the defender is required to make and then defend statements of fact about the pursuer that he did not in fact make in order to be protected in the inference that he did make. This is absurd. Scenario (iv), on the other hand (e.g. "X stole my laptop" without the disclosure of primary facts), should be treated as an allegation of fact, going to truth rather than comment. This is consonant with first principles.
Roddy Dunlop	No. The justification for the defence, as I see it, is that the "audience" is in a position to judge the comment for itself. As long as the defence requires the commentator to state, at least by reference, the facts upon which his comment is based, the audience is put in that position. If one starts to introduce a requirement that the facts provide a "sufficient basis" for the comment, then one starts to introduce notions of censorship which have no place in the law of defamation. A complete disconnect between the facts stated and the comment offered might be evidence of dishonesty on the part of the commentator, but it seems to me that if one starts to require the court to assess the sufficiency of the factual underpinning for the comment then one enters very dangerous territory. A statement of opinion that X was a disgrace [plainly a comment] because he had voted for the Y political party would satisfy the modern requirements for the defence: as long as it is made honestly, the audience is able to listen to the comment and its factual underpinning, and make its mind up for itself. Requiring the court to judge whether or not the facts provided an adequate foundation for the comment would complicate matters significantly, and one can envisage real difficulties for a court in assessing what is, or is not, a "sufficient basis".
Graeme Henderson	Most practitioners regularly refer the Courts to *London Artists v Littler* [1968] 1 ALL ER 1075. Why should this clear explanation of the Law be replaced by a statute ?
Ursula Smartt	Provision should be made in statute which provides 'privilege' given to comment in peer-reviewed statements (e.g. academic journals or book reviews) and should extend to publication of a fair and accurate statement or assessment. This applies to material that is 'substantially the same' as the original publication. This must exclude malice which would safeguard a person's reputation (or 'honour').
Gavin Sutter	Yes – subject to the proviso that, as noted above, I would support the view that the factual basis at the time of the comment being published should be that as was honestly believed to be the case by the defendant.

Campaign group	
Libel Reform Campaign	Yes.
Insurance interest	
Aviva	Yes, we consider that any statutory defence of fair comment should make clear that the fact or facts on which the comment is based must provide a sufficient basis for the comment. The essence of the defence is that a reader would be able to consider the relevant facts and reach a conclusion different to that of the author.
Law firm	
BLM	Yes, we consider that any statutory defence of fair comment should make clear that the fact or facts on which the comment is based must provide a sufficient basis for the comment. The essence of the defence is that a reader would be able to consider the relevant facts and reach a conclusion different to that of the author.
Media and media-related organisations	
BBC Scotland	No
CommonSpace	Yes.
NUJ	No.
SNS	No. There is difficulty in putting the burden of proof of facts onto a commentator.
Representative bodies (Legal)	
Faculty of Advocates	Yes.
Law Society of Scotland	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	
Paul Bernal	Yes, but see the answer to question 13. I do not believe that statement of the relevant facts should be a requirement. Those facts should exist, however.
Stephen Bogle	What the DP suggests about this seems sensible. Fair comment would not be appropriate as a defence - if it an unreasonable comment at the time of the utterance but subsequent evidence proved its veracity then defence of truth may be appropriate. Or indeed a verbal injury action would be more appropriate for the pursuer.
Eric Clive	No. Why should a commentator not say e.g. "If the facts alleged in such and such a report are true then I consider X is not fit for public office."?
Roddy Dunlop	Yes. The purpose of the defence is to allow comment to be passed on true facts (or facts covered by privilege). If the facts did not exist at all at the time of the comment then the justification for the comment is absent.
Graeme Henderson	This issue usually only arises in *Reynolds* privilege cases. As a matter of logic a fair comment can only be made at the time when facts exist upon which comment can be made.
Gavin Sutter	Completely (again, preferably subject to the standard of the facts being what the defendant reasonably believed to be factual at the time). One cannot have opinions on a matter of fact (or reasonably believed fact) of which one is unaware at the time that opinion is expressed.
Campaign group	
Libel Reform Campaign	Yes.
Insurance interest	
Aviva	Yes, the statute should make clear that the fact or facts on which the comment is based must exist before or at the same time as the comment is made. It would appear unfair on a pursuer for a defendant to be able to take advantage of facts which came into existence at a later date which had no bearing whatsoever on the person who made the statement.
Law firm	
BLM	Yes, the statute should make clear that the fact or facts on which the comment is based must exist before or at the same time as the comment is made. It would appear unfair on a pursuer for a defender to be able to take advantage of facts which came into existence at a later date which had no bearing whatsoever on the person who made the statement.
Media and media-related organisations	
BBC Scotland	Yes.

CommonSpace	Yes.
NUJ	Yes.
SNS	Yes, again for the sake of clarity.
Representative bodies (Legal)	
Faculty of Advocates	Yes.
Law Society of Scotland	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?

(Paragraph 5.21)

Comments on Question 15	
Paul Bernal	Yes, but there is a question of what would constitute a 'fact'. The 'fact' that someone else has said something, for example, where that someone else is someone that could be reasonably expected to be trustworthy, should count. This might include commentary by a professional journalist, for example.
Stephen Bogle	I might mention here that don't think the term "opinion" is helpful here. Opinions are different from comments as Eric pointed out at the SLC defamation event in April (see also p 652 ff of his MLR piece). Maybe this is an overly pedantic point but I think it is still worth making. In answer to the question, no, it doesn't appear necessary that fair comment be used in these instances as other defences are available. In regard to comments upon a privileged statement, I would tend to agree with the analysis the DP provides at para 5.16.
Eric Clive	I would prefer to see the defence divorced from factual base but if not then I would support this proposal.
Roddy Dunlop	The factual underpinning should either be true, or covered by privilege. Allowing the defence where defamatory comment is made on "facts" which are not actually true or covered by privilege, merely because they were reasonably believed to be true, would overly extend the defence.
Graeme Henderson	No.
Ursula Smartt	See my comments above.
Gavin Sutter	Yes, as noted above, I do believe that the test should extend not only to opinion based on the narrow categories of provable fact and privileged statements, but also to material reasonably believed to be factual at the time. I would stress that this should be clarified to apply only to 'X believes Y to be an established fact', as distinct from 'A suspects B to be the case, but lacks an honest believe that is has been proven'. The defence should protect an honest opinion, not mere speculation.
Campaign group	
Libel Reform Campaign	Yes. It is particularly important that defence should also be worded so as to include the final aspect, that the facts were 'reasonably believed' to be true. This would offer protection to those commenting on social media or those commenting on facts alleged by another media outlet. It is easy to imagine cases where an allegation published in a national newspaper leads to many people commenting on social media, and columnists writing comment pieces based on those supposed facts. The assumption that those facts are true would be 'reasonable' if they appear in a prominent media outlet.

	This is not to deny a person vindication. If the media outlet that initially published the allegations had its facts wrong, then it would of course be vulnerable to a defamation action itself. Moreover, the extent to which others commented on those false facts would mitigate against them regarding damaged and any 'serious harm' test. However, those who commented on those facts should not be penalised for doing so. The harm to the pursuer's reputation was done by a mistake on the part of the publisher of those facts, not those who subsequently offered comment.
Insurance interest	
Aviva	Yes, the statutory defence of fair comment should be framed to make it available where the factual basis of the opinion expressed was true, privileged or reasonably believed to be true.
Law firm	
BLM	Yes, the statutory defence of fair comment should be framed to make it available where the factual basis of the opinion expressed was true, privileged or reasonably believed to be true
Media and media-related organisations	
BBC Scotland	Yes.
CommonSpace	Yes.
Google	Following the developments brought about by the 2013 Act, we also agree that the defence of fair comment should be broadened, and should reflect a requirement that the author honestly believed the comment of opinion he or she expressed.
NUJ	Yes.
SNS	Yes, especially qualified privilege.
Representative bodies (Legal)	
Faculty of Advocates	We support the first two aspects of that proposal, but not the third. We have difficulty with what it would mean in practice. In the course of litigation, the definition of 'reasonably believed to be true' will presumably be case specific and raises a range of questions similar to the current 'responsible journalism' test in relation to Reynolds privilege. What efforts would a journalist have to make in order to satisfy that test? What about a home blogger? Would the standard of pre publication investigation be the same for all or not? Would a local paper relying on a national story be entitled to do so? By contrast, the absence of such a provision will certainly provide clarity. The current law requires the facts to be substantially true and that position provides a discipline on those making comment which might be considered to be a useful one as the rights of freedom of expression and reputation are balanced. We are content that the existing law in relation to the factual accuracy underpinning comment is clear and works in practice.

Law Society of Scotland	Yes.

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

(Paragraph 6.15)

Comments on Question 16	
Paul Bernal	Unequivocally yes. One of the most important defences to set out in statutory form.
Stephen Bogle	I'm in complete agreement with para 6.15.
Eric Clive	Yes. This is very important.
Campbell Deane	(Covering questions 16-18) Reynolds privilege has done considerable service to Defenders since it came to the fore. From experience, it is perhaps the most commonly referred to defence to a pre action letter of claim and is almost always incorporated as a defence to proceedings raised. Notwithstanding that aside from *Adams –v- Guardian Newspaper*, there is little or no direct authority to establish the proposition that Reynolds is in fact part of Scots Law, there is a general acceptance at practitioner level that it is treated as being part of Scots law and indeed most journalists are fully trained in Lord Nichols 10 point test and the responsible journalism test laid out there. It should be noted however that notwithstanding that Reynolds has been of considerably assistance to Defenders it is not a panacea for all wrongs. Cases including *Cooperative Funeral Care Services v Scottish Daily Record and Sunday Mail Limited* (settled) and *Cayzer –v- Times Group Newspapers* (settled) are cases where Reynolds privilege defences were advanced. It is possible from a Pursuer's perspective to successfully defeat the Reynolds privilege defence (albeit an uphill struggle).
Eric Descheemaeker	(Covering questions 16 -18) Given that changes from the current common law are likely to be wanted, and the fact that the seminal authority for the defence in Scots law is an English case whose authority has now been superseded in its original jurisdiction, the Reynolds defence is indeed a prime candidate for inclusion in an Act of Parliament. The question is what form it should take. As argued in much greater length elsewhere (E. Descheemaeker, "Three Errors in the Defamation Act 2013", 6 Journal of European Tort Law (2015), 24), the statutory defence enacted in England in 2013 is highly problematic. One principal reason is that it hinges on a concept, "public interest", which is not only notoriously open-textured but is now being used in a novel sense: whatever public interest might have meant in the law of defamation, it always applied to the subject-matter of the incrimination, not the circumstances of its disclosure (for which a complex battery of duties and interests were pressed into service). In its

	newer sense, “publication in the public interest” seems to be no more than a token of approval: a “good thing” as opposed to a “bad thing”. This is seriously damaging for the clarity and accountability of the law. The main reason for this unfortunate turn of events would appear to be the desire to bring the nascent defence of reportage into the Reynolds defence when its basis is in fact completely different. The result was that the Supreme Court – which heard the appeal in *Flood* at a most unfortunate time – and then the British Parliament were forced to settle for the vaguest possible formulation of the defence: language that was broad enough to encompass two entirely distinct rationales, i.e. reasonable belief in truth (mainstream Reynolds) and warranted republication independently of any truth value (reportage). These absolutely must be disentangled if the defence that has stemmed out of the seminal Reynolds case is to remain intelligible. The gist of ordinary Reynolds privilege was best encapsulated to my mind not in any British case but by the Supreme Court of Canada in *Grant v Torstar* (2009) in the words of McLachlin CJ, “I … would formulate the test as follows. First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances” In other words this really is a defence of “reasonable truthfulness”, where the defender argues that he ought to escape liability because he tried reasonably hard to get it right. If this is true then it follows that the defence is properly limited to statements of fact. This, indeed, makes much sense: truth and Reynolds go to justifying a statement of (primary) fact; fair comment secondary facts and opinions; while qualified privilege cuts across these as protecting the context of a defamatory disclosure rather than its content. Reportage, on the other hand, is predicated on the view that, in some circumstances, it is perfectly justifiable to repeat a defamatory incrimination (whether fact or comment) that was made by another, without endorsing it or taking a stance as to its truth value. This can only be understood against the background of the rule of repetition whereby the repeater is prima facie treated as the main “asserter” of a statement. The rule of repetition is absurdly broad and the defence of reportage is accordingly to be warmly welcomed. But it is arguably too ill-formed at this stage to be put in statutory form. The danger of getting it wrong is too great. Courts must work out the shape of the defence and ideally relate it to other ways of qualifying the rule of repetition (such as the great number of qualified privileges, whether statutory or at common law, for reports). Not putting it on a statutory footing is in no way a problem provided it is made clear that the defence of responsible publication (in its *Grant v Torstar* form) is not to be read as excluding other possible defences.

Roddy Dunlop	Yes. A codification of the *Reynolds* defence, along the lines seen in the 2013 Act, would be welcome.
George Gretton	Yes.
Graeme Henderson	There is little doubt that *Reynold*s Privilege will apply in Scotland. There has been no judgment issued which suggest that such a defence offends against Scots Law. I can see little purpose in attempting to codify this area of law.
Gavin Sutter	I was sceptical about this being included in the Defamation Act 2013, as I was unconvinced that statute could adequately replicate such a nuanced concept as Reynolds privilege. How well it works in practice remains to be seen.
Ursula Smartt	The *Reynolds* defence (and the 10-point criteria which is a very tall hurdle for any defendant to prove) should be abolished and subsumed by statute e.g. statute should provide for the defence to be available in circumstances where the defendant (e.g. newspaper or online publication) can show that the statement complained of was, or formed part of, a statement on a matter of public interest and that the journalist or publisher reasonably believed that publishing the statement complained of was in the public interest. This would also incorporate Art 10 ECHR. The public interest at the time of publication is an objective test.
Campaign group	
Libel Reform Campaign	Yes. A clear statutory public interest defence should be available in cases where the author has acted responsibly, according to the type of publication. This would curb the chilling effect of libel laws and lead to cases being resolved quickly. There is a profound public interest in freedom of expression, which is a fundamental right set out in Article 10 of the European Convention on Human Rights and the Human Rights Act. Freedom of expression has been shown to be of particular importance as a means of ensuring political accountability, advancing understanding, and achieving personal fulfilment. This is not because everything that people say is true, but because an open society tends towards noisy imperfection more than silence. Scotland needs a new effective defence that protects the public interest so citizens can defend themselves, unless the pursuer can show they have been malicious or reckless. A public interest defence would allow the publication of speech on matters of public interest in cases where the demonstration of truth may be inappropriate. This is a principle which recognises that the public interest may be best served by the publication of uncertain information, leaving the subject of such information to respond publicly. A statutory public interest defence would have the benefit of clarifying and strengthening the law with regard to freedom of expression. It would send a strong message to 21st century publishers (i.e. NGOs, scientists, bloggers, social media users and citizen journalists) of the points they

	should bear in mind when considering whether to publish. The SLC's discussion document's comparison of the 'reasonableness' test as presented in s.4 of the Defamation Act 2013, and the Reynolds Defence which preceded it, omits any mention of the fact that far more people may be considered publishers now than in the past. Any defence which requires a publisher to meet criteria which impose a disproportionate burden on freedom of expression will make it inappropriate for NGOs, researchers and bloggers, who are increasingly publishers of public interest material. Any defence which is uncertain will chill public interest discussions as many publishers would rather settle claims out of court or avoid publication than face the legal uncertainty of mounting a complex and unpredictable defence. The lack of a body of case law under the Reynolds case law in England and Wales is both a symptom of its failings and an argument for a clear statutory public interest defence in cases where the defendant has acted responsibly, taking into account the nature of the publication and its context.
Insurance interest	
Aviva	Yes, there should be a statutory defence of publication in the public interest in Scots law. The very nature of the defence makes this desirable.
Law firm	
BLM	Yes, there should be a statutory defence of publication in the public interest in Scots law. The very nature of the defence makes this desirable.
Media and media-related organisations	
BBC Scotland	Yes.
Tom Brown (Journalist)	No objection to this.
CommonSpace	Yes, we believe this is very important.
Google	Yes.
NUJ	Yes based on *Reynolds* defence principles.
SNS	Yes.
Representative bodes (Legal)	
Faculty of Advocates	To some extent the answer to this question depends on whether there are other public interest defences available, for example, in relation to fair comment. In principle, we are strongly supportive of the concept of a public interest defence and in practice the Reynolds defence has been a very important part of the Scottish legal landscape, notwithstanding the relative scarcity of reported cases.

	In our experience, the Reynolds criteria are extremely useful in providing journalists with a framework within which they can operate. We do not, with respect, agree with the characterization of Article 10 (para 6.6) as guaranteeing the right of the public to be informed on every matter of public concern. Article 10 gives that right but it is always subject to being balanced against other rights and considerations. That balancing exercise (see for example Lord Steyn in *Re S*) is an important part of this area of the law. The Discussion Paper notes that the new Section 4 changes the emphasis from responsible journalism to whether the belief in the public interest was reasonable. Given the considerable public disquiet about the conduct of some aspects of the media in recent times, thought might be given to whether that shift is one which is justified. It may, or may not, be that the Reynolds standards are upheld under the new statutory test but if the hope is that they are, we remain unconvinced as to why the shift from emphasis on responsible journalism makes that more likely? We note with interest some of the difficulties in the operation of the new Section 4, not least the interplay with the question of fair or honest comment. We note that the Discussion Paper takes the view that despite those problems, 'the courts in England and Wales will no doubt address these points.' We do question whether that is an acceptable basis for legislation. Passing provisions in one jurisdiction which are acknowledged as flawed, and in the hope that the Courts in another jurisdiction will later give guidance, is not a proposal which we can support. Our position is accordingly that either a) an improved statutory provision be considered which deals with the deficiencies of the 2013 Act, and does so in a way consistent with the rest of any statute drafted or b) we rely on the existing common law provisions The least attractive option is to accept that because England has passed a defective provision, so too should we.
Law Society of Scotland	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	
Paul Bernal	Yes. Amongst other things this would reduce the scope for legal argument about the nature of a comment – reducing costs, speeding up trials and improving legal certainty.
Stephen Bogle	I don't think it needs to extend to expressions of "opinion". I find the approach of Lord Nicholls in *Reynolds* (p 193 – 195) persuasive.
Eric Clive	Yes.
Roddy Dunlop	Yes. The criticisms of the fact that this is the situation in England do not seem to me to be of particular force. Moreover, the utility of such a defence is amplified in the event of public interest being removed as a factor in the defence of honest comment, as is being considered. The point of the public interest defence is that it should be available to protect speech of whatever nature as long as the public interest favours the utterance. It would be anomalous to say that such a defence is lost merely because the speaker was commenting rather than making a statement of fact. In many cases, an utterance in the public interest will involve a combination of statements of fact and opinion thereon. To protect only the former and not the latter would be anomalous.
George Gretton	Yes.
Graeme Henderson	The suggestion in this proposal would involve conflating the defence of fair comment with *Reynolds* privilege.
Gavin Sutter	No. I believe that, as regards matters of opinion, the Honest Opinion defence is already sufficient.
Campaign group	
Libel Reform Campaign	Yes.
Insurance interest	
Aviva	Yes, we consider that any statutory defence of publication of public interest should apply to expressions of opinion as well as statements of fact. Again, the underlying rationale is that any such publication must be in the public interest and if it is it should not matter whether it is a statement of fact or an expression of opinion.
Law firms	
BLM	Yes, we consider that any statutory defence of publication in the public interest should apply to expressions of opinion as well as statements of fact. Again, the underlying rationale is that any such publication must be in the public interest and if it is it should not matter whether it is a statement of fact or an expression of opinion.

Media and media-related organisations	
BBC Scotland	Yes.
CommonSpace	Yes.
NUJ	Yes.
SNS	Yes, interpretation and analysis is increasingly important for news businesses.
Representative bodies (Legal)	
Faculty of Advocates	We hold to the position that the public interest aspect of any opinion is better and more obviously dealt with by maintaining that as an aspect of fair comment. That allows a differentiation between opinion supported by fact on a matter of public interest and opinion based on a much more fluid 'all the circumstances of the case' test. The difficult interplay of this provision with the honest comment aspects of the 2013 Act seems to us to offer unnecessary complexity.
Law Society of Scotland	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	
Paul Bernal	No particular view.
Stephen Bogle	Yes but a cut and pasting of s 4 (3) from the Act 2013 would be unsatisfactory. The present wording of s 4 (3) is too wide and suggests that there should be no assessment of the responsibleness of the reporting and does not indicate that the reportage should be neutral, albeit such an explanation is found in the explanatory notes. If there is to be a statutory formulation it would seem appropriate to stress the need to be neutral and responsible in reporting a dispute.
Eric Clive	It definitely should.
Eric Descheemaeker	No. See his comments under question 16 above.
Roddy Dunlop	It should. Reportage provides protection where there is a political "spat" which it is appropriate to bring to the public's attention, whether or not the reporter believes the comments or accusations made in the course of that spat to be true. As long as the reporting is undertaken neutrally, it seems to me to be appropriate to allow for a defence of reportage in such circumstances, as otherwise the ability to publicise such matters is unjustifiably hindered.
George Gretton	Reportage should be covered by the legislation.
Graeme Henderson	If there is to be such a defence it is essential that reportage should be included. In a free society the media ought to be able to report allegations provided that they are not adopted by the reporter.
Gavin Sutter	I would not be opposed to it.
Campaign group	
Libel Reform Campaign	Yes. Reportage should certainly be covered by new public interest provisions. When the respondent is a newspaper or broadcaster, 'reasonableness' will include the tone and manner of the report and how a dispute is described.
Insurance interest	
Aviva	Yes, we consider that a statutory defence of publication in the public interest should include a provision as to reportage. There is plainly a public interest in fair, balanced and neutral reporting of disputes between parties where the dispute concerned is on a matter of public interest.
Law firm	
BLM	Yes, we consider that a statutory defence of publication in the public interest should include a provision as to reportage. There is plainly a public interest in fair, balanced and neutral reporting of disputes

	between parties where the dispute concerned is on a matter of public interest.
Media and media-related organisations	
BBC Scotland	Yes, it should.
NUJ	Yes, it is imperative that provision for reportage must be included.
SNS	Yes, it is important to be able to cover debates and disputes effectively.
Representative bodies (Legal)	
Faculty of Advocates	Yes. We consider that a useful tool to encourage fair and accurate reporting.
Law Society of Scotland	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?

(Paragraph 7.33)

Comments on Question 19	
Paul Bernal	Yes - including a proper review of the different types of internet intermediaries. An ISP, for example, is very different from the operator of a social media service or a search engine. The defences available to different kinds of internet intermediaries should be different.
Stephen Bogle	Yes, this is of the utmost importance.
Eric Clive	This is something which might be better done at supra-national level.
Eric Descheemaeker	Covering 19-20 The position of internet intermediaries highlights much of what is wrong with the English/Scots law of defamation. As with a number of other requirements of the prima facie cause of action, the law starts with an absurdly broad definition of what counts as a publisher, only to backpedal frantically at the defences stage, involving itself in considerable – and, to my mind, entirely unnecessary – difficulties in the process. At common law, everyone who is facilitating the publication of a defamatory statement is regarded as a publisher provided they are more than a mere conduit (it is not clear where the line is drawn between the two: e.g. in the offline world, the Post Office is a mere conduit but a public library stocking a newspaper or a paper boy selling it are [secondary] publishers potentially liable in defamation). In the offline world this did not really matter as, in practice, they would be most unlikely to be sued, even less so to be sued successfully given the additional defence of "innocent dissemination" that they can avail themselves of. As often what the online world does is not so much to create a new reality requiring new or different rules, but to bring the inadequacy of existing rules into sharper focus. Due to the possible anonymity of the primary publisher, the practical difficulty of getting a remedy against them (especially in a cross-border situation) and the fact that what they really want is often to have a statement taken down so as to prevent further publication rather than damages, pursuers really do sue internet intermediaries in defamation. I have no principled objection to the taking down of a statement on the internet or access to it being blocked by an intermediary having technical control: the online world is subject to the rule of law, and to policing, every bit as much as the offline one. Like many other forms of material, from apology of terrorism to pedopornography, defamatory statements available online might be found to be unlawful and action taken in consequence. But it is absurd to sue intermediaries as

	defenders (even subsidiary ones) in a defamation action, just as much as it would be to say that e.g. Blogspot promotes terrorism because a blog it hosts does. Internet intermediaries, to the extent that they are regarded as secondary publishers, can avail themselves of all the defences available to offline facilitators, including innocent dissemination. But they have also been given an additional ad hoc defence in the guise of s 5 of the Defamation Act 2013. This provision is especially interesting because it exposes the clash of logics between defamation actions and policing the internet. On the face of it, it presents itself as an ordinary defence to an ordinary action in defamation, i.e. where P is suing D for having published a statement liable to cause others to think less well of them. In reality what the defence requires is essentially for the intermediary to do one of two things: either establish a line of contact between poster and complainant to allow the latter to sue the former directly, or remove the statement complained of. But neither of these options makes much sense if the intermediary has committed the legal wrong of defamation, which is supposed to be the case. You do not normally escape liability in delict by pointing the finger to someone else; and removing the cause of harm would only reduce the quantum of damages, not remove the liability altogether. This gives away, to my mind, the fact that s 5 is not a defamation defence in any meaningful sense of the term; it is a mechanism to police the internet which has been misplaced in a Defamation Act (creating great injustices in the process: why should people complaining about defamatory statements be given a privileged position)? More importantly perhaps, the policing mechanism is a perverse one. Assuming satisfactory contact cannot be established between the two "real" parties, the alternative for the intermediary is simple: either remove the statement complained of or risk being sued. It is not difficult to see why they would opt for the former: besides the sheer hassle and cost of defending a defamation action, their position would be highly precarious given the difficulty for someone who is not a publisher in any real sense of the term to rely on such defences as truth, responsible publication etc. Accordingly they are likely to indulge the complainant's request. But why should they remove the statement? No legal wrong has been established (it is not even clear that any has been alleged). Even from a policing-the-internet perspective, it would only be justifiable if it was unlawful, i.e. defamatory-in-law (taking into consideration all defences). But of course the intermediary is not a court of law and is utterly unable to adjudicate on such a question. What they might do is judge whether it is prima facie defamatory – so much is generally obvious – but they have neither the factual nor the legal knowledge to decide whether the statement is a libel in the legal sense. (Indeed the MoJ guidelines suggest that they should take at face value the complainant's assertion that the statement is "factually inaccurate" or contains "opinions not

	supported by fact" [§9], which are neither necessary nor sufficient conditions for a libel to be constituted.) If they are afraid of being sued, they will simply remove the material because someone does not like it: the potential for stifling free speech, in particular the publication of justified material (e.g. defamatory but true), is enormous. This provision is wrong in every respect. What we really need is to draw a clear and satisfactory line between (real) publishers and non-publishers. Most internet intermediaries are not publishers in any meaningful sense of the term and so should not be potential defenders in a defamation action in the first place. This would render the law of defamation clearer, more logical and more protective of free speech.
Roddy Dunlop	Ideally, yes – although I do not underestimate the task in anticipation. As the Discussion Paper indicates, the law as it presently stands is confused and confusing, with a number of statutory and common law principles creating a patchwork quilt which is neither easy to advise upon nor easy to apply. It can also be said with some force that the law has struggled to keep pace with technological developments in this area. Nevertheless, the stark fact remains that for internet publication claimants are likely to litigate elsewhere. Given that publication on the internet is published wherever it is accessed, it is likely that jurisdiction can be found in the specialist media courts in London. There has been little in the way of defamation litigation based on internet publication in Scotland. Proportionality therefore perhaps dictates that the wholesale review that would be necessary purely to address this point under Scots law might not be a profitable use of money or resources. The new English regime under s.5 has its critics, but it is an improvement over what existed before its inception.
Graeme Henderson	No. The 2002 directive should provide sufficient protection.
Gavin Sutter	Yes, although it should of course be borne in mind at all times that there are limitations as to the changes in law which can be made, in the light of the UK's commitments under the EU Electonic Commerce Directive (2000/31/EC). (At time of writing, I note this in the hope and expectation that the UK will elect to remain within the EU.) This key issue was missed in early stages of the campaign to reform English libel law (the Libel Reform Campaign's 2009 'Free Speech is not For Sale' report contained a call for online intermediaries to be absolved of all liability in respect of third party uploaded content. Had this been pursued, it would have flown directly in the face of European law.
Ursula Smartt	This is a complex issue and case law is not quite clear on this. You could adopt the US stance that ISPs are only 'hosts' or 'walls upon which graffiti can be posted'. This was adopted by Eady J in *Tamiz v Google Inc* [2012] EWHC 449 (QB). I think operators of websites and ISPs should be made responsible for content (defamatory or harassment) once it has been brought to the notice of internet intermediaries (see: Godfrey v Demon Internet [2001] QB 201). This then limits the circumstances in which an action for defamation can be brought against someone who is not the primary publisher of an allegedly defamatory statement (see: *Lord McAlpine of West Green v*

	Sally Bercow [2013] EWHC 1342 (QB).
Campaign group	
Libel Reform Campaign	Yes. The responsibilities of, and protections for intermediaries and ISPs should be reviewed and clarified. One way in which reputation managers have been able to secure the removal of material critical of their clients is to threaten secondary publishers with defamation. An ISP, that has no knowledge of something published online and that has no significant legal support, will have no choice but to remove the content in question. The current E-Commerce Directive, and the principle of s.5 and s.10 of the Defamation Act 2013, acknowledge that it would be unfair for intermediaries to be instantly and fully liable for defamatory statements posted on their platforms. This approach also represents how ordinary people conceive of content posted online. Responsibility for the words rests with the author and publisher, not a social media platform or ISP. Unfortunately, we have reservations with the way s.5 currently operates (see answer to question 20, below).
Insurance interest	
Aviva	Yes, there should be a full review of the responsibility and defences for publication by internet intermediaries. The role played by such intermediaries is central to the issue of how to deal with publications on the internet/by electronic means. Such intermediaries have a range of roles and there should be careful consideration of whether the roles they undertake (particularly where they do so for profit) should come with any form of liability/responsibility for the publication of material where they are intrinsic to the publication.
Law firm	
BLM	Yes, there should be a full review of the responsibility and defences for publication by internet intermediaries. The role played by such intermediaries is central to the issue of how to deal with publications on the internet / by electronic means. Such intermediaries have a range of roles and there should be careful consideration of whether the roles they undertake (particularly where they do so for profit) should come with any form of liability / responsibility for the publication of material where they are intrinsic to the publication.
Media and media-related organisations	
BBC Scotland	Yes.
CommonSpace	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/
NUJ	Yes.
SNS	Yes. There is a lack of clarity in this area of law.
Representative bodies (Legal)	
Faculty of Advocates	Yes. We consider this to be a complicated area of the law worthy of a separate strand of the current project.
Law Society of Scotland	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.
Senators of the College of Justice	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.

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	
Paul Bernal	It is possible, but not in the form set out in the Defamation Act 2013, which is not clear enough nor detailed enough to be of sufficient help to either claimants or intermediaries. There must be clarity over what constitutes a 'website operator' – and a modern law should acknowledge that even the term 'website' is neither clear nor up to date. Many services, for example, are accessed via apps on smartphones, not through web-browsers. Are they 'websites'? Who operates them? More complex social network sites have tiers of control – what does an 'operator' mean in the case of a Facebook group? Is Facebook the operator? Is the person who moderates the group? What if there are joint moderators? All this needs to be much clearer than is in the Defamation Act 2013 – and the levels of responsibility must be much clearer too. The law should be very careful not to create a chill, for example by putting responsibility on those who run message boards or discussion groups, nor to remove the incentive to moderate discussions (which is generally a good thing) by putting responsibility on moderators or those who allow moderated groups. Further, it is important not to create a situation where anonymous or pseudonymous comments are prevented from occurring. For many people, anonymity or pseudonymity is a crucial protection – from whistle-blowers to those at risk of abuse or bullying, or those with stalkers or other enemies. Concern over defamatory comments by anonymous or pseudonymous people are often overblown: if a comment has no attribution is has far less credibility and hence less capability of creating harm to a reputation.
Stephen Bogle	I don't think the 2013 Act did a very good job here, unfortunately. I think the issue is not with the intermediary but with the "publisher" who has some form of editorial control. But it does seem to be necessary that on various social media platforms a user is allowed to request that content about them be withdrawn if it is defamatory. In that regard, section 5 does something useful in setting up a procedure.
Eric Clive	No comment.
Roddy Dunlop	As before, it would be an improvement notwithstanding the deficiencies identified in the paper.
Graeme Henderson	No. See answer 19.
Ursula Smartt	Yes, definitely. See my comments above. Section 5 of the Defamation Act 2013 is so well constructed that it would be best to adhere to the same wording.

Gavin Sutter	It would certainly help. Section 5 provides a mechanism for a clear notice based system whereby a compliant website operator can be sure of being entitled to the defence in Section 1 of the Defamation Act 1996, while potential claimants are not unfairly deprived of the opportunity to bring a case against an identifiable poster of a defamatory allegation. The effect of Section 10 of the Defamation Act 2013 should also be considered in this context. Applying more broadly, to all ISPs, not only 'operators of websites', Section 10 provides that these may only be sued in defamation where it is not "reasonably practicable" to sue the party or parties directly responsible. This not only helps to further protect the operator of a website (per Section 5) from being sued where all necessary and appropriate steps have been taken to identify the real culprit, but also to shield all service providers from bearing the brunt of litigation as easy targets and perceived deep pockets.
Campaign group	
Libel Reform Campaign	**We have significant concerns about the operation of section 5 of the Defamation Act 2013.** The underlying principles behind s.5 are well founded. They acknowledge that an operator of the website is not likely to be directly responsible for contentious content and that they should be afforded legal protections while they establish who is. The regulations that accompany s.5 also ensure that the author/publisher has a say in whether to defend the content, before the website operator removes it. It also offers a quick and clear method of redress for a claimant whose primary interest is not seeking damages but simply the removal of defamatory content. Unfortunately, the 'inequality of arms' between those on the claimant side of a section 5 procedure, and those on the defendant side, means that free speech is significantly squeezed. Lawyers who have used s.5 say that the defendant (usually an individual) almost never consents to the release of their contact details to the claimant (usually a company). A section 5 notice is therefore essentially an effective take-down notice. Reputation managers can issue notices, even when there may be defences protecting the statement, and be confident it will result in the removal of the content. This is a squeeze on free speech and it disproportionately affects individual writers, to the benefit of large corporations. For the same reasons, the procedure as currently laid out does not protect whistleblowers who want to remain anonymous. An improvement on the current section 5 procedure would be to introduce the option of a court-based backstop to the procedure. For a fee, any party to the section 5 procedure (pursuer, respondent, website operator) could request the court to certify that the words complained of are prima facie defamatory. This would ensure that the most vexatious defamatory postings are removed swiftly; and that the worst reputation management is discouraged. It would also be a way for web companies who depend on User Generated Content (for example, Trip Advisor) to protect their business.

Insurance interest	
Aviva	Yes, a defence for website operators along the lines of section 5 of the Defamation Act 2013 would be helpful in addressing the issue of the liability of intermediaries. However, careful consideration would need to be paid to how that section would work. The regulation that accompanies section 5 is extremely cumbersome and in practice is much less used in England and Wales than the former practice of issuing "take down" notices. In this respect consideration needs to be paid to the interests of those who are defamed on the internet. In particular, there have been numerous incidences of extremely unpleasant publications being made on the internet by anonymous sources and/or "trolling". It seems to us to be extremely unfair on any claimant that they must engage with the author of any such publication who may be seeking to upset and/or provoke them in circumstances where a simple mechanism to ask an intermediary to take down highly defamatory and/or unpleasant material would enable justice to be served quickly, effectively and at proportionate cost.
Law firm	
BLM	Yes, a defence for website operators along the lines of section 5 of the Defamation Act 2013 would be helpful in addressing the issue of the liability of intermediaries. However, careful consideration would need to be paid to how that section would work. The regulation that accompanies section 5 is extremely cumbersome and in practice is much less used in England and Wales than the former practice of issuing "take down" notices. In this respect consideration needs to be paid to the interests of those who are defamed on the internet. In particular, there have been numerous incidences of extremely unpleasant publications being made on the internet by anonymous sources and / or "trolling". It seems to us to be extremely unfair on any claimant that they must engage with the author of any such publication who may be seeking to upset and / or provoke them in circumstances where a simple mechanism to ask an intermediary to take down highly defamatory and / or unpleasant material would enable justice to be served quickly, effectively and at proportionate cost.
Media and media-related organisations	
BBC Scotland	The debate around the adequacy of section 5 might inform a clearer provision for Scots law
Google	We strongly support approaches that encourage and facilitate the placing of responsibility for defamatory material on the individual internet users who posted that content online. Such approaches encourage individuals to be responsible online citizens, and ensure that citizens who do not act responsibly are held accountable for any online misconduct. In this regard, we would support the introduction of a provision equivalent to Section 10 of the 2013 Act, which makes clear that claims should not be brought against parties that are not the author, editor or publisher of the statement complained of where the claimant is able to bring an action against the author, editor or publisher. As internet intermediaries are, in most cases, not the author, editor or publisher of the content complained of, this provision ensures that claimants pursue the individuals directly

	responsible for posting the offending content online. In this context, the *Brett Wilson LLP v Persons Unknown* case helps demonstrate that it remains entirely practicable for a claimant to bring a successful action against an individual even when their identity remains unknown. In the event that the (known or unknown) author of the content either does not engage with the proceedings brought against him or her by the claimant, or refuses to comply with any subsequent court order, Section 13 of the 2013 Act provides the claimant with the ability to invite the court to order the operator of a website on which the defamatory statement is posted to remove that statement. This approach ensures that defamation disputes (particularly those in which the content is not obviously unlawful) are addressed in the appropriate forum, i.e. the court, and that a successful claimant can secure both the vital vindication that he or she seeks, as well as removal of the statement in issue. The Law Commission has asked whether a defence for website operators along the lines of Section 5 of the 2013 Act would sufficiently address the issue of liability of internet intermediaries for publication of third party defamatory material. In discussions of defences that may be available to internet intermediaries, it is important to consider carefully whether in fact the intermediary has any liability in the first place, and thus has any need to present a defence. In this regard, we would highlight that Articles 12-15 of the Ecommerce Directive do not constitute a liability regime, that is, they do not introduce additional liability for internet intermediaries. Rather, they are a defensive regime that impact such, if any, liability that an internet intermediary might have under existing laws. Accordingly, if an internet intermediary does not have any liability under national defamation law (such as is the case where an intermediary hosts unlawful defamatory content prior to having received and considered sufficiently detailed and adequately substantiated notice of that content) then they do not need to avail themselves of the Ecommerce Directive defences, nor of any national defamation law defences . Turning to the Section 5 defence in England and Wales, we support the adoption of provisions that help protect website operators against claims brought in respect of third-party Content hosted on their websites. Where an action is brought against a website operator (for example an operator of an online forum, blog site, social media site or a site which facilitates the posting of user-generated video content) in respect of a statement posted on the website, it will be a defence under Section 5 for the website operator to show that it did not post that statement itself. In circumstances where the actual poster of an offending statement is identifiable, Section 5 of the 2013 Act therefore provides a complete defence for website operators and is a welcomed reform on that basis. The existence of such a defence should discourage vexatious claims which target website operators instead of targeting the source of the defamatory content, i.e. its known author. However, in order for website operators to avail themselves of the Section 5 defence where the poster is anonymous, they must comply with the onerous procedures set out in the Defamation (Operators of Website) Regulations 2013 . In practice, these labyrinthine procedures place a

	complex and disproportionate administrative burden on website operators, and need to be carried out within unreasonably short timeframes if the defence is to be relied on (instead of simply requiring the operator to act "expeditiously" as per the Ecommerce Directive). In some instances, the procedures are simply impracticable, such as the requirement to anonymise a complaint, at the complainant's option, before sending it on to the original author. This makes it impossible for the author to determine who has submitted the complaint, and, correspondingly, makes it impossible for the author to determine whether the complainant truly has any rights to assert (assuming that the complaint remains intelligible in such circumstances). The difficulty of meeting the short timeframes associated with the steps in this process (e.g., 48 hours), whilst handling the large volume of complaints often received by larger website operators, and, time differences associated with operations of multinational companies being spread across multiple jurisdictions, means that website operators' compliance with these procedures is, in reality, exceedingly difficult and burdensome. As a result, many website operators may prefer to avoid the impracticable procedures set out in the Regulations in respect of the Section 5 defence and continue to rely on the existing defences, where such defences are required.
NUJ	Yes but discussion regarding the shortcomings of Section 5 and steps to address these shortcomings should influence any new Scottish statutory defence for website operators.
SNS	As 19 above. Section 5 has not brought the absolute clarity it was hoped.
Representative bodies (Legal)	
Faculty of Advocates	No. We consider that the question should be looked at afresh and in light of the practical difficulties highlighted in the Discussion Paper.
Law Society of Scotland	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?

(Paragraph 7.47)

Comments on Question 21	
Paul Bernal	Yes, in principle, though they need to be flexible enough to react as technology changes – different forms of search mechanism and aggregation can develop very fast.
Stephen Bogle	I think this would be very difficult. Again, I wonder if traditional categories such as editor and publisher may allow a court to then develop a jurisprudence which is flexible to accommodate the fast changing nature of the internet and social media. Adopting today's terminology and schema risks becoming obsolete very quickly.
Eric Clive	No comment
Eric Descheemaker	(Covering questions 21-25) This is typically the sort of provisions that should not be included in an Act. For one thing, there is no particular reason why these specific contexts should be dealt with by ad hoc provisions rather than the application of general principles. Additionally these factual contexts are those most likely to vary dramatically in the near future: a label used in 2016, such as "aggregation service", might mean something very different in 2020, rendering the 2016 rule unsuitable; additionally new realities will almost certainly come into existence that will not be accounted for by the law, thereby creating further difficulties. The temptation to tweak either the substance or the formulation of the law in response to any new technological development must be resisted at all costs. In terms of the substance of the law, most of these intermediaries should not be regarded as publishers in the natural sense of the term, which would terminate any defamation action brought against them. While predictive results in a search engine should logically count as primary publication, the search engine operator would escape liability on the basis that the publication, being automated, would lack the required element of intentionality. Again, someone who sets a hyperlink should not be any more responsible for the content of the page linked to than one referencing a book in a footnote. Besides the usual difficulties (e.g. they might not even be aware of the defamatory content) there is the additional fact that the content of a page can be altered ex post the publication of the link. It is unacceptable on the most basic principles of justice to hold someone accountable for something they have no control over. The only way to avoid liability would be to refrain from hyperlinking altogether: this would be as undesirable as banning footnotes in academic works.
Roddy Dunlop	A more up-to-date definition of "publisher", taking account of such matters, would be helpful.

Graeme Henderson	My short answer is that if the 2002 directive is out of date, it should be amended. (This applies also to questions 22-25).
Ursula Smartt	This links to the Google Spain ruling by the ECJ ('right to be forgotten' - *Google Spain SL v Agencia Espanola de Proteccion de Datos* (AEPD) (C-131/12) [2014] Q.B. 1022) – and this case has already set the precedent for all member states of the EU which is: • The operator of a search engine is obliged (in certain circumstances) to remove links to web pages that are published by third parties and contain information relating to the data subject from the list of results displayed, following a search made via the search engine on the basis of that person's name ('de-listing' or 'de-linking'); • Courts (or regulators) have to balance the data subject's right to privacy and the economic interest of the data controller; • Activities of search engines and publishers of websites are liable to affect significantly the fundamental rights to privacy and to the protection of personal data; • Article 10 ECHR includes the right of internet users to receive information (via internet search engines); • Individuals playing a role in public life may not benefit from the right to be de-listed ('the right to be forgotten'). Therefore there is no need to introduce a measure into Scots law. The Scottish courts can rely on ECJ jurisprudence.
Gavin Sutter	Yes, it would be useful to clarify the law relating to links in this manner.
Campaign group	
Libel Reform Campaign	The pace of technological change in this area presents pitfalls for the creation of legislation. Many of the current issues concerning freedom of expression in the United Kingdom have arisen due to old laws being applied to new technologies (for example, the Multiple Publication Rule, developed in the 1840s, produces counterintuitive outcomes when applied to internet publication). Hyperlinking, search engines and aggregation are all modern technological developments that could be superseded as the use of mobile 'apps' becomes prevalent. Further analysis of the distinctions between websites, web services and apps may be necessary to understand whether they undermine any powers that are to be set out in law. As the creation of URLs can be an automated process based on text pulled from the web page or customised manually, it demonstrates a key challenge to legislators to ensure that protections are in place that correctly identify the responsibilities of the publisher and intermediary. If the defendant is publishing on their own platform (i.e. website or intranet) it is not unreasonable to believe that they have a greater responsibility to understand how that platform utilises metadata to set hyperlinks, preview texts and thumbnails to ensure their content is published in a way that is true to the nature of the piece and cannot be presented in a manner that could threaten defamatory action. However, when content is published on third party platforms, such as social media sites, how 'foreign' algorithms may manipulate the content and metadata beyond the intent of the author, may identify a more complex picture of ultimate responsibility for the presentation of the defamatory statement.

Insurance interest	
Aviva	Yes, ideally the responsibility and defences for those who set hyperlinks, operate search engines or offer aggregation services should be defined. However, there may be significant challenges in defining where liability lies for such specific instances.
Law firm	
BLM	Yes, ideally the responsibility and defences for those who set hyperlinks, operate search engines or offer aggregation services should be defined. However, there may be significant challenges in defining where liability lies for such specific instances.
Media and media-related organisations	
BBC Scotland	Yes.
CommonSpace	Legal guidance and clarification at least is needed in this area.
Google	**E-commerce Directive** It is vital that any amendments made to, or new legislative provisions concerning, defamation law in Scotland are consistent with EU law, and in particular the requirements of the Ecommerce Directive. In particular, we would highlight the need for national legislation to reflect the 'notice and takedown' procedures specifically envisaged by the Ecommerce Directive; this regime contained in Articles 12-14 (together with the ban on imposing general monitoring obligations contained in Article 15) strikes a careful balance between the interests of persons affected by unlawful information, internet intermediaries and internet users. With this in mind, consistency of terminology is an important issue. We would therefore recommend that any legislative reform in this area use the language and terminology already used in the Ecommerce Directive, or at least explain clearly how the legislative language relates to the Ecommerce Directive language (for example, by adopting a definition of "Internet Service Provider" that expressly includes, but is not limited to, those providing the services covered in Articles 12-14 of the E-commerce Directive). At the very least, this will help reduce the potential for conflict between domestic and international law. When applying Articles 12-15 of the Ecommerce Directive, it is important to note the obvious desirability, particularly from a public policy perspective, of not penalising internet intermediaries that introduce voluntary measures to detect and tackle illegal or harmful online material. Such responsible intermediaries should not be prevented from benefitting from the Ecommerce defence regime on the dubious grounds that such measures change the overall nature of their service and thus prevent that service from being considered as inherently technical, automatic and passive in nature. In this regard, we welcome the recognition under Section 5(12) of the 2013 Act, that moderation by the operator of a website of statements posted on it by others, does not

	invalidate the Section 5 website operators' defence. **Search Engine Operators** The Law Commission has asked for input in relation to defences that might be available to intermediaries who set hyperlinks, operate search engines or offer aggregation services. While we believe that it remains important to question any underlying assumption that intermediaries might be considered liable in the first place, and thus be deemed to need any defence, we also believe that an appropriate framework of defences has been established by the Ecommerce Directive, and that Articles 12-15 of the Ecommerce Directive provide a robust and well thought out regime, which is flexible enough to cover all such services, and has withstood the test of time. In relation to the application of this existing framework of defences to intermediaries who, for example, operate search engines, we note that the CJEU decision in *Papasavas* (C-291/13) clarified that "Article 2(a) of Directive 2000/31 must be interpreted as meaning that the concept of 'information society services', within the meaning of that provision, covers the provision of online information services for which the service provider is remunerated, not by the recipient, but by income generated by advertisements posted on a website". Following this, it was held in the *Mosley v Google* case that Article 13 of the Ecommerce Directive (the "Caching" defence) affords legal protection to internet service providers providing search engine services, such as Google. A pragmatic view shared by Advocate General Maduro in *Google France SARL v Louis Vuitton Malletier SA* : "In my view, it would be consistent with the aim of Directive 2000/31 for Google's search engine to be covered by a liability exemption. Arguably Google's search engine does not fall under Article 14 of that directive [the "Hosting" defence], as it does not store information (the natural results) at the request of the sites that provide it. Nevertheless, I believe that those sites can be regarded as the recipients of a (free) service provided by Google, namely of making the information about them accessible to internet users, which means that Google's search engine may fall under the liability exemption provided in respect of 'caching' in Article 13 of that directive. If necessary, the underlying aim of Directive 2000/31 would also allow an application by analogy of the liability exemption provided in Articles 12 to 14 thereof." **Policing the Internet** Google believes that intermediaries should not be forced to police the internet. This is particularly the case in the context of allegations of defamation, which can be highly fact dependant and can involve complex legal defences regarding which the internet intermediary cannot be expected to possess all, or any, of the relevant supporting information. An intermediary simply cannot be expected to know something of the strength of possible defences such as truth or fair comment for every complaint. It would not appear to us to be desirable to effectively outsource the judicial function of national courts in such

	cases to internet intermediaries, by making intermediaries decide what should stay online and what should not, in circumstances where the unlawfulness of the content is not obvious. Equally, it is hard to see how it would be in the genuine interest of a nation to impose obligations on each intermediary to review and moderate its content (even if such an exercise was feasible given the scale at which popular intermediaries operate) when such an imposition would force many intermediaries (particularly those who are starting up) to take the easiest path and delete content irrespective of whether it is obviously unlawful or not. For the reasons set out above, Google highly commends the Ecommerce Directive regime to the Law Commission and trusts that, whilst it was established more than 15 years ago, the careful and respectful balancing of rights that it embodies will act as a guiding framework for the reform of defamation law in Scotland.
NUJ	Yes along with recognition of and provision for continuing technological change**.**
SNS	Yes. As above, responsibilities and defences are unclear
Representative bodies (Legal)	
Faculty of Advocates	In principle, yes. We would emphasise, however that all of these more detailed matters require to be examined in greater depth before legislation is drafted. We will be happy to comment on any proposals once that work is complete.
Law Society of Scotland	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	
Paul Bernal	Similar, but not identical. It should be acknowledged that hyperlinks are often set automatically by algorithm – for example in search results – so the level of involvement is different.
Stephen Bogle	Probably.
Eric Clive	No comment
Roddy Dunlop	Yes. Similar principles are in play.
Ursula Smartt	See above.
Gavin Sutter	Yes.
Campaign group	
Libel Reform Campaign	Yes. We do believe, however, that further clarification is needed as to how the setting of hyperlinks falls within the remit of any new law in the manner that is highlighted above. The responsibility to set hyperlinks can fall to both intermediaries and the publishers themselves (webmasters employed in the same publication, the author on their personal blog or digital communications teams) which identifies a clear difference in terms of ultimate responsibility. When the ultimate responsibility lies with intermediaries it is important to identify where the basis for the hyperlink originates. If the hyperlink relates directly to the content produced by the original publisher the responsibility may lie not with the intermediary but with the original publisher. It would be an undue burden on the intermediaries to interrogate the validity of the content of the article that is the source of the hyperlink and so should have a defence similar to that which is available to those who host material.
Insurance interest	
Aviva	Subject to clarification as to what will constitute setting a hyperlink, we consider that it will be sensible for intermediaries who set hyperlinks to be able to rely on a defence similar to that which is available to those who host materials.
Law firm	
BLM	Subject to clarification as to what will constitute setting a hyperlink, we consider that it will be sensible for intermediaries who set hyperlinks to be able to rely on a defence similar to that which is available to those who host materials.
BBC Scotland	No – it seems to us that they may be differently situated so as not to attract liability in some cases.
Google	It is vital that any amendments made to, or new legislative provisions concerning, defamation law in Scotland are

SNS	Not so sure, given hyperlinking is a deliberate act.
Representative bodies (Legal)	
Faculty of Advocates	See answers 19 & 21.
Law Society of Scotland	Yes.

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	
Paul Bernal	Yes, but the nature of that responsibility is different from other forms. Google's mechanism for applying the *Google Spain* ruling – via an online form – might be a route forward here.
Stephen Bogle	No.
Eric Clive	No comment
Roddy Dunlop	No. That seems to me to be unrealistic: liability should rest with people who make, publish, repeat or endorse defamatory statements. To impose liability on someone who allows another to find such statements seems to me to be a step too far, and would verge on censorship.
Ursula Smartt	See above.
Gavin Sutter	Not where the search return is purely an automatic operation of the software as per the user's commands. I would, however, draw a distinction between user-inputted search terms and a search engine's own auto-complete function. Google have been found liable for defamation in several cases across a range of EU jurisdictions as well as in Japan when their system automatically offered defamatory statements (Satanist being one, rapist another) when users inputted the names of specific individuals. I feel this is it entirely reasonable to hold the search engine to account in such circumstances.
Campaign group	
Libel Reform Campaign	There is a distinction between 'responsible' and 'liable' in this instance. Search results are 'neutral' in the way that a librarian is neutral: they merely present a user with information about what has been published. Search engines should never be liable for defamatory information that appears in search results. However, when a piece of content has been shown to be defamatory and removed from the web, it is reasonable for a pursuer to request that the digital remnants of that content be removed from the web, even if that means the search engine intermediary take proactive action to ensure removal from search results. In practice, this is already the case with the majority of search engines that de-index broken links and removed web content.
Insurance interest	
Aviva	No, we do not consider that intermediaries who search the internet according to user criteria should be responsible for the search results. On the face of it the search results will simply be the result of a mechanical exercise.
Law firm	

BLM	No, we do not consider that intermediaries who search the internet according to user criteria should be responsible for the search results. On the face of it the search results will simply be the result of a mechanical exercise.
Media and media-related organisations	
BBC Scotland	No.
SNS	No.
Representative bodies (Legal)	
Faculty of Advocates	See answers 19 & 21.
Law Society of Scotland	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?

(Paragraph 7.47)

Comments on Question 24	
Paul Bernal	Yes, and again it should not necessarily be identical.
Stephen Bogle	Yes.
Eric Clive	No comment
Roddy Dunlop	n/a
Ursula Smartt	The EU Data Protection Directive covers this (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data). Google Spain had wide-reaching implications on providers of search engines (such as Google or Bing) and operators of websites. Following the 'right to be forgotten' (RTBF) ruling by the ECJ in May 2014, Google and others were forced to establish a system to deal with requests for removal of personal (inaccurate or irrelevant) data.
Gavin Sutter	An awareness-based defence as regards material inputted by the third-party user would be appropriate
Campaign group	
Libel Reform Campaign	Yes.
Insurance interest	
Aviva	Whilst we do not consider this intermediaries who search the internet according to user criteria should be liable for search results, in the event that it is decided that such intermediaries should be responsible for the search results we consider that they should be able to rely on a defence similar to that available to intermediaries who provide access to internet communications.
Law firm	
BLM	Whilst we do not consider that intermediaries who search the internet according to user criteria should be liable for search results, in the event that it is decided that such intermediaries should be responsible for the search results we consider that they should be able to rely on a defence similar to that available to intermediaries who provide access to internet communications.
Media and media-related organisations	
BBC Scotland	We do not consider that that should require a defence.

SNS	n/a
Representative bodies (Legal)	
Faculty of Advocates	See answers 19 & 21.
Law Society of Scotland	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?

(Paragraph 7.47)

Comments on Question 25	
Paul Bernal	Yes. Definitions and borders between types of services are blurred here, and may well become more blurred.
Stephen Bogle	Yes.
Eric Clive	No comment
Roddy Dunlop	I answer this in the same way as Question 23 – the principles seem to be broadly similar.
Ursula Smartt	See my comments above and relevant case law.
Gavin Sutter	Insofar as intermediaries control the information provided over such services, they should be held to the strict liability standard as primary publishers.
Campaign group	
Libel Reform Campaign	Yes.
Law firm	
BLM	Yes, intermediaries who provide aggregation services should be able to rely on a defence similar to that which is available to those who retrieve material.
Media and media- related organisations	
SNS	Unsure.
Representative bodies (Legal)	
Faculty of Advocates	See answers 19 & 21.
Law Society of Scotland	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?

(Paragraph 8.9)

Comments on Question 26	
Paul Bernal	No comment.
Stephen Bogle	I see privilege as being closely linked to the constitutional settlement of the UK, and therefore symmetry here is important – this isn't just about private law but also public law and the need for free debate within democratic forums such as parliament or within judicial setting. Thus, so long as the UK remains as it is, I think the Scots approach should align closely with that of England and Wales and so the approach of the 2013 Act should be followed.
Eric Clive	Yes. See below.
Campbell Deane	No.
Eric Descheemaeker	Questions 26-30 Qualified and absolute privilege are both difficult doctrines. It is less than clear why they exist and have the shape they currently have. This is especially true for qualified privilege, which like fair comment (and perhaps what has now become absolute privilege) emerged as a way to rebut the presumption of malice. In ordinary situations of qualified privilege, i.e. those based on limited disclosure in the context of a special relationship (e.g. past employer writing a reference letter to a prospective one), the existence of reciprocal interests or duties dislodged the presumption of malice and made it necessary for the pursuer positively to prove some sort of spite or ill-will. This, however, is not true of the very great number of privileges for reports, which really are (like reportage) concerned with the warranted republication of defamatory statements made by others. Both subcategories are crying out for rationalisation. However this cannot be done in a simple way. The situations in which one is justified in repeating a potentially false and defamatory statement without having to bear the risk that it might not be provably true is one of the most pressing concerns that the law of defamation should address. It is hoped that courts will do so as they further engage with the nascent defence of reportage. On the other hand, it is not clear that the continuing existence of a defence predicated on the rebuttal of malice makes sense when the paradigm of defamation has been moving decisively away from animus iniuriandi. But these are questions which go beyond the brief of the current reform project of the Scots law of defamation. Against this background it is believed that the least bad option would be to align Scots law on English law and, accordingly, to replicate s 7 of the 2013 Act in the forthcoming statute. This would at least provide

	consistency across Great Britain.
Roddy Dunlop	No, unless a complete codification is contemplated. Otherwise, the law is clear.
Graeme Henderson	No.
Gavin Sutter	No.
Campaign group	
Libel Reform Campaign	We believe that reporting of parliamentary proceedings and judicial proceedings should retain absolute privilege.
Insurance interest	
Aviva	No, we do not 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.
Law firm	
BLM	No, we do not 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.
Media and media-related organisations	
BBC Scotland	No.
CommonSpace	We believe that reporting of judicial and parliamentary proceedings should be protected by absolute privilege.
NUJ	No.
SNS	No.
Representative bodies (Legal)	
Faculty of Advocates	No.
Law Society of Scotland	No. We believe that the current system of absolute privilege is a requirement for effective judicial and parliamentary processes.
Senators of the College of Justice	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.

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	
Paul Bernal	Yes.
Stephen Bogle	Yes; I agree with para 8.12.
Eric Clive	Yes.
Campbell Deane	Yes.
Roddy Dunlop	Yes. I agree with the Paper that it is difficult to see a good reason for not making this extension.
Graeme Henderson	Yes. With the advent of the internet the extent of privilege should be modernised to include analogous situations to the situations which currently enjoy privilege.
Ursula Smartt	An interesting question. The answer should be 'yes' but I cannot see international laws being changed (e.g. Geneva Convention) or the UN Security Council. Not all countries have the 'open justice principle' like the UK – though increasingly we see 'closed courts' and in camera proceedings (e.g. in 'secret court' and terrorism proceedings). 'Absolute privilege' is UK-specific and I cannot see it being introduced in the ECtHR (Strasbourg) nor the ECJ) Luxembourg).
Gavin Sutter	Yes.
Campaign group	
Libel Reform Campaign	Yes. In the increasingly globalised world and media environment, the proceedings of international courts and tribunals form an essential part of the public discourse and must receive the same protections as British parliamentary and judicial proceedings.
Insurance interest	
Aviva	We agree that absolute privilege 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. This would provide a clear and consistent treatment of such material.
Law firm	
BLM	We agree that absolute privilege 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. This would provide a clear and consistent treatment of such material.
Media and media-related organisations	
BBC Scotland	Yes.
CommonSpace	Yes.
NUJ	Yes.
SNS	Yes.
Representative bodies (Legal)	
Law Society of Scotland	Yes, we believe that absolute privilege should apply to these proceedings, for the same reasons as our previous answer.
Senators of the College of Justice	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.
Faculty of Advocates	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	
Stephen Bogle	I think the Scots approach should align closely with that of England and Wales and so the approach of the 2013 should be followed.
Eric Clive	Yes.
Graeme Henderson	Yes. See again answer to question 27 above.
Ursula Smartt	See my comment at question 27.
Gavin Sutter	Yes.
Campaign group	
Libel Reform Campaign	Yes. All such statements (like parliamentary proceedings and judicial proceedings) form part of the legal 'public record'. Fair reporting of these statements and documents should be privileged in defamation law.
Insurance interest	
Aviva	Yes, we agree that the law on privilege should be modernised to extend qualified privilege to cover communications issued by bodies such as legislatures or public authorities outside the EU or statements made at press conferences or general meetings of listed companies anywhere in the world.
Law firm	
BLM	Yes, we agree that the law on privilege should be modernised to extend qualified privilege to cover communications issued by bodies such as legislatures or public authorities outside the EU or statements made at press conferences or general meetings of listed companies anywhere in the world.
Media and media-related organisations	
BBC Scotland	Yes.
CommonSpace	Yes.
NUJ	Yes.
SNS	Yes.
Representative bodies (Legal)	

Faculty of Advocates	Yes.
Law Society of Scotland	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?

(Paragraph 8.19)

Comments on Question 29	
Paul Bernal	Yes, for clarity and simplicity. Defamation law should be accessible to people other than legal experts – ordinary people can become caught up in defamation, so to have the law more easily accessible and understandable for those ordinary people is highly desirable.
Stephen Bogle	Yes - clarity, coherence and ease of accessibility would be my first few reasons as to why this should be so.
Eric Clive	There would be benefit in having everything set out in one place.
Roddy Dunlop	The format of the 1996 Act with its various schedules is perhaps not the most user friendly. But equally I am unaware of any particular difficulty arising therefrom, and do not consider there to be a pressing need for reform.
Graeme Henderson	No.
Ursula Smartt	s 2 Def Act 1996 ('offer to make amends') should be retained or reformulated in statute. This will keep matters out of court and reduce the high cost of litigation. There should be three conditions: • The publisher or newspaper (or online media) should make a suitable correction of the statement complained of and a sufficient apology to the aggrieved party; • The 'defamer' should publish the correction and apology in a manner that is' reasonable'; and • pay to the aggrieved party compensation and costs (this is at the discretion of the court/ tribunal/ mediator).
Gavin Sutter	Aside from the more general desirability of consolidating all Defamation legislation into one Act, there is no particular reason to do this.
Campaign group	
Libel Reform Campaign	Yes. As discussed in our answer to question 8, there is a virtue in putting established law into statute. As more people and organisations become 'publishers' a restated list of privileged materials would significantly reduce the chill on free speech that unfounded legal threats can cause.
Insurance interest	
Aviva	We agree that it would be of benefit to restate the privileges of the Defamation Act 1996 in a new statute. This is in order to make the law clear and accessible (see our response to question 8).
BLM	We agree that it would be of benefit to restate the privileges of the Defamation Act 1996 in a new statute. This is in order to make the law clear and accessible (see our response to question 8).

Media and media-related organisations	
BBC Scotland	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.
CommonSpace	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.
NUJ	Yes. In order to make them more accessible and easier to follow by everyone including members of the public.
SNS	Yes. Anything which aids clarity would be of value to those operating without the benefit of immediate legal advice
Representative bodies (Legal)	
Faculty of Advocates	Yes, but only if that statute was able to resolve the difficulties set out in paragraph 8.18. The existing position of confusion in some areas defeats the purpose of having a statute. We would welcome the opportunity to consider draft provisions on this matter standing the complexity identified.
Law Society of Scotland	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?

(Paragraph 8.23)

Comments on Question 30	
Paul Bernal	No comment.
Stephen Bogle	I think the Scots approach should align closely with that of England and Wales and so the approach of the 2013 Act should be followed.
Roddy Dunlop	No. The law here is sufficiently settled.
Graeme Henderson	No.
Ursula Smartt	Unfortunately there does not exist any definition in law at present as to the meaning of 'qualified privilege' (e.g. s 15 Defamation Act 1996 does not do so). Until and unless 'qualified privilege' is properly defined in statute (codified) – there will always be judge-made law in this respect.
Gavin Sutter	It would seem sensible to clarify the law in this regard.
Campaign group	
Libel Reform Campaign	It is vital that Scots Law reflects the tools and methods used to communicate in the modern age. Section 9(1) of the defamation act 1952 extended the law to "cover extracts from or abstracts of a parliamentary report broadcast by means of wireless telegraphy" and we believe it is necessary for any future reform to continue to be updated to reflect changing technologies. As more people get information about parliament through broadcast media, internet livestreams and social media platforms there is a need to ensure laws accurately protect and incorporate modern methods of communication and publication
Insurance interest	
Aviva	We agree that it would be sensible to review Scots law in relation to qualified privilege for publication of parliamentary papers (or extracts thereof).
Law firm	
BLM	We agree that it would be sensible to review Scots law in relation to qualified privilege for publication of parliamentary papers (or extracts thereof).
Media and media-related organisations	
BBC Scotland	Yes – we would favour Lord Lester's original proposals.
NUJ	Yes.
SNS	It certainly seems sensible to extend privilege to parliamentary publications.

Representative bodies (Legal)	
Faculty of Advocates	Yes. The content of any such reform would require significant additional work, however. We note the various issues raised in the Green Paper 'Parliamentary Privilege' published by the UK Government in 2012 at paragraphs 292 to 313 which set out some of the arguments against adopting an approach of absolute privilege. Subject to the detail of any proposals being presented, our preliminary position is that the arguments for an extension of qualified privilege are preferable to those in support of absolute privilege.
Law Society of Scotland	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?

(Paragraph 8.27)

Comments on Question 31	
Paul Bernal	No comment.
Stephen Bogle	I think the Scots approach should align closely with that of England and Wales and so the approach of the 2013 Act should be followed.
Eric Clive	The existing protection seems arbitrarily narrow but I am not sure whether the remedy is to abolish it and rely on a threshold plus expanded fair comment or to expand it.
Eric Descheemaeker	No. There does not appear to be any reason why academic discourse should be treated differently from other forms of public interest speech. At any rate it is well covered by existing defences.
Roddy Dunlop	No. The adoption of section 6 plus the existing defences of honest comment and public interest/*Reynolds* privilege seem to me to provide adequate protection.
Graeme Henderson	No.
Ursula Smartt	Contributors to academic or scientific discourse must be able to avail themselves of the defences of 'honest comment' or 'honest opinion'. Such primary defences must be readily usable to deter attempts – particularly by large corporations - to bully the academic author of a critical report through the threat of legal action. Otherwise this would have a chilling effect on scientific speech (see: the Dr Simon Singh case - *British Chiropractic Association v Singh* [2010] EWCA Civ 350).
Paul Spicker	The concessions in the 2013 Defamation Act are insufficient to protect academics who make legitimate scientific criticisms of a process. The case of *BCA v Singh* is illustrative. If the aim is to use peer review as a test of scientific quality, peer review is not restricted to journals. Academic bids for funding are often peer reviewed. 13 of 16 books I have written have been peer reviewed, and two others have been subject to the judgment of editorial boards. The idea that peer review offers some kind of protection against defamation is in any case questionable. As a peer reviewer I am usually asked to make judgments about the validity and rigour of the submission. I have never been asked to notify the editor whether or not academic comment and criticism might act to the detriment of someone's commercial interests, and would not consider that to be part of a reviewer's role. It is not clear however why safeguards should only be applicable at the point of formal publication or submission to other bodies. Academic papers commonly go through several stages of development before they

	appear, which may include consultation with colleagues, reviews of drafts, presentation in seminars, presentation in conferences and submission to peer reviewed journals; then there is likely to be subsequent dissemination through various media, including teaching and public resources, and plans for such dissemination are increasingly required by bodies that fund research. There should be a general exemption for all bona fide academic discourse, the nature of such discourse to be determined case by case rather than to be treated as occurring only in specified locations or outlets.
Gavin Sutter	No – I believe we can trust a court to recognise an appropriate peer-reviewed journal when it sees one, without further statutory clarification. I would be strongly opposed to this defence being extended further. It is possibly worth mentioning that I was unconvinced of the value of this defence when it was introduced into the 2013 Act. This was, of course, a reaction to the Singh and Wilmshurst cases, all of which were won by the defendants. While I can certainly see an argument that Wimlshurst was unfairly pursued in multiple cases, I do not consider this defence to have been an appropriate reaction to a situation in which the law already operated to protect the interests of these defandants.
Campaign group	
Libel Reform Campaign	Protection of peer reviewed science would arguably not do a great deal to reduce the chilling effect of the defamations laws on academic discussion. Only a small proportion of academic discourse happens in peer reviewed papers. The public discussion of science and evidence which researchers contribute to almost never happens in the pages of peer reviewed journals. Academic journal publishers and editors tell us that they are more likely to receive defamation threats for the news and opinion sections of the journal than the peer reviewed papers. Until there is an effective public interest defence which enables scientists to debate issues in good faith, whatever the forum, they will continue to be chilled. A public interest defence is needed regardless of any special protection being available to the sub-group of peer-reviewed publications.
Insurance interest	
Aviva	Yes, we think it is necessary to widen the privilege in section 6 of the 2013 Act for peer reviewed statements in scientific or academic journals. Consideration should be paid to protecting other publications, particularly in circumstances where there are relatively few claims (as far as we are aware) in relation to peer reviewed journals and scientific discussion and debate is not limited to publications in such journals. Conferences in particular are times when such discussion and debate takes place.
Law firm	
BLM	Yes, we think it is necessary to widen the privilege in section 6 of the 2013 Act for peer reviewed statements in scientific or academic journals. Consideration should be paid to protecting other publications, particularly in circumstances where there are relatively few claims (as far as we are aware) in relation to peer reviewed journals and scientific discussion and debate is not limited to publications in such journals. Conferences in particular are times when such discussion and debate takes place.

Media and media-related organisations	
BBC Scotland	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.
SNS	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.
Representative bodies (Legal)	
Faculty of Advocates	We note and welcome the additional protections within the 2013 Act which already apply in Scotland. We consider the examples of emails, newspaper articles and editorial comment which would fall outwith the protection to be examples of publications which benefit sufficiently from the existing protections, whether that be a defence of qualified privilege or fair comment. We are, however, confused by the exclusive reference to 'journal'. We agree that the exclusion of statements in academic books appears illogical. We note that no attempt to define 'journal' exists in the Defamation Act 2013. We note further the issues with definition clearly experienced by the Joint Committee on the draft Defamation Bill (Report October 2011). That said, it may be that if the threshold test for a publication which is to be granted protection is that of 'independent review' and additionally there is a requirement of editorial review, then such a test was considered more practical in the context of securing publication in a reputable and established journal than in the context of publishing a book (now a relatively simple task for any individual) which the author subsequently claims to be 'academic'. Section 6 and the discussions which led to its drafting make plain that issues of definition and categorisation of publications are extremely difficult. We understand why the preference of legislators was to leave these matters to the Courts, but would respectfully take the view that doing so simply because the issues appear too convoluted to resolve in legislation is not a path which should be followed in Scotland. We would therefore, in principle, support the extension of any such provision in Scottish legislation to cover a wider range of academic publications but would flag at the outset of that process the very real challenges in producing a workable, logical and enforceable solution.
Law Society of Scotland	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.

(Paragraph 9.8)

Comments on Question 32	
Paul Bernal	No comment.
Stephen Bogle	I have no firm views at present.
Eric Clive	Yes.
Roddy Dunlop	The only area where I suggest consideration might be merited relates to the rule in Bonnard v Perryman, which has formed part of the law of England for over a century yet which is not part of Scots law – a point reaffirmed in *Massie v McCaig.* The introduction of s.12(3) of HRA perhaps means that there is no need for any change here: both jurisdictions require to follow s.12(3) which might be said in many ways to supersede Bonnard. Moreover, it is arguable that the rule in *Bonnard* gives insufficient weight to Article 8 rights, and that it has seen an artificial tendency towards other causes of action, such as "false privacy", in order to avoid the invocation of the rule. Nevertheless, if the law of defamation is to be the subject of significant overhaul, it seems to me to be worth considering whether the Bonnard rule should be imported into Scots law.
Graeme Henderson	I consider that the Law of Interdict should be revisited. I have highlighted potential procedural changes. A further issue arises out of the widespread dissemination of defamatory material on the internet. The maker of the statement may have no resources by which the target of his statement can obtain damages. The maker of the statement may well have mental health and other social issues. Should interdict prevent him from making statements, prevent him from using his computer after a certain time of night or prevent him from using a computer at all? The court has no power to order that someone in breach should undergo a mental health assessment.
Ursula Smartt	I agree: the law on interdict/ interim interdict should not be reformed. How else would we have found out about certain superinjunctions such as Ryan Giggs and the celebrity superinjunction of PJS?!
Gavin Sutter	I see no reason to disturb the existing law here.
Campaign group	

Libel Reform Campaign	Yes.
Insurance interest	
Aviva	Yes. We agree that there is no need to consider reform of the law relating to interdict and interim interdict.
Law firm	
BLM	Yes, we agree that there is no need to consider reform of the law relating to interdict and interim interdict.
Media and media-related organisations	
BBC Scotland	Yes.
SNS	Agreed.
Representative bodies (Legal)	
Faculty of Advocates	Yes.
Law Society of Scotland	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?

(Paragraph 9.12)

Comments on Question 33	
Paul Bernal	Yes, for similar reasons to my response to question 29.
Stephen Bogle	This is an interesting suggestion; I have no firm views but appears sensible. Any provision should make clear about the legal effect of an offer of amends, i.e. the defender is not absolved – they have committed a wrong - but an action is barred or the wrong they have committed is remedied by the offer of amends.
Eric Clive	Yes.
Campbell Deane	(Covering 33-35) The Offer of Amends procedure has proved an invaluable tool to Defenders (as well as to Pursuers) who are aware once the offer of Amends is advanced (and accepted) that all they are thereafter arguing about is the level of compensation. One difficulty which arises is that at present in Scotland there has been no case which has looked at the level of discount awarded in English procedure (for example *Nail –v- Newsgroup Newspapers Limited*) and confirmed that the level of discount being awarded in England is comparable to that which a Scottish Court would award. Practitioners are left with explaining to the Pursuer in Scotland that it is likely that a Scottish Court would follow that of its English counterpart so far as discount is concerned without being able to authoritatively advise clients as to that matter when considering a tender which inevitably flows from the Offer of Amends procedure.
Roddy Dunlop	I do not see any need for this. The procedure, which is extremely useful and now well-used, is stated in three sections of the 1996 Act, and is readily accessible.
George Gretton	Yes. More broadly, as a matter of legislative technique it would be helpful if all existing statutory provisions about defamation could be consolidated in the new bill (including those bits of the 2013 Act that apply in Scotland). This would be useful to those who have to deal with the law – journalists, solicitors etc. It may also be worth respectfully mentioning that s 3(1) of the Law Commissions Act 1965 calls on the two commissions to pursue "the reduction of the number of separate enactment."
Graeme Henderson	No. I have found this regime to work well without the need to amend it.
Ursula Smartt	Yes. See my comment above.
Gavin Sutter	Yes.
Campaign Group	
Libel Reform Campaign	Yes.

Insurance interest	
Aviva	Yes, we consider that the offer of amends procedure should be incorporated in a new Defamation Act (again, for the reasons set out in our response to question 8 above).
Law firm	
BLM	Yes, we consider that the offer of amends procedure should be incorporated in a new Defamation Act (again, for the reasons set out in our response to question 8 above).
Media and media-related organisations	
BBC Scotland	Yes.
SNS	Yes.
NUJ	Yes.
Representative bodies (Legal)	
Faculty of Advocates	Yes.
Law Society of Scotland	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.
Senators of the College of Justice	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.

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	
Paul Bernal	Yes.
Stephen Bogle	Prima facie, this seems sensible.
Eric Clive	Yes.
Roddy Dunlop	Yes. The decision in *Moore v SDR* is anomalous, and the reasoning of Eady J in *Tesco Stores v Guardian News & Media* is more consistent with the legislative policy. Building on that, either rejection of an Offer of Amends, or the expiry of a given time limit for acceptance (whether stated in days or weeks, or merely by way of a requirement to accept within a "reasonable time"), should mean that parties thereafter know where they stand and can litigate on the basis that the Offer cannot thereafter be accepted.
Graeme Henderson	No. The English Courts saw little difficulty in imposing a time limit by which an offer could be accepted. There was no need for the statute to be altered. This issue could be resolved by introducing Rules of Court enabling the Courts to set time limits.
Gavin Sutter	This seems reasonable.
Insurance interest	
Aviva	Yes, there would appear to be sense in introducing a rule that the offer of amends procedure be amended to provide that the offer must be accepted within a reasonable time or otherwise be treated as being rejected.
Campaign group	
Libel Reform Campaign	Yes, this will ensure that the court hearings are not manipulated by vexatious pursuers who are looking to draw out the proceedings longer than necessary. As the rejection of an offer of amends by the pursuer can be used as a defence by the defendant it stands to reason that this should not be something that is manipulated or delayed by the pursuer. However, we acknowledge that the time frame will need to accurately reflect the details of the case and any amended law should not seek to identify a too restrictive or inflexible time frame that may close off this valuable channel for resolution beyond that of lengthy court proceedings or the seeking of financial damages.
Law firms	
BLM	Yes, there would appear to be sense in introducing a rule that the offer of amends procedure be amended to provide that the offer must be accepted within a reasonable time or otherwise be treated as being rejected.
Media and media-related organisations	

BBC Scotland	Yes.
NUJ	Yes.
SNS	Yes. Such case law as exists shows a need for clarity to prevent abuse, as observed by Eady.
Representative bodies (Legal)	
Faculty of Advocates	Yes.
Law Society of Scotland	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.
Senators of the College of Justice	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.

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

(Paragraph 9.12)

Comments on Question 35	
Paul Bernal	No comment.
Stephen Bogle	I have no views on this.
Eric Clive	It should be made clear that an offer of compensation and expenses is not always required. In some cases a correction and apology would be enough - but this might be linked to the threshold proposal.
Roddy Dunlop	I suggest that the Commission might want to consider whether the repercussions of *Warren v Random House* are consistent with the legislative intent. In terms thereof, a pursuer who is given a qualified offer amends may embark upon two separate litigations: a Minute to enforce the Offer of Amends, and a separate claim in defamation insofar as the publication complained of (or the meanings therein) are not covered by the qualified Offer. Dual litigation such as that is difficult to justify, and I wonder whether a better solution would be to say that the pursuer accepting a qualified Offer has a simple choice: either accept the Offer and enforce it alone; or accept it on the basis that he still insists on the other meanings complained of – in which case the claim would still be litigated, with the accepted Offer falling to be dealt with as part of the ultimate decision. Otherwise there are potential difficulties in double compensation, assessment of damage to reputation, and the like.
Graeme Henderson	I do not wish the regime to be tinkered with.
Ursula Smartt	Damages in Scottish libel actions are compensatory rather than punitive (see: *Baigent v BBC* [1999] SCLR 787). This is a good idea and should be incorporated into statute.
Gavin Sutter	No.
Campaign group	
Libel Reform Campaign	As an offer of amends is only currently available to defendants who acknowledge they were wrong to publish the contentious statement or have defamed the pursuer unintentionally, we believe the good faith demonstrated in offering to make amends should be met with the good faith of the pursuer in accepting their responsible offer of amends. Consideration should be given to the idea that a pursuer should be incentivised to accept a reasonable offer of amends, perhaps with regards to damages awarded and costs ordered.
Insurance interest	
Aviva	Yes, we consider that there would be sense in considering whether, in the event that a requirement for serious harm is introduced, the making of an offer of amends would involve an admission that serious harm has been caused or is likely to be caused to the reputation of the claimant. If this is

	the case then it may act as a deterrent to defenders considering making offers of amends which would clearly not be in the public interest.
Law firm	
BLM	Yes, we consider that there would be sense in considering whether, in the event that a requirement for serious harm is introduced, the making of an offer of amends would involve an admission that serious harm has been caused or is likely to be caused to the reputation of the claimant. If this is the case then it may act as a deterrent to defenders considering making offers of amends which would clearly not be in the public interest.
Media and media-related organisations	
BBC Scotland	No.
SNS	No.
Representative bodies (Legal)	
Faculty of Advocates	We consider that the offer of amends procedure is an important part of the resolution process and in many cases significantly removes the necessity of litigation. That said, the opportunity to introduce Scottish legislation allows the possibility of providing greater clarity in a number of areas. First, the major attraction for the publisher in the procedure is the reduction in the damages awarded. That reduction is often a half to a third. Section 3(5) allows that "If the parties do not agree on the amount to be paid by way of compensation, it shall be determined by the court on the same principles as damages in defamation proceedings. The court shall take account of any steps taken in fulfillment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly." We are unaware of any case where an offer of amends has led to an increased award in damages and standing that being the principal motivation for any publisher to make such an offer are unclear what purpose that provision serves? It is plainly desirable that the precise reduction in any award of damages be a matter for the court in each specific case, but if the opportunity to draft a clearer clause incentivizing the commercial advantage of the offer of amends to publishers and the public has presented itself, there may be merit in doing so. Secondly, it will be obvious that any Scottish provision will require to reflect Scottish procedure. Some of the provisions reflect English practice, for example 'open court' statements which have no enabling procedure in the Scottish Rules of Court. That practice is not one currently followed in Scotland, albeit we note the prospect that such a provision might be

	introduced. Thirdly, we are aware of potential confusion about the impact of a qualified offer of amends which might usefully be removed in a Scottish provision. Section 3(2) of the 1996 Act is in the following terms "3 Accepting an offer to make amends "(1) If an offer to make amends under section 2 is accepted by the aggrieved party, the following provisions apply. "(2) The party accepting the offer may not bring or continue defamation proceedings in respect of the publication concerned against the person making the offer, but he is entitled to enforce the offer to make amends, as follows." The wording of that provision leaves open an argument based on statutory construction that acceptance of even a qualified offer of amends ends proceedings. That is not the intention of the provision as we understand it; a qualified offer of amends should still allow proceedings in respect of the publication to proceed in relation to meanings not addressed by the qualified offer. It might assist in providing clarity if any section were to be appropriately drafted to reflect that position, and indeed for the position of offers and qualified offers of amends to be dealt with in separate sections.
Law Society of Scotland	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.
Senators of the College of Justice	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.

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	
Paul Bernal	Yes.
Stephen Bogle	Yes.
Professor Eric Clive	Yes.
Roddy Dunlop	Yes. IPSO enjoys such a power, and I cannot think of a good reason for denying it to the Courts.
Graeme Henderson	Yes. There is a logic in requiring that the result should be published in the relevant publisher should publish the judgement.
Ursula Smartt	Absolutely! This should be done 'prominently' (e.g. on the front page of a newspaper and online edition).
Gavin Sutter	Yes. I would also suggest that such a provision place emphasis on any such summary being given a similar level of prominence to the original publication.
Campaign group	
Libel Reform Campaign	No. We believe such measures to be problematic and to have serious implications for freedom of expression. Forcing someone to publish something is an infringement of free speech. As worded, s.12 of the Defamation Act 2013 could turn judges into editorial writers. There are also pragmatic concerns with this measure. How would the mandatory publication of summary judgements work for books, which are not part of a serialised publication like newspapers? How would such mandatory publication work on Twitter, with only 140 characters? These provisions may also cause confusion when a defendant has already made an offer of amends, or already issued a correction.
Insurance interest	
Aviva	Yes, we agree that it would be appropriate for the courts to have the power to order an unsuccessful defender in defamation proceedings to publish a summary of the relevant judgment.
Law firm	
BLM	Yes, we agree that it would be appropriate for the courts to have the power to order an unsuccessful defender in defamation proceedings to publish a summary of the relevant judgment.
Media and media-related organisations	

Google	We consider it contrary to public policy and the principle of freedom of expression for a court to be able to order a website operator to publish a summary of its judgment. However, if the decision is made to adopt Section 12 of the 2013 Act into Scots law, we believe that it should not extend to intermediaries. As highlighted above, internet intermediaries are rarely able to defend a defamation claim on the grounds of truth, because they do not know whether the material published is true or not. We feel strongly that in these circumstances it is wrong that an internet intermediary could be forced by the courts to publish material in circumstances where it has no knowledge of the facts underlying the claim. Further, requiring an intermediary to publish such material raises many issues, for example, assuming that the summary is to be published in the same place as the words complained of, if the author of the words was not sued, or given an opportunity to defend his or her position, why should the claimant be entitled to force the publication of material on the author's blog/website that the author might not agree with? If the power to publish a summary of a judgment is introduced, it is suggested that this power be amended so that it only applies to claims against the primary publisher/author of material, and not against any internet intermediary.
SNS	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 constitue a summary, because it would be unreasonable if the summary length was disproportionate in relation to the offending statement.
Representative bodies (Legal)	
Faculty of Advocates	No. We are unpersuaded by this provision. Whilst we understand the basis for the proposal, we are instinctively concerned about a Court ordering any media organisation to publish material, and further to make orders in terms of wording, time, manner, form and place of publication. That appears to us to stray too far into an infringement of the Article 10 rights of the media and the editorial discretion of the media. The editorial freedom of the media has long been recognised by the Courts. As Lord Hoffmann put it in *Campbell v MGN Ltd* 'judges are not newspaper editors' . Further, we note that the instruction of corrections and apologies is dealt with by the new Independent Press Standards Organisation (IPSO) which was considered by the UK Parliament to be an appropriate forum. Whilst that does not include a power to force publication of any court judgement, a complaint to IPSO rising from the same publication would be dealt with under those procedures and offer an alternative and non statutory route.
Law Society of Scotland	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?

(Paragraph 9.18)

Comments on Question 37	
Paul Bernal	Yes, but care needs to be taken and proper guidance given so that this does not overly burden the people in charge of the websites.
Stephen Bogle	Yes.
Eric Clive	Yes.
Roddy Dunlop	Such a power probably already exists, under reference to the Court of Session Act 1988 and actions *ad factum praestandum*. I have certainly obtained such orders under the existing law. But it would make sense to make express provision therefor.
Graeme Henderson	There may be practical difficulties in the Court ordering a specific act that is not possible in its jurisdiction.
Ursula Smartt	In an ideal world yes (operators of websites). But what do you do with operators of websites and ISPs that are located outside UK jurisdiction? We are back to the Google Spain case and have to rely on existing EU law.
Gavin Sutter	Yes.
Insurance interest	
Aviva	Yes, we consider that the court should be given a specific power to order the removal of defamatory material from a website or the cessation of its distribution. If this were not the case then much of the benefit of bringing a successful claim would be lost.
Campaign group	
Libel Reform Campaign	Yes. There is no justice or public interest in continuing to publish material that a court has declared to be defamatory. Any law or regulations that give the courts this power should insist that any court order explicitly sets out the precise text to be removed, and the exact web link to be removed. Legislation and regulations should expressly forbid orders made under such powers to refer to publication on an issue in general terms, or to refer generally to a top-level domain. Furthermore, any such orders should not be rolled up in any order or interdict preventing future publication.
Law firm	
BLM	Yes, we consider that the court should be given a specific power to order the removal of defamatory material from a website or the cessation of its distribution. If this were not the case then much of the benefit of bringing a successful claim would be lost.

Media and media-related organisations	
CommonSpace	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?
Google	As regards Section 13 of the 2013 Act, which concerns the power of the court to order removal of defamatory content from a website, we believe that it is entirely appropriate in circumstances where: (a) a claimant has secured a final injunction to prevent publication of an online statement by the author; and (b) the author has declined to remove that statement, that there be a statutory provision empowering the court to order the website operator to remove the specific statement complained of from the identified web page. Such an order may of course be unnecessary to the extent that some website operators would voluntarily remove the content on sight of the third party court order. We would note however, that it would be wrong as a matter of principle for a website operator to be ordered to remove material in circumstances where the court either refuses to grant an injunction against the author of the defamatory material, or lacks the jurisdiction to do so. Section 13(1) currently fails to make reference to the court granting any such injunction in an action for defamation and should therefore be amended to include reference to this prior to adoption.
SNS	There are considerable difficulties in this area because of the effect of aggregation and re-publication. 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.
Representative bodies (Legal)	
Faculty of Advocates	Yes.
Law Society of Scotland	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?

(Paragraph 9.20)

Comments on Question 38	
Paul Bernal	Yes.
Stephen Bogle	I'm sceptical about the value of this procedure if it is understood to offer a pursuer their opportunity to speak in court. I wonder how successful such things have been in criminal courts, i.e. victim statements? One would hope modern judgements written in plain English would satisfy this need. One might suggest that there is a need for the Court of Session, for example, to follow the press statement procedure of the Supreme Court, that may be just as valuable and less cumbersome and legally ambiguous as a statement made in court.
Eric Clive	Yes, if necessary. Could this not be done already?
Campbell Deane	It would be a considerable benefit to any Pursuer to be able (if they so wished) from the perspective of reputation management and reputation restoration to have the ability to allow statements to be read in open Court.
Roddy Dunlop	I understand this is deemed extremely useful under English procedure, and cannot see a compelling reason why it should not be adopted in Scotland.
Graeme Henderson	Since the purpose of an action involves vindication of reputation this procedure would assist. At present the only time the result of a settled case is published is when the press report a dispute on expenses. At that time the basis upon which an action was raised and defended will be ventilated in open court.
Ursula Smartt	Ideally the law should be so written that court litigation is avoided, due to the exorbitant costs. Court are open anyway – and soon we have courtroom TV (with Scotland being the forerunner in any case) – and all statements read out in open court can be published, recorded and read out.
Gavin Sutter	Yes; the added publicity which this can give, as distinct from 'only' a statement in one published outlet, can be a positive benefit for the claimant.
Campaign group	
Libel Reform Campaign	Yes. In many defamation cases, such a statement provides precisely the kind of vindication that a claimant or pursuer seeks.
Insurance interest	
Aviva	Yes, the law should provide for a procedure in defamation proceedings which would allow a statement to be read in open court. Again, this seems to us to be an important element in a successful pursuer obtaining vindication.
Law firm	
BLM	Yes, the law should provide for a procedure in defamation proceedings which would allow a statement to be read in open court. Again, this seems to us to be an important element in a successful pursuer obtaining vindication.

Media and media-related organisations	
BBC Scotland	Yes.
NUJ	Yes.
SNS	Yes.
Representative bodies (Legal)	
Faculty of Advocates	We are not in principle against that proposal but set out a number of observations which make us cautious about recommending it be adopted. First, the settlement of actions in Scotland is not currently problematic. We would therefore be providing a remedy to a problem which does not exist. Secondly, there is no sense from those practising in the area that pursuers have identified the absence of such a procedure as either a barrier to settlement or something which is missing from the process. In contrast to the position in England (where the scale of litigation is vastly greater) there is no expectation that such a statement in court is required or desirable. Thirdly, given that context, there must be a risk that providing an additional point of disagreement between the parties in fact achieves the opposite effect from that described in England at paragraph 9.19. We do not dispute that given the practice in England many claimants in that jurisdiction might see the value in that process. But that is a considerable distance from justifying the introduction of a new procedure in Scotland where no obvious desire for reform exists. In our experience, the greater the number of aspects of a claim that require to be agreed, the longer and more expensive the process. The need to agree a form of words and narration for Open Court will inevitably add to the length and expense of the process.
Law Society of Scotland	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.

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

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	
Paul Bernal	With care in relation to how 'republication' is defined in relation to the internet, yes.
Stephen Bogle	No comment.
Eric Clive	Yes.
Roddy Dunlop	I consider that Scotland should adopt the same limitation period as that applying in England and Wales, as otherwise one is simply encouraging libel tourism. Someone complaining of defamation can be expected to "get a move on" in order to protect his or her reputation, and so I cannot see any justification either for a longer limitation period or, all the more so, one which is of a constantly renewable nature.
Graeme Henderson	No. If a publisher takes the commercial decision to republish then the publisher can bear the consequences of doing so. They will require to bear in mind that with the change of times something which they published my not have been defamatory at the date of publication but may be so now.
Ursula Smartt	The single publication rule should be introduced into statute thereby abolishing the 'multiple publication rule' (*Re. Brunswick*). There should be a one-year limitation period from the date of the first publication of that material to the public or a section of the public. This should include online publications (*Budu v BBC* [2010] EWHC 616 of 23 March 2010 (QB)). This measure would also underpin freedom of expression under Article 10 ECHR by providing far greater protection to publishers and authors.
Gavin Sutter	I am emphatically in favour of ending the multiple publication rule and replacing it with a single publication rule, as was done in the Defamation Act 2013, for reasons expanded upon in "One Way or Another? Is it time for the introduction of the single publication rule in English defamation law?", Contemporary Issues in Law Vol 7 Issue 4, ISSN: 1357-0374
Robert Templeton	The focus of most reform movements is to move from a 'multiple publication rule' to a 'single publication rule' in order to remove the perpetual nature of the delict. This is particularly pertinent to online archives as in *Loutchansky v Times Newspapers Ltd*. This dicta from Europe seems to make the Brunswick case less tenable in the light that the Duke brought the action 17 years after original publication. In the case of *Budu v. BBC* the court held that a period of five years was too long a period, certainly in the light of the fact the BBC had made efforts to put notices on their website. The main argument against a multiple publication rule (especially considering that archives and online material which can exist for many years) is that it creates a perpetual liability without limitation. Lord Lester himself argued in *Loutchansky* that the Limitation Act 1980 was 'rendered nugatory' in respect to online archives making '…the maintainer of the

website…liable to be indefinitely exposed to repeated claims in defamation'. The "social utility" that Lord Lester argued was recognised by the ECHR as important for the public as a free and '…important source for education and historical research'. However they recognised the ratio of the Court of Appeal in England, that archives must be maintained and '…the attachment of an appropriate notice warning against treating it as the truth will normally remove any sting from the material' resulting in lesser damages.

What this decision does neglect is the fact that a lot of material may not be known to be defamatory in the first instance. Further it underestimates the impact a defamation action can have whether the actual damages awarded are high or not. It was recognised by the Joint Committee on the draft Defamation Bill that unless cost is tackled 'financial inequality [, which] has allowed the wealthy to use bullying tactics in threatening costly legal action…' will continue. The same could be said of Scots law. Hence why Anti-SLAPP might be a better way forward.

It has still to be seen but an abandonment of said rule may lead to a worse situation for both pursuer and defender. Some defamation pursuers wait to see if aspersions die a natural death before pursuing. The introduction of this rule may increase litigation by those who wish to quell the imputation, where waiting would lead to losing the claim.

The limiting factor in Section 8(5)a & b of the Defamation Act 2013, appears to address the second objection, that a publisher can simply publish in an obscure way and then subsequently publish later on. However a better solution may be simply creating provisions to specifically protect archives instead of imposing a blanket single publication rule.

It may be instructive to look at the American experience. Gleeson CJ et al in *Dow Jones v Gutnick* discussed the development of the USA's single publication rule. In effect the rule evolved from a successful argument that the multiple publication rule defeated their statute of limitations. Unlike in *Loutchansky* a number of courts in America at the county level recognised that a publication of an article could be disseminated indefinitely and therefore the first publication should be the day on which limitation ran from. Any subsequent publications were to be considered as a part of the original publication – essentially one delict. Prosser, writing in 1953 America wrote (commenting on the *Duke of Brunswick*):

The rule may or may not have been appropriate in 1849 to small communities and limited circulations. It scarcely needs pointing out that it is potentially disastrous today, when a periodical such as Life is distributed to some 3,900,000 individual readers

At the time Prosser was writing the multiple publication rule applied still to interstate actions and highlighted this as a problem. For example where defamatory material was communicated in California and then subsequently in Texas – there would be two delicts. Where there was a communication in San Francisco and Los Angeles there would only be one delict. It can be contended that the USA has had the impetus for a much longer time to develop a law to regulate State – State defamation. It

	is now the case that the USA has a single publication rule for interstate defamation, they have also developed the law so that whichever state is chosen to bring the action, the action is settled there for all jurisdictions. One might then be forgiven for supposing that this is a very generous, claimant friendly rule which must lend itself to "libel tourism" between the various states, which have varying defamation laws. There are rules which govern whether an action is well founded in a particular state. The judges in Dow Jones criticised the way in which the single publication rule in the USA '…broken free of its roots to govern choice of law'. Yet it may have been a necessary extension. The law in the USA is not at all claimant friendly; it is mostly the same as the UK when the two litigants are private individuals. However the USA free speech trumps truth that if defamatory speech is directed at public figures. There are a number of rules which limit the jurisdiction of courts in interstate actions. The case *Young v New Haven Advocate* was a case where the target of the communication of internet material was discussed. It was held in that case that internet publication did make information accessible everywhere but'…something more than posting and accessibility is needed…The newspaper must, through the internet postings, manifest an intent to target and focus on Virginia readers.' It should be observed that there are those who "forum shop" between states for more favourable laws for their particular needs and due to the single publication rule the entire distribution to all the states are decided in that forum. Where the USA adopted the single publication rule to regulate choice of law and jurisdiction this was entirely necessary. As Scotland now has both a differing limitation period and does not have a single publication rule, the inevitable consequence is that litigants will be open to bring their claim to Scotland. This is especially true if the publication is on the internet as there is potentially greater circulation. Being that the Defamation Act 2013 was wholly concerned with reform of English law, its effect could be to shift their "problem" to another jurisdiction, namely Scotland. To not address the choice of law/jurisdictional implications which the USA are already equipped to manage is vexatious and should be a material consideration in the Commission's consideration for reform This is whether the Commission chooses to opt for adopt a single publication rule or whether they consider alternative provisions, such as suggested below as a preferable alternative.
Campaign group	
Libel Reform Campaign	Yes. The transition from a 'multiple publication rule' to a 'single publication rule' was the first of the measures of the Defamation Act 2013 on which consensus was achieved. The change was recommended by the Libel Working Group (2009), the Culture Media and Sport Select Committee (2010) and the Draft Defamation Bill Joint Committee (2011). It was also present in the Lester Defamation Bill (2010) and the wording of clause 6 of the Draft Defamation Bill (2011) is exactly the same as the wording of s.8 of the Defamation Act 2013.

	While a 'multiple publication' principle may have made sense in the era of hand-delivered pamphlets or 'poisoned pen' letters, it makes no sense in the era of hot type printing (circa 1880s) let alone the Age of the Internet (circa 1990s). As described at paragraph 10.5 of the commission's discussion paper, the multiple publication rule allows for a perpetual resetting of the limitation clock for pieces of content that require only a single act of publication by the author. Although a page from an internet archive may be downloaded many times, it is self-evidently a single 'publication', because it derives from a single computer file or entry made on a single occasion. This is how ordinary people conceive of the process and the law should not confound common sense by counting retweets or clicks on archive links as a new publication. The phenomenon of libel tourism relies heavily on the internet and the multiple publication rule. We believe the decline in libel tourism cases since the commencement of the Defamation Act 2013 is attributable in a large part to the introduction of the single publication rule at s.8. While we acknowledge the issues discussed at paragraph 10.9 of the discussion paper, concerning damage done by the defamatory material at a date significantly after publication, we agree with the suggestion made at paragraph 10.11: that s.32A of the Limitation Act 1980 "does what is necessary" to mitigate this risk so far as s.8 of the Defamation Act 2013 is concerned. We therefore agree with the commission's suggestion at paragraph 10.11 that any similar provision in Scots law makes an analogous reference to s.19A of the Prescription and Limitation (Scotland) Act 1973.
Insurance interest	
Aviva	Yes, we 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. This has proved extremely effective in England and Wales and provides proper protection for those who publish material in different formats and/or those who provide access to archive materials. It also prevents meritless claims being pursued in relation to minor publications.
Law firm	
BLM	Yes, we 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. This has proved extremely effective in England and Wales and provides proper protection for those who publish material in different formats and / or those who provide access to archive materials. It also prevents meritless claims being pursued in relation to minor publications.
Media and media-related organisations	
BBC Scotland	Yes.

CommonSpace	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.
Google	We believe that the introduction of the single publication rule, equivalent to Section 8 of the 2013 Act, into Scots law is highly desirable, to prevent, amongst other things, indefinite liability for online publications. Without the single publication rule, publishers are at risk of being sued perpetually, years or even decades, after first publication. By this time, the authors of the material in question may not be able to adequately defend what they have written because the evidence may no longer be available for them to establish a defence of truth. We are of the opinion that the multiple publication rule is incompatible with the way in which the internet works, because it effectively abolishes the limitation period. This approach is out of date with the modern age, and does not reflect how internet users seek to communicate information. We also believe that it is desirable for there to be harmonisation of the limitation period and its operation for defamation laws across the UK, as well as the court's discretionary power to override the limitation period in appropriate circumstances.
NUJ	Yes.
SNS	Yes. Essential in the digital age when the current position is that access to stories via search engines and retweets reset the legal clock.
Representative bodies (Legal)	
Faculty of Advocates	No. We are not persuaded that the balance between the interests of parties is at present inappropriate. The current regime has the advantage of a) working in practice and b) being understood. In our experience, the media organisations, as the parties which might be considered most likely to consider the position too favourable to pursuers, in practice manage that risk by removing material from websites when litigation is threatened or commenced. The discussion in Chapter 10 amply demonstrates the difficulties of reform in this area. We remain open to considering specific proposals should they emerge.
Law Society of Scotland	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.

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	
Paul Bernal	Overall, I think the single publication approach is probably the best way forward, though the defence of non-culpable republication has its merits too. There is a specific issue here in relation to social media, and in particular to Twitter (and to a certain extent Facebook). The idea that a Tweeter could be held to account for re-tweeting something posted by a source that it is reasonable for them to trust – most directly a professional journalist – is something to be avoided. Users of social media who are not professional journalists should be entitled to assume that the professional journalists have done their work properly, and should not be expected to fact-check them. The non-professionals have neither the expertise nor the information to be able to do this, nor even, necessarily, to know that a given statement might be considered to be defamatory: the damage of any statement should be considered to be made by the journalist, not by those RTing the stories. This means that more responsibility is on the journalists for their statements on social media – this is part of their job. Unlike the ordinary users, they should be expected to understand the law and to take responsibility for it.
Stephen Bogle	No comment.
Roddy Dunlop	N/A
Graeme Henderson	No.
Gavin Sutter	The multiple publication rule, as it currently stands, is simply untenable in the modern world. These alternatives all seek to mitigate its problems, but none do so as simply as a single publication rule, supported by a judicial discretion to hear a case after the limitation period has elapsed where to do so would be in the interests of justice. There is no good argument for unnecessary complication here.
Robert Templeton	An alternative to a single publication rule: • to create a defence regime where archivists would be obliged to amend the material or append a notice indicating that the imputation is not the truth upon complaint from the defamed. • It has been argued that there are some defamatory statements made on the internet which have no weight and therefore are not to be considered as defamatory. It therefore could be argued if this is right, that some defamatory material on the internet may merit being awarded some qualified privilege. • Originally a defamation action was split into two claims and what Norrie observes is that culpa was the basis of economic injuries and

	animus iniuriandi the basis of solatium. Today if one establishes the latter then one establishes liability for the former. The animus or malice, is presumed (irrebuttably) upon establishing the words are defamatory. Thus, fault for economic loss is based on the mere fact the words are said by the defender. Actual fault or negligence is not regarded at all. The two heads coalesced a long time ago and Norrie has argued that these separate heads should be reaffirmed. This in effect would mean: o Solatium would be the head for hurt feelings, and one would have to show malice in order to be successful under this head of claim. o Patrimonial loss would be based on negligence instead. A claimant would have to show that there was negligence in their statement. The only reason we have the law with the irrebuttable presumption is because our law of negligence was not at all equipped to cope with complex culpa when the dawn of newspapers arose in the 18th Century. Now that it is, it could be reformed to put the law back into this state. With regards to the internet, this could solve a lot of the problems detailed in your other questions. However this may be considered, too radical a change in the law. It has to be said though, that a Common Law basis of Defamation law is very dominant in the world, this would represent a fresh and very Civilian take on the law of defamation.
Campaign group	
Libel Reform Campaign	N/A - see above; we favour the replacement of the multiple publication rule with that of the single publication rule. The defence of non-culpable republication places an undue strain on the publishers and operators of website to retrospectively amend and label content to identify the fact that a challenge has been made. As the consumption of news increases there is a greater responsibility on the publishers to reflect that in their publication. At a time where conventional media outlets are struggling financially and citizen journalism is flourishing but is based on the work of volunteers or underfunded staff we believe that the responsibility to both maintain the daily editorial output and retrospectively amend previous content may place unnecessary restrictions on the press in Scotland.
Insurance interest	
Aviva	Whilst we do not consider that the multiple publication rule should be retained, in the event that it is retained, we agree that it should be modified to introduce a defence of non-culpable republication.
Law firm	
BLM	Whilst we do not consider that the multiple publication rule should be retained, in the event that it is retained, we agree that it should be modified to introduce a defence of non-culpable republication.
Media and media-related interests	
SNS	A combination of the answer to Q39 with the back-up of options a and b.
Representative bodies (Legal)	

Faculty of Advocates	We have not had time to consider the alternatives in detail but on immediate consideration do not support non-culpable republication, not least because of concerns about practical implementation and cost. Similarly, the threshold test is not one we favour. We consider that such a test, as with the 'serious harm' test, is more likely to create additional delay and expense in litigation. Were the volume of litigation in Scotland that of England, an argument might be made that action to restrict or exclude claims was more necessary. That is not the position in Scotland. Further, a threshold test removes certainty from the process which is not in the interests of either parties or the public.
Law Society of Scotland	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?

(Paragraph 10.20)

Comments on Question 41	
Paul Bernal	Yes. One year seems more appropriate and consistent, though of course any period is to an extent arbitrary.
Stephen Bogle	No comment.
Eric Clive	Yes.
Campbell Deane	One of the main differences between the English and Scottish legal systems so far as Defamation is concerned is the fact that the limitation period in Scotland is three years. Again, there seems to be a mistaken belief that parties will run to Scotland to litigate because they are time barred in England. Such a proposition at practitioner level has no basis in reality. I am only able to recollect one case in the last 20 years where a Pursuer time barred in England who was refused an application in terms of extending the limitation period in England, sought to raise proceedings in Scotland (*Kennedy –v- Aldington*). Mr Kennedy however had a substantial link to Scotland as was plead in terms of the averments. The case ultimately settled. It would seem however that to expunge this difference between the two systems is another method by which there will be further harmonisation between England and Scotland and will result in parties limiting their advice to English jurisdiction rather than Scotland.
Roddy Dunlop	As discussed above, yes.
Graeme Henderson	No. There has been no call for a reduction. In practice the existence of the three year period means that advisors can tell their client to wait and consider what the impact of the defamatory publication was. There is an argument that a Corporation should be permitted to sue within five years of it suffering economic loss. Why should the quinquennium not apply in the event that a Company sues?
Ursula Smartt	Yes. One year.
Gavin Sutter	Yes. One year, as has been the case in England and Wales since 1996, is entirely sufficient.
Robert Templeton	I would suggest meeting this in the middle. Perhaps reduce it to 2 years rather than just one. This will neither force potential litigants to take court action but also does not give an inordinate amount of time to bring a claim.
Campaign group	
Libel Reform Campaign	Yes.
Insurance interest	
Aviva	Yes, we consider that the limitation period should be reduced to less than three years. On the face of it, any pursuer who has suffered damage to their reputation would be aware of it from a relatively early stage and if

	their true concern is that there has been such damage to their reputation then they should be expected to act quickly to bring a claim and remedy that damage. One has to question why a pursuer who is aware of a publication and that harm has been done or is likely to be done to their reputation would not take any action in relation to it save for tactical purposes. In this respect it is clear to us that any form of publication tends to be much more significant as at the moment of publication as news or comments are a perishable commodity. Those who publish are likely to be prejudiced in defending any claim if it is pursued some years after the original publication. Sources may have disappeared, records may not have been kept and other material that might have assisted in the defence of the claim may not be available. In the circumstances, the longer the delay between the publication and any claim, the more difficult it is for a defender to defend the claim. Too many pursuers make a tactical decision to wait before pursuing a claim for this reason.
Law firm	
BLM	Yes, we consider that the limitation period should be reduced to less than three years. On the face of it, any pursuer who has suffered damage to their reputation would be aware of it from a relatively early stage and if their true concern is that there has been such damage to their reputation then they should be expected to act quickly to bring a claim and remedy that damage. One has to question why a pursuer who is aware of a publication and that harm has been done or is likely to be done to their reputation would not take any action in relation to it save for tactical purposes. In this respect it is clear to us that any form of publication tends to be much more significant as at the moment of publication as news or comments are a perishable commodity. Those who publish are likely to be prejudiced in defending any claim if it is pursued some years after the original publication. Sources may have disappeared, records may not have been kept and other material that might have assisted in the defence of the claim may not be available. In the circumstances, the longer the delay between the publication and any claim, the more difficult it is for a defender to defend the claim. Too many pursuers make a tactical decision to wait before pursuing a claim for this reason.
Media and media-related organisations	
BBC Scotland	Yes.
CommonSpace	Yes.
NUJ	Yes.
SNS	Yes. To one year to bring Scotland into line with England and Wales.
Representative bodies (Legal)	
Faculty of Advocates	No. We see no reason to make such a change.
Law Society of Scotland	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).

[7] [2015] EWHC 509 (QB)

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	
Paul Bernal	Yes.
Stephen Bogle	No comment.
Eric Clive	Yes.
Roddy Dunlop	Again, I consider that this should be so.
Graeme Henderson	No.
Ursula Smartt	Yes. To the court's discretion.
Gavin Sutter	Yes.
Robert Templeton	The case law which has developed around this section would not be equipped to deal with this specific case, and it may be more appropriate to create a specific test for this in legislation, if this is to be the approach.
Campaign group	
Libel Reform Campaign	Yes. As noted in paragraphs 10.13-14 of the Commission's document 'In Scotland, as discussed above, limitation in defamation actions starts to run only when the publication comes to the attention of the pursuer.' We believe this to be a flawed principle. Whilst a date of publication is, by definition, a matter of public record and an easily established fact, the date of 'awareness' of it is a matter that (while not strictly subjective) is nevertheless not open to be tested. It allows a pursuer enormous leeway to start the limitation to period at a time that suits them. 'Date of awareness' becomes another matter of fact to be debated and, if necessary, proven in the courts. It therefore makes defending a defamation case additionally complex and expensive, which is in turn a chill on free speech. We recommend that any proposals to reform defamation in Scotland amend provisions on limitation, to run from the date of publication.
Insurance interest	
Aviva	Yes, the limitation period should run from the date of publication subject to the discretion of the court to override it. This provides for a very clear start point for any claim and it seems to us that the necessary elements of the cause of action should arise at the date of publication (which is when any harm is likely to start) rather than date of knowledge on the part of the pursuer. In addition, a limitation period that is tied to the knowledge of the pursuer invites pursuers who are close to the limitation period to give dishonest evidence about the date when they became aware of a

	publication. It also means that there is little or no certainty about the date. In particular if the pursuer's date of knowledge is used defenders are not in a position to know what limitation period they face and have relatively little prospect of successfully challenging a date of knowledge.
Law firm	
BLM	Yes, the limitation period should run from the date of publication subject to the discretion of the court to override it. This provides for a very clear start point for any claim and it seems to us that the necessary elements of the cause of action should arise at the date of publication (which is when any harm is likely to start) rather than date of knowledge on the part of the pursuer. In addition, a limitation period that is tied to the knowledge of the pursuer invites pursuers who are close to the limitation period to give dishonest evidence about the date when they became aware of a publication. It also means that there is little or no certainty about the date. In particular if the pursuer's date of knowledge is used defenders are not in a position to know what limitation period they face and have relatively little prospect of successfully challenging a date of knowledge.
Media and media-related organisations	
BBC Scotland	Yes.
CommonSpace	Yes.
NUJ	Yes.
SNS	Yes.
Representative bodies (Legal)	
Faculty of Advocates	We are open to that possibility, albeit would question the impact of the change. If the argument were to be taken (as presumably if available in a particular case it would) that the exercise of the Section 19A discretionary power was justified because there was no awareness of the article, that would presumably carry considerable weight with the Court. If so, the impact may be minimal.
Law Society of Scotland	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.

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	
Paul Bernal	No comment.
Stephen Bogle	No comment.
Eric Clive	Yes.
Roddy Dunlop	Yes. A longstop of five years would be more consonant with the points discussed above. If a person is unaware of a defamatory allegation for more than five years, it is perhaps indicative of a lack of serious harm to reputation.
Graeme Henderson	No.
Ursula Smartt	The long stop prescriptive period should be abolished.
Gavin Sutter	I don't consider that tinkering with this would provide a solution. The simple, and best, move is simply to move to a limitation period which commences on date of first publication, and ends after twelve months have passed. A claimant who fails to discover the publication within that time simply cannot have been caused serious reputational harm by it, or they would surely have become aware. In the event that this did indeed happen, the courts could exercise their discretion to step in and agree to hear the case outside the limitation period, if they could be persuaded that ignorance of the publication was, in the circumstances, legitimate, and that it would be in the interests of justice to allow the case to go ahead once the claimant has belatedly become aware.
Campaign group	
Libel Reform Campaign	Yes. The longer the long-stop period, the greater the restrictions on freedom of expression.
Insurance interest	
Aviva	Yes, we consider that the longstop period should be reduced to less than 20 years on the basis that reputation is something that can be instantly harmed by a publication and to allow a claim to be pursued up to 20 years after the date of publication makes little or no sense
Law firm	
BLM	Yes, we consider that the longstop period should be reduced to less than 20 years on the basis that reputation is something that can be instantly harmed by a publication and to allow a claim to be pursued up to 20 years after the date of publication makes little or no sense.
Media and media-related interests	

BBC Scotland	Yes.
CommonSpace	Yes.
NUJ	Yes.
SNS	Yes. 20 years in the digital age seems very long indeed.
Representative bodies (Legal)	
Faculty of Advocates	We consider that of all the options explored, this may be the most effective.
Law Society of Scotland	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?

(Paragraph 10.20)

Comments on Question 44	
Paul Bernal	Yes.
Stephen Bogle	No comment.
Eric Clive	Yes.
Roddy Dunlop	Yes.
Graeme Henderson	No.
Ursula Smartt	The multiple publication rule should be abolished. This is the internet age!
Gavin Sutter	Yes.
Campaign group	
Libel Reform Campaign	Yes. The shorter the limitation periods, the greater space for freedom of expression. On this aspect of the law, the Commission should also consider its interaction with any new provisions around a 'serious harm' threshold. If a pursuer took 19 years and 11 months (as para 10.14 imagines) to even notice that they have been defamed, it is highly unlikely that their reputation will have been significantly damaged to a degree that would overcome a 'serious harm' test akin to s.1 of the Defamation Act 2013.
Insurance interest	
Aviva	Yes, we would favour reducing the limitation periods even if the multiple publication period is to be retained.
Law firm	
BLM	Yes, we would favour reducing the limitation and prescriptive periods even if the multiple publication period is to be retained.
Media and media-related organisations	
BBC Scotland	Yes- both.
CommonSpace	Yes, we believe time periods should be as short as is reasonably possible.
NUJ	Yes, both.

SNS	Yes.
Representative bodies (Legal)	
Faculty of Advocates	We are not persuaded of the need to change the multiple publication rule. We are content with a limitation period of 3 years and see merit in a reduction of the long-stop prescriptive period.
Law Society of Scotland	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.

(Paragraph 11.4)

Comments on Question 45	
Paul Bernal	Yes, but great care is needed so that there cannot be any 'gaming' of these threshold tests. Percentages of access, for example. can be manipulated, particularly online, where it might be possible to arrange to have automated systems to access a page from a particular location enough times to take something out of a jurisdiction.
Stephen Bogle	No comment.
Eric Clive	Yes.
Campbell Deane	Finally, there is a general held belief amongst those pushing for reform in relation to Scots Law that the consequence of the changes brought in by the Defamation Act 2013 in England would result in litigation flowing to Scotland from London from Pursuers/Claimants seeking to take advantage of Scots Law and the fact that Scotland had not incorporated the 2013 Act into legislation. It is submitted that such calls were fanciful, scaremongering and have not been borne out by any reality. The position in fact is that litigation so far as Defamation law in Scotland is concerned remains at historically low levels and should alignment with the English legislation come to the fore then that level is likely to fall further. As I indicated to the Honourable Lord Pentland my greatest concern is that the Commission will create a statute which is entirely fit for purpose but which will not be tested for the simple reason that other jurisdictions will prove more advantageous.
Roddy Dunlop	It is true to say that there are but isolated incidences, so far, of "libel tourism" in Scotland. I myself have come across only three in 15 years of practice: *Ewing v Times* (to get round the fact that the pursuer was a vexatious litigant in England); and two other cases, which settled, raised in Scotland as a result of being time-barred in England. It is thus difficult to say that there is a pressing need to deal with "libel tourism". Equally, however, in order to deal with the potential therefor, I cannot see a convincing objection to measures such as those taken south of the border.
Graeme Henderson	No. The Scottish Courts have not encountered Libel tourism and the introduction of such a rule would introduce further complication to the law. It is arguable that the creation of a specialist Court may make the Scottish Experience more consumer friendly. However the creation of such a Court may mean that spurious claims are more likely to be thrown out more quickly.
Ursula Smartt	Yes (see my answers above). This would limit the Scottish court's jurisdiction to hear and determine an action until and unless it is satisfied that, of all the places in which the statement complained of has been

	published, Scotland would be the most appropriate place in which to bring an action in respect of the statement. Since the measure is already in statute in England and Wales (s 9 Def. Act 2013) – it would be best to adhere to the same law to close the loophole for some 'forum shoppers' like Mr Ewing. This would also overcome the problem of courts readily accepting jurisdiction simply because a claimant frames their claim so as to focus on damage which has occurred in the Scottish jurisdiction only. Section 9 addresses the issue of 'libel tourism' and focuses the provision on cases where an action is brought against a person who is not domiciled in the UK, an EU Member State or a state which is a party to the Lugano Convention. This section applies to an action for defamation against a person who is not domiciled – 9 (a) in the United Kingdom; (b) in another Member State; or (c) in a state which is for the time being a contracting party to the Lugano Convention. I have already addressed this point above. Scots law should adopt the full wording of s 9 Def Act 2013 so that there is UK-wide jurisdiction.
Gavin Sutter	The supposed phenomenon of 'libel tourism' has been much exaggerated; there is, in my view, simply no credible evidence that the big, bad wolf of English libel law is chilling free expression around the globe. Indeed, with the renewed emphasis on sufficient connection to the jurisdiction such that there is a reputation that a claimant might fairly expect to protect in cases such as *Jameel v Dow Jones* ([2005] EMLR 353) and *Don King v Lennox Lewis* ([2005] EMLR 45), any argument that an English court will simply hear any and all libel cases brought because the article in question is on the internet and therefore available in the UK, claims of 'libel tourism' are tenuous at best. Section 9 really adds little to the existing position. One would expect a judge to consider the proportion of publication in England and Wales against that elsewhere as part of a full consideration as to whether that is an appropriate jurisdiction in which to hear the case anyhow. Fortunately, the 2013 Act stops far short of what some parties argued for, which was that a crude numbers game alone could be used to dictate whether or not a case should be heard in England and Wales. The far more sensible approach is to leave it to the judiciary to decide whether the interests of justice are best served by allowing someone to have their case heard, based specifically on publication in the jurisdiction, and sufficient evidence to indicate that that person has a reputation to protect therein.
Campaign group	
Libel Reform Campaign	Yes. As the recent *Ahuja v Politika* case [EWHC] 3380 (QB) has shown, the problem of claimants pursuing inappropriate libel tourism cases still persists, but that s.9 of the Defamation Act has resulted in curbing such actions.

	The issue of jurisdiction is an area where parity with the law in other parts of the United Kingdom is particularly important. If a foreign claimant suing a foreign defendant is barred from suing in London they should not be allowed to engage in 'forum shopping' in Edinburgh. Libel tourism caused egregious free speech violations. As such it caused significant reputational damage to the London courts (including the so-called 'Libel Terrorism' law passed by the US Congress). Scotland should legislate to ensure that Edinburgh is not similarly discredited in future.
Insurance interest	
Aviva	Yes, we consider that it would be desirable to introduce a new threshold test for establishing jurisdiction in defamation actions equivalent to section 9 of the 2013 Act in Scots law. Whilst the effect of the threshold is modest given the wider EU and treaty obligations that exist there is nonetheless attraction in ensuring that pursuers do not forum shop and to avoid claims with little or no connection to Scotland being pursued in Scotland.
Law firm	
BLM	Yes, we consider that it would be desirable to introduce a new threshold test for establishing jurisdiction in defamation actions equivalent to section 9 of the 2013 Act in Scots law. Whilst the effect of the threshold is modest given the wider EU and treaty obligations that exist there is nonetheless attraction in ensuring that pursuers do not forum shop and to avoid claims with little or no connection to Scotland being pursued in Scotland.
Media and media-related organisations	
BBC Scotland	Yes, it would be desirable.
Google	We support the introduction of a threshold test for establishing jurisdiction in defamation actions, equivalent to section 9 of the 2013 Act.
NUJ	Yes.
SNS	Yes. Data is readily available to demonstrate extent of dissemination.
Representative bodies (Legal)	
Faculty of Advocates	No. The overwhelming experience of practitioners is that there is no evidence for 'libel tourism' in Scotland. If anything, the reverse is true. Moreover, the factors which created London as a global centre of litigation in this area do not exist in Scotland. It will be of interest to the Commission to note that those places with a growing defamation practice include Dublin. The reasons for that include the level of damages awarded in the Irish Courts which far exceed anything awarded in Scotland. There is, in short, no basis for further restricting the already limited number of defamation cases in the Scottish jurisdiction. The risks to the development of Scots law in this area are already immediate and real.
Law Society of Scotland	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.

Senators of the College of Justice	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.

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	
Paul Bernal	No comment.
Stephen Bogle	No comment.
Eric Clive	I would be happy for defamation cases to be handled by judges.
Roddy Dunlop	I query whether defamation should remain an enumerated cause. The law is becoming ever more complex, and such cases are accordingly less and less suited for determination by jury.
Graeme Henderson	The current regime is not satisfactory. Irrespective of what the litigants think a case may be unsuitable for jury trial. In the event that a specialist Court is created part of its case management system would involve the Court assuming the power to consider whether or not a case should be sent to Jury trial. It may also introduce a degree of sophistication into Scots procedure. For example could a Jury be asked to decide a case where a defence of Reynolds privilege is pled?
Ursula Smartt	There are no libel jury trials in Scotland (and the 2013 Act removed jury trials in defamation actions from the English/ Welsh courts – subject to the judge's direction in very exceptional cases). This is welcomed and Scots law should remain 'judge alone' in defamation actions.
Gavin Sutter	I am firmly of the belief that section 11 has been a positive change in English law. It remains to be seen in what conditions a jury will be considered necessary. Arguments about whether the judiciary are indeed sufficiently representative of "ordinary people" can be made in favour of juries (although this might perhaps be said to mask a much more fundamental argument about issues that need to be addressed with the judiciary). In practice, the great gain of Section 11 has been that an early hearing on meaning can be arranged and deliver a decision with some certainty, enabling parties to make a more informed decision as to whether to proceed to trial or settle on the basis of that decision.
Campaign group	
Libel Reform Campaign	Yes. We recommend that measures similar to s.11 of the Defamation Act 2013 be introduced into Scots law - a presumption against a jury trial. Defamation cases can be extremely expensive. Many of the issues that can escalate legal costs concern the uncertainty over the meaning that a jury will attribute to statement. The case is effectively argued on several fronts until trial. A judge-led system allows many questions over meaning to be settled earlier in the process, resulting in lower costs to both claimants and

	defendants. In recent years, the courts of England & Wales have instituted far better case management in defamation claims. Meanings are decided much earlier and judges have been able to operate far more robust case management.
Insurance interest	
Aviva	Yes, we consider that the existing rules on jury trial should be modified. In particular, modifications should be made to enable key issues to be determined at an early stage. This will assist the parties in determining central issues at an early stage which may result in more claims being concluded at an early stage. It will also inevitably save costs in the form of both court costs and costs for the parties and will result in more effective and faster justice. It also has the potential benefit of there being fully explained decisions on key points which will assist publishers, pursuers and those advising them in understanding the law.
Law firm	
BLM	Yes, we consider that the existing rules on jury trial should be modified. In particular, modifications should be made to enable key issues to be determined at an early stage. This will assist the parties in determining central issues at an early stage which may result in more claims being concluded at an early stage. It will also inevitably save costs in the form of both court costs and costs for the parties and will result in more effective and faster justice. It also has the potential benefit of there being fully explained decisions on key points which will assist publishers, pursuers and those advising them in understanding the law.
Media and media-related organisations	
BBC Scotland	We 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.
Google	In line with our comments above, regarding the desirability of adopting a consistent approach to defamation law across the UK, Google supports the abolition of the presumption of jury trial, and the retention of a discretionary power to order trial by jury in exceptional cases.
NUJ	We would be in favour of abolition of jury trials in defamation cases.
SNS	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 anaylsis of language and definitions of the public interest are increasingly complex.

Representative bodies (Legal)	
Faculty of Advocates	We agree that the presumption for jury trial and the question of 'special cause', should be replaced by a broad discretion for the court in relation to the appropriate form of inquiry in the specific facts of each case.
Law Society of Scotland	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.
Senators of the College of Justice	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).

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	
Paul Bernal	I would avoid allowing defamation actions to be taken in respect of the dead. There are points in its favour, but they are outweighed in my view by the downsides.
Stephen Bogle	No comment.
Eric Clive	No- for all the reasons mentioned in earlier consultations.
Campbell Deane	No. There appears in terms of the Consultation paper a general tendency towards the harmonisation of Scottish and English law. One obvious benefit to the Pursuer and the Pursuer's solicitors would be that no such provision exists in terms of English law which would allow parties to sue uniquely in Scotland as part of Defamation of the deceased. Given that no such provision exists under English law then the principle of liable tourism may indeed come to the fore with parties raising proceedings in Scotland for Defamation of the deceased as a consequence of publication in the UK where downloadable in Scotland. How one would establish a necessary threshold of harm for a deceased relative would, it is submitted be far from straightforward.
Roddy Dunlop	No. I was part of the Faculty Committee which responded to the previous suggestion made in this regard by the Scottish Ministers. I do not consider that the limited justifications advanced for such a change in the law are sufficient to override the significant objections thereto. I should be happy to make the Faculty response available, if the Commission does not have this already.
George Gretton	I oppose this suggestion. The idea of an additional category of competent defamation claims depresses me. One shudders to imagine the consequences. The Ozzies have this right. The German rule is a bad one but at least it is confined to the *Strafgesetzbuch*, so that some rational control happens via the common sense of the *Staatsanwaltschaft*.
Graeme Henderson	No. I would refer to the response by the Faulty of Advocates to the 2011 Scottish Government Consultation on this issue.
Ursula Smartt	This is a moot point and has been discussed in the Scottish Parliament for some time (e.g. in relation to the family of schoolgirl Diane Watson, stabbed to death by a fellow pupil). It has been raised by those who are relatives of deceased who have been accused of historic child sexual abuse (e.g. Jimmy Saville or Sir Leon Brittan). A measure in law of this kind would open the doors for bereaved relatives of the dead to take an action if the reputation of a relative is traduced by the media after their death, possibly even invoking Art 8 ECHR. I think this would be an unwelcome development.
Gavin Sutter	NO. I am currently co-writing an article on this matter, but suffice it to say here that I believe strongly that this would be an unnecessary and

	unwelcome interference with the Article 10 right. The implications of *Putistin v Ukraine* (App No 16882/03) [2013] ECHR 16882/03 are indeed concerning. I would agree with the conclusions of the prior investigation in Scotland, to the extent that the protection of the reputation of the deceased, insofar as that may be necessary or legitimate, is best left to other mechanisms. The notion that a Jimmy Saville type could be protected even beyond the grave concerning; more generally, however, while reputational damage to a living person is rightly a clear Article 10(2) exemption to the freedom of expression right, posthumous offence taken on behalf of that person by close relatives or descendants in my opinion simply goes too far, and would cause a distinct chill on the freedom of expression right of others. I firmly believe that current English law, under which any and all libel proceedings not completely concluded, although there may be a case for a judicial discretion on this matter. See, for example, the case of *Harvey Smith v Bobby Dha* [2013] EWHC 838, in which the High Court refused to give judgment where the claimant had died after the hearing had concluded, but prior to the issue of a judgment. In such a case considerable expenses may have already been incurred, and it might be seen as fairer to grant the judiciary the power to determine whether it would be in the interests of justice to allow the proceedings to be concluded. In no circumstances, however, would I support a defamation action being concluded where there would not be unfair economic loss to one or other of the parties, or, indeed, where a hearing had not commenced.
Margaret and James Watson	Yes. There is ample scope for the introduction of defamation of the deceased legislation under Section 2 of Article 10 of the Convention of Human Right - Freedom of Expression, which is a qualified right, not an absolute right. Section 2 of Article 10 of the Convention of Human Rights imposed the following clearly defined restrictions - "In the interest of public safety". It cannot be in the public interest to disseminate egregious or grossly misleading information about events leading up to a murder. "Protecting the health and Morals". It is imperative that the added mental anguish and torment endured by families of murdered victims is given due prominence when considering if there is a need for defamation of the deceased legislation. "Protection of reputation and rights of others". Given that families of the deceased are denied any legal standing under the current Scottish Defamation Legislation and excluded from the Independent Press Standards Organisation, Arbitration Service, as only complainants who have the option of taking civil defamation action have access to Ipso Arbitration Service. it is misleading to suggest that remedy to defamation of the deceased can be addressed under Ipso rules or Editors Code. Ipso have acknowledged that a substantial number of publishers throughout the UK have not joined their organisation **[***Remainder of sentence deleted as confidential***]**. We have attached a copy of Ipso rules to be taken into consideration by the Scottish Law Commission: "Maintaining the Authority and Impartiality of the Judiciary". **[***Remainder of paragraph deleted as confidential***]***.* Article 8 of the Convention of Human Rights - Right to Private and Family Life. Article 8 of the Convention was acknowledged by the EU Court in the 2013 Judgement *Putitstin v Ukraine* as a mechanism whereby families of murdered victims can challenge unfounded attacks on the good name and character of murdered victim. It would be travesty of justice if the full implications of the EU Court Judgement in the 2013 *Putitstin V Ukraine* case is not recognised and endorsed in Scotland.

	Article 10 and 8 of the Convention of Human Rights Directives has been fully ratified by the UK and Scottish Governments therefore the Scottish government has a duty to fully implement Article 10 and 8 of the Convention of human rights.
Campaign group	
Libel Reform Campaign	No. As outlined in the discussion paper, measures that would allow proceedings to be brought on behalf of a deceased person would fundamentally alter the nature of defamation. It would discourage investigative journalism and historical research and could have prevented the reporting of the abuse perpetrated by Jimmy Saville (reporting that was thwarted during Saville's lifetime by his reliance on libel threats against journalists and his victims). We recognise that distress can be caused to the relatives of victims of a crime or an accident. Such distress is best remedied through press standards, regulation and editorial codes. Existing laws that prevent harassment could also be used to prevent persistent intrusion into grief. The British Parliament debated this issue during the passage of the Defamation Act 2013 (House of Lords Hansard, 17 December 2012, column GC430). The amendment which probed the matter, tabled by Lord Hunt of Wirral, was rejected. There is therefore no prospect of such measures being introduced into the law of England & Wales. If such measures were introduced in Scotland, they would be rendered essentially meaningless by the UK-wide nature of most publications.
Insurance interest	
Aviva	No, we do not consider that statutory provision should allow an action for defamation to be brought on behalf of someone who has died in respect of statements made after their death. The cause of action of defamation is so closely associated with the individual concerned that there is little or no attraction allowing claims to be brought after the person concerned has died. That is particularly the case bearing in mind the additional complexities that would arise if such a claim were allowed to be pursued in relation to who would have the entitlement to pursue the claim and in relation to the difficulty that would be faced for defenders in circumstances where the primary witness (or the person likely to be the primary witness) was no longer available to be questioned or cross-examined.
Law firm	
BLM	No, we do not consider that statutory provision should allow an action for defamation to be brought on behalf of someone who has died in respect of statements made after their death. The cause of action of defamation is so closely associated with the individual concerned that there is little or no attraction allowing claims to be brought after the person concerned has died. That is particularly the case bearing in mind the additional

	complexities that would arise if such a claim were allowed to be pursued in relation to who would have the entitlement to pursue the claim and in relation to the difficulty that would be faced for defenders in circumstances where the primary witness (or the person likely to be the primary witness) was no longer available to be questioned or cross-examined.
Media and media-related organisations	
BBC Scotland	No. This has been fully and recently considered.
CommonSpace	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.
NUJ	No.
SNS	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 imposible 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.
Representative bodies (legal)	
Faculty of Advocates	No. The potential uncertainty resulting in any such legislation would be unwelcome. We consider that, consistent with the delictual nature of the current law, once a party has died his right to raise action dies with him. We are concerned that to introduce the considered change could have a significant effect on the ability to probe allegations against individuals or have reputations properly examined; for example the post death revelations relating to Jimmy Savile. We are open to giving the matter greater consideration, albeit would direct the Commission to the Faculty of Advocates Response to the previous Scottish Government consultation on 'Defamation and the Deceased' from 2011.
Law Society of Scotland	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?

(Paragraph 12.30)

Comments on Question 48	
Paul Bernal	Yes, if this is to be brought in, it must be closely limited.
Stephen Bogle	No comment.
Eric Clive	Yes – it should be nobody.
Roddy Dunlop	If the law is to be changed, then only spouses, parents or children should be able to sue. The much wider range of relatives entitled to sue for damages for actual death would be inappropriate in this context.
Ursula Smartt	This point was discussed as the Defamation Bill passed through Parliament (specifically in the HL). But the part of the bill was defeated. It would only mean that aggressive litigants would use the threat of a very expensive libel action to suppress adverse coverage for many years – Art 10 ECHR – freedom of expression should prevail. Death must end any such threats. This allows journalists and authors (and victims of historic sexual abuse) to air allegations after a person has died. The families of the dead may be distressed at media coverage and it would be extremely worrying to think that they might be able to use human rights law (or Scots law) to continue to prevent legitimate exposure after their death.
Gavin Sutter	I would prefer that this not be permitted at all, but if anyone is to be permitted to sue in defamation for the protection of an individual's posthumous reputation, it should be very strictly limited
Margaret and James Watson	Yes.
Campaign group	
Libel Reform Campaign	We **strongly oppose** any measures to allow a defamation action to be brought on behalf of someone who has died.
Insurance interest	
Aviva	Whilst we do not consider that claims should be able to be pursued on behalf of a person who has died, if it is decided that a claim can be pursued on behalf of a person who has died we consider that there should be a restriction on the parties who may competently bring an action for defamation on their behalf.
Law firm	
BLM	Whilst we do not consider that claims should be able to be pursued on behalf of a person who has died, if it is decided that a claim can be pursued on behalf of a person who has died we consider that there should be a restriction on the parties who may competently bring an action for defamation on their behalf.

Media and media-related organisations	
BBC Scotland	Yes, subject to the view expressed at no. 47 above.
CommonSpace	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.
NUJ	Yes but see response to Q47 above.
SNS	As above.
Representative bodies (Legal)	
Faculty of Advocates	No. We do not support a change in the law to allow such actions, and accordingly the question does not arise.
Law Society of Scotland	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?

(Paragraph 12.30)

Comments on Question 49	
Paul Bernal	Yes.
Stephen Bogle	No comment.
Eric Clive	It should be nobody.
Roddy Dunlop	No, as above.
Gavin Sutter	I would restrict it solely to that person's legal spouse and children.
Margaret and James Watson	We are of the view that it should be direct family members as suggested in section 14 of the Damages (Scotland) Act 2011.
Campaign group	
Libel Reform Campaign	We **strongly oppose** any measures to allow a defamation action to be brought on behalf of someone who has died.
Insurance interest	
Aviva	Yes, if there is to be a restriction it should limit the parties to people falling within the category of relative for the purpose of section 14 of the Damages (Scotland) Act 2011.
Law firm	
BLM	Yes, if there is to be a restriction it should limit the parties to people falling within the category of "relative" for the purpose of section 14 of the Damages (Scotland) Act 2011.
Media and media-related organisations	
BBC Scotland	Yes, subject to the view expressed at no. 47 above.
CommonSpace	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.
NUJ	Yes but see response to Q47 above.
SNS	As above.
Representative bodies (Legal)	
Faulty of Advocates	Given the response above we do not support any attempt to categorise "relative" for the purposes of the Act. We consider that the very difficulty posed by the query strengthens the argument that change in this area of the law will give rise to confusion and conflict.

Law Society of Scotland	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?

(Paragraph 12.32)

Comments on Question 50	
Paul Bernal	For consistency, a year would be as good a period as any.
Stephen Bogle	No comment.
Roddy Dunlop	If permissible at all, the same one year time limit discussed above should apply.
Gavin Sutter	I would, in the interests of protection of Article 10 rights, incorporating freedom of historical analysis, also argue for a time limit to any right to sue for posthumous defamation. Ten years would seem a reasonable limit.
Margaret and James Watson	No. To have a time limit imposed would inflict undue pressure on families who lost a much loved member of their immediate family to murder. Serious consideration must be given for physical and psychological wellbeing of immediate family members of the deceased murdered victim when considering imposing any time limit. The EU Court of Human Rights made no reference to imposing a time limit in the *Putitstin V Ukraine* case.
Campaign group	
Libel Reform Campaign	We strongly oppose any measures to allow a defamation action to be brought on behalf of someone who has died.
Insurance interest	
Aviva	Yes, there should be a limit as to how long after the death of a person a claim could be pursued. We suggest that should be a maximum of five years.
Law firm	
BLM	Yes, there should be a limit as to how long after the death of a person a claim could be pursued. We suggest that should be a maximum of five years.
Media and media-related organisations	
BBC Scotland	Yes, subject to the view expressed at no. 47 above – one year.
NUJ	One year, but see response to Q47 above.
SNS	As above.
Representative bodies (Legal)	
Faculty of Advocates	Given our response we do not agree with this proposal in principle. Should there be a decision to allow this proposal we suggest that any time limit should be as short as possible to allow clarity and certainty in the law.

Law Society of Scotland	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?

(Paragraph 12.36)

Comments on Question 51	
Paul Bernal	If we are to allow defamation actions on behalf of the dead, we need to be flexible.
Stephen Bogle	No comment.
Eric Clive	No comment
Roddy Dunlop	If permissible at all, I would not support any such restrictions.
Gavin Sutter	If posthumous actions for defamation are to be allowed, I do not consider such restrictions to be useful
Margaret and James Watson	Both (a) and (b). There is well documented evidence that both the perpetrator (criminal memoirs) and journalist who campaign on behalf of convicted murderers have taken advantage of the lack of legal redress available to families of murdered victims under the current Scottish Defamation Legislation.
Campaign group	
Libel Reform Campaign	We **strongly oppose** any measures to allow a defamation action to be brought on behalf of someone who has died.
Insurance interest	
Aviva	We do not consider that the pursuit of a claim should be restricted according to the circumstances in which the death occurred or whether the defamer was a perpetrator of the death.
Law firm	
BLM	We do not consider that the pursuit of a claim should be restricted according to the circumstances in which the death occurred or whether the defamer was a perpetrator of the death.
Media and media-related organisations	
BBC Scotland	Yes.
NUJ	Yes.
SNS	As above.
Representative bodies (Legal)	

Faculty of Advocates	Given our response we do not agree with this proposal in principle. Should there be a decision to allow this proposal we suggest that limitation along the lines suggested would limit the uncertainty and lack of clarity in any change in the law.
Law Society of Scotland	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:

- **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	
Paul Bernal	I would remove them all. Ordinary defamation should be enough.
Stephen Bogle	I think verbal injuries are important. I am in complete agreement with the analysis and argument made by Elspeth Reid at the SLC's defamation event in April. Some of the problems we experience with the law of defamation stems from the fact that defamation actions are raised when an economic injury could be remedied more efficiently and appropriately by slander of title, falsehood about the pursuer causing business loss etc. Or indeed highlight that a defamation action is sometimes not appropriate – i.e. it is being used to chill criticism rather than remedy an economic loss suffered by an economic organisation. The existence of verbal injuries demonstrates that the law does protect economic organisations from loss stemming from harmful public statements; it also helps frame that the purpose of defamation is to protect reputation not the economic status of an organisation nor to stifle fair criticism.
Eric Clive	None seems important in practice but the first three should probably be retained for use in rare cases. The last two should be swept away if they exist.
Roddy Dunlop	These are almost unknown in my experience. I have dealt with one case of verbal injury, and none in the other categories.
Graeme Henderson	Whilst I consider that almost all of the more exotic forms of action referred to in this Section should be retained I have doubts over the viability of an action based upon verbal injury to feelings caused by exposure to public hatred contempt and ridicule. I agree that there is little point in raising such an action when a defamation action is available (13.33). The question is whether it is worth the effort of Parliament to abolish it.
Elspeth Reid	Case law in this area is certainly now scarce (perhaps due in part to (i) the perception that the law in this area is troubled and obscure (see, e.g., *Steele v Daily Record* 1970 SLT 53, Lord Wheatley at 60); (ii) the challenges of proving malice in this context: and (iii) the overlap with the law of defamation, which offers the advantages of presumptions of falsity and malice). However, the infrequency of litigation is not necessarily an argument for abolishing verbal injury in all contexts. **Falsehood about the pursuer causing business loss; slander of title; slander of property**

	As regards the verbal injuries that deal with economic or business interests, some of the mischiefs previously encompassed by verbal injury have to an extent been taken over by developments elsewhere in the law of delict. The "staggering march of negligence" (T Weir, "The Staggering March of negligence, in P Cane and J Stapleton (eds), The Law of Obligations (1998) 97) has extended the reach of negligence into protection of reputation where economic loss has been caused by misstatement. We now have a clearer understanding of the frameworks for the delicts of inducing breach of contract and causing loss by unlawful means. And in addition, there is of course now more extensive public law control of comparative advertising. But while these factors have marginalised the economic verbal injuries, the disappearance of verbal injury from this context would nonetheless leave an important gap. It is desirable that a civil remedy should remain available to deal with deliberate lies told to the detriment of pursuer's economic interests. Even when taken together the developments noted above do not directly address that principle for all contexts. Neither negligence nor indeed defamation map clearly on to the facts of the leading English case of *Ratcliffe v Evans* [1892] 2 QB 524, for example, and there are numerous scenarios in the case law that would not readily lend themselves to liability under another head (see, e.g., *Joyce v Motor Surveys Ltd* [1948] Ch 252). Indeed, it is noticeable that there was little suggestion in England prior to the 2013 Defamation Act, or in Northern Ireland that the equivalent "malicious falsehoods" should be abandoned. If verbal injury is to be retained in this context, there would appear to be little point in changing the generic label, "falsehood about the pursuer causing business loss", or the familiar and established terms for the subcategories of "slander of title" and "slander of property". This terminology has the virtue of familiarity and reasonable clarity of meaning. There is, however a case for a statutory restatement of what these entail (discussed below in the response to question 53). **Slander on a third party** On the other hand, there is little to be lost in abandoning slander upon a third party as a distinct category (except in exceptional circumstances that lend themselves in any event to the more general category of a falsehood calculated to cause business loss to the pursuer). The authorities as to the ambit of this delict were never clear, although latterly they confined it to the business domain only, but the absolute absence of case law for over a century speaks to it having lapsed into desuetude. In this connection I leave aside the overlap with question 47 – the issue whether an action should be available for defamation of the dead, which was the real gist of the wrong in *Broom v Ritchie* (1904) 6 F 942. **Injury to non-economic interests: false statements** Although the case for retaining the economic verbal injuries in some form is perhaps not contentious, greater difficulties attach to the continued

	existence of the verbal injuries relating to non-economic interests. There was indeed a line of thinking at the end of the nineteenth century to the effect that the only surviving form of verbal injury addressed economic interests only. However, the Inner House clearly acknowledged in *Steele v Daily Record* in 1969 that a form of liability for verbal injury persists in the non-economic sphere. At the same time, as noted in the Discussion Paper, the scope of verbal injury in this context has been severely constricted by the formulation adopted in Steele. While the verbal injuries discussed above are measured by their impact on economic interests, this type of verbal injury is apparently measured by its impact on reputation. As formulated in Steele, it requires that impact to be acute (bringing the pursuer into "public hatred and contempt", causing the community if not to "hate" then to "condemn or despise" him or her, so that the test is "something stronger" than the class test for defamation set out in *Sim v Stretch*). In other words over the course of the twentieth century this form of verbal injury has drawn on the terminology of defamation to define itself, but in a form that sets a more exacting threshold for measuring the harm, as well as requiring malice and falsity to be proved. If the offending statement can meet these criteria, it will almost certainly have crossed the threshold required for a successful claim in defamation. If this form of verbal injury is defined in the terms set out in Steele, little would be lost therefore by abandoning it. But two further questions also require attention. *First, is there scope for a form of non-economic verbal injury to reputation in which harm is measured by a different standard from that indicated in Steele?* This question should be answered in the negative. The creation of a form of injury to reputation in which the threshold of harm is set lower than in the law of defamation would not only create confusion but would also raise problems of compliance with article 10 ECHR. Indeed if we consider the subject matter of this kind of verbal injury in the nineteenth century, it often involved allegations of impropriety in lifestyle or ridiculous satirical depictions of public and semi-public figures that were shocking to the Victorians but are not appropriate as the stuff of litigation in the twenty-first century. It is also doubtful whether it is practical to create a lesser form of injury to reputation that would be actionable in Scotland but not in England. *Secondly, is there still scope for a form of (false) verbal injury that defines itself otherwise than by injury to reputation?* A problem here is how to deal with the dissemination of false facts that may be damaging or hurtful, but do not meet the traditional "Sim v Stretch" test in the sense that the subject's reputation has been lowered. Take, for example, a false assertion that a prominent clergyman had been born out of wedlock. In a society where more than 50% of births now occur outwith marriage and in a legal system which has long since eliminated discrimination between legitimate and "illegitimate" children, it would be invidious to recognise such an imputation as diminishing the subject's reputation in the regard of "right-thinking" persons. But the individual concerned may wish, quite naturally, to suppress the circulation of a false story of this nature. Similar considerations would affect the dissemination of false information about sexual orientation, or health matters, for example,

	which should not have an impact upon reputation as measured by the standard applied in "*Sim v Stretch"/Steele*, but which nonetheless might be deeply unwelcome. In this regard a parallel may be drawn with what the US scholar, William Prosser termed "publicity which places the plaintiff in a false light in the public eye" ("Privacy", (1960) 48 California Law Review 383). Media allegations of this nature would almost certainly fall foul of the Editors' Code of Practice, but the question remains whether they should also give rise to civil liability. As a matter of principle, the answer to that question is almost certainly "yes". Until the latter part of the nineteenth century verbal injury did indeed encompass such matters, but after a gap of more than a century, and with all the uncertainties attached to those nineteenth century authorities, the law of verbal injury could not usefully be revived in this context. The issues presented by such cases are now more clearly addressed by twenty-first century discussion on the scope of the law of privacy. The English case law gives a steer that while the tort of misuse of private information for the most part concerns unwelcome disclosure of the truth, it can also deal with false information about the private domain (see e.g. *McKennitt v Ash* [2008] QB 73 per Longmore LJ at para 86). In short, therefore, disclosure of false facts that does not necessarily injure the individual's reputation, but impinges on his or her private domain should be actionable, but the better way forward is to acknowledge a law of privacy rather than to attempt to breathe new life into the nineteenth-century law of verbal injury. **Injury to non-economic interests: true statements** As the Discussion Paper notes, the authorities tend to the view that a form of verbal injury perpetrated by truthful imputations did not survive into the twentieth century. Setting asides possible divisions of opinion on legal history, however, the more important question here is in regard to modern policy choices. Should some form of liability for truthful imputations be preserved in the modern law? The discussion on this point runs in parallel with that concerning the veritas defence in defamation. It has often been observed that individuals should not normally be entitled to protect a reputation that is based on lies, and it goes without saying that truth should not be suppressed without cogent reason. (See also the observation made recently by Lord Neuberger in *O v Rhodes* [2016] AC 219 at para 111 in regard to the *Wilkinson v Downton* tort of intentional infliction of mental harm: it is "vital that the tort does not interfere with the give and take of ordinary human discourse (including unpleasant, heated arguments, whether in domestic, social, business or other contexts, sometimes involving the trading of insults or threats), or with normal, including trenchant, journalism and other writing.") But there is a further aspect to this question, which in a sense is nothing new. Disclosures about illness, or long-past misdemeanours, or romantic entanglements were the types of verbal injury for which Hume and Borthwick regarded the veritas defence as particularly inappropriate, and indeed it remains difficult to disagree with the view that a remedy should be available when "some secret matter, known only to the defender, has been

	officiously and unnecessarily circulated to the world" Hume, Lectures, vol 3, p 160. At the same time, the more relevant characterisation of such injury is not so much the denting of reputation – in the twenty-first century no one should suffer in his or her reputation because of an episode of mental illness, for example ¬– but rather the unwanted intrusion into the private sphere. What then is the most appropriate vehicle for delictual liability in that context? Even assuming the survival in the modern law of some form of verbal injury for truthful disclosure, this is hardly credible as providing the modern framework for redress in this context. There has been no case law for over a century, and such nineteenth century authority as exists is complex and confusing. Moreover, while this form of injury was discussed by the Institutional writers, it was against the background of a very different cultural and social understanding of the private sphere – and indeed of the importance of freedom of expression. Looking beyond Scotland to comparative authority we now have an abundant literature elsewhere to guide us on the modern implications of breach of privacy as an independent delict/tort. In short, therefore, the more appropriate mechanism for dealing with truthful disclosure of this nature is to be found in acknowledging infringement of informational privacy as a delict in its own right (as now supported by article 8 ECHR). Truth should not be readily suppressed, and due weight must be given to article 10 ECHR, but the law of privacy can provide a starting point for setting boundaries on liability in a way that verbal injury, as it has come down to us, cannot do. **Conclusion** In summary, verbal injuries should be retained insofar as they deal with economic interests, since removing them would leave a gap that would not always be filled by other areas of liability, but in order to reduce uncertainty it would be helpful to set these out in statutory form. However, verbal injury in so far as it deals with non-economic interests has for practical purposes fallen into desuetude, in regard to false and truthful imputations. If a remedy is to be provided in this sphere for injurious disclosure, true or false, that does not necessarily detract from reputation as such, the more suitable modern framework is to be found in the law of confidentiality and privacy. It is further worth noting that outwith the private sphere the more egregious mischiefs addressed by verbal injury in the nineteenth century are now dealt with the Protection from Harassment Act 1997, and also arguably by the "Wilkinson v Downton" delict of intentional infliction of mental harm, assuming that the Scots courts accept its recent reformulation in *O v Rhodes* [2016] AC 219.
Ursula Smartt	The law on defamation should be revised and include libel and slander (as in England). Both should be codified and defined in statute and be subject to the 'serious harm' test. There should be actual or future proof of economic loss. All the above terms should be abolished.
Gavin Sutter	Insofar as the first three cannot come under defamation (see, e.g. the development of the concept of 'trade libel' in English law), it would make sense to review and retain. I am unconvinced of the value of 'verbal injury to feelings' – insofar as anything here falls short of the defamation standard, it would seem to me an undesirable limit on the Article 10 right.

	Slander on a third party, as discussed in the consultation document, could well be left to slip into history.
Campaign group	
Libel Reform Campaign	The defences available for verbal and non-verbal defamation should be aligned, in particular the serious harm test. Limited verbal slander should only in the most egregious circumstances be cause for damages as a verbal apology to correct the record without the need for expensive legal action is the best course of action in these circumstances.
Insurance interest	
Aviva	In practice none of the causes of action identified are regularly pursued and in our view they are not important in practice and should not be retained.
Law firm	
BLM	In practice none of the causes of action identified are regularly pursued and in our view they are not important in practice and should not be retained.
Media and media-related organisations	
BBC Scotland	BBC Scotland has not found them to be important in practice, but if they are to be retained, theoretical clarification would be welcome.
SNS	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.
Representative bodies (Legal)	
Faculty of Advocates	In general, we do have experience of a few cases involving malicious falsehood and also verbal injury but those cases are not common. The other areas raised do not greatly impact on current defamation actions and practice.
Law Society of Scotland	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]
Senators of the College of Justice	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.

[8] 1970 SLT 53.

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	
Paul Bernal	No comment.
Stephen Bogle	I think there is great value in verbal injuries which offer a good balance in Scots law, albeit underused and misunderstood.
Eric Clive	Not very important.
Roddy Dunlop	I do not consider there to be any need for reform in this area, given that the law is relatively certain and very rarely invoked.
Graeme Henderson	I see no merit in codifying this esoteric branch of the Law.
Elspeth Reid	If some categories of verbal injury are to be retained (as proposed in my response to question 52), a restatement in statutory form is desirable in order to dispel confusion and to resolve conflicting views as to their ambit. The infrequency and inconsistency of the case law, together with a shortage of recent Inner House authority, provide an insecure foundation for the modern law. The consequence is a lack of focus in the basic taxonomy of verbal injury (see e.g. *Continental Tyre Group Ltd v Robertson* 2011 GWD 14-321 on slander of property), as well as in regard to the fundamental requirements of liability. For example, the old uncertainties regarding malice in fact and malice in law in regard to privilege in the law of defamation have also made their mark upon the malice requirement in verbal injury. Thus differing approaches are found to the significance of injurious intention, as contrasted with hostility or "bad motive", and to the relevance of knowledge or imputed knowledge of the falsity of the statement. These differences are perhaps not huge in practical terms, but given the challenges of proving malice in any event, they make it difficult for litigants to assess exactly what they are required to prove. (Compare the analysis of the malice requirement as between, for instance, *Steele v Daily Record* 1970 SLT 53, *Barratt International Resorts Ltd v Barratt Owners Group* 2003 GWD 1-19, *Westcrowns Contracting Services Ltd v Daylight Insulation Ltd* [2005] CSOH 55. Note also *McIrvine v McIrvine* [2012] CSOH 23, in which Lord Brodie at para 23 stated "that it is not necessary to show malice…in order to obtain interdict of false assertions as to a party's title", which seems to go against English authority on injunctions and malicious falsehood: *British Railway Traffic and Electric Co Ltd V CRC Co Ltd* [1922] 2 KB 260.) A statutory restatement that clearly set out the framework of the surviving verbal injuries would therefore be valuable in improving the coherence and accessibility of the law. The areas of uncertainty that might usefully be addressed in such a statutory provision might include the following: • *Malice* Malice remains a key requirement, in order to protect legitimate discussion of the comparative merits of goods or services and to

	avoid undue interference in disputes between businesses, but clearly some of the uncertainties indicated above should be resolved. In this connection the Scottish courts (see e.g. *Westcrowns, Barratt*) have taken note of Glidewell LJ's statement in *Spring v Guardian Assurance* that "the test of what constitutes malice in the tort of malicious falsehood is the same as the test in relation to the torts of libel and slander" ([1993] 2 All ER 273 at 288). But at the same time it is debatable whether the context of qualified privilege in defamation is directly equivalent to that of malicious falsehood; a better comparator may in fact be found in the discussion of targeted and untargeted harm in the other economic delicts, in particular the delict of causing loss by unlawful means (see, e.g., *Global Resources Group v Mackay* 2009 SLT 104 per Lord Hodge at para 17). • *Falsehood* It is important to distinguish between on the one hand self-commendation and on the other disparagement or denigration of the pursuer's goods or services. However, in this regard it will be necessary to reflect on how this form of verbal injury measures up against any new definitions applied to defamation (so that an exacting threshold in defamation does not result in a flow of claims into verbal injury if more loosely defined). On a related point of detail, thought should also be given to the merits of following the English decision in *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2011] QB 497 in which the Court of Appeal ruled that the single meaning rule that does apply in defamation does not apply in malicious falsehood (so that rather than fixing on one meaning, if two or more meanings are plausible, they can all be considered). • *Publication.* Unlike in the Scots law of defamation, publication to a third party/world at large seems essential, but the question of liability for republication remains open. • *Damage*. As the Defamation Act 1952 s 3(1) indicates, verbal injury does not require actual damage - the pursuer may proceed on injury "calculated to cause damage". Two issues arise, however. The first is how probable the damage requires to be in terms of projected consequences for sales etc. (*See Tesla Motors Ltd v BBC* [2011] EWHC 2760 underlining the importance of establishing the specific nature and amount of the loss allegedly caused by such a slander; *Kennedy v Aldington* [2005] CSOH 58 allowing proof before answer but underlining the need to assess the "loss of a chance" of a sale.) The second is whether economic loss only is recoverable, or whether, as seems proper, anxiety and distress to individuals should be compensated when it flows from economic loss to their business interests (*cf* English cases such *as Kaye v Robertson* [1991] FSR 62, and *Joyce v Sengupta* [1993] 1 WLR 337 and conflicting interpretations of *Paterson v Welch* (1893) 20 R 744).
Ursula Smartt	See my points made in para 52. 'Slander' should cover this term and 'verbal injury' should be abolished (too archaic).

Gavin Sutter	n/a
Campaign group	
Libel Reform Campaign	Please see above for the answer to question 52.
Insurance interest	
Aviva	Whilst we do not consider that if the claim of verbal injury should be retained in statutory form. if it is retained we consider that it would assist to identify the categories in which that would be possible so that the law is clear
Law firm	
BLM	Whilst we do not consider that the claim of verbal injury should be retained in statutory form, if it is retained we consider that it would assist to identify the categories in which that would be possible so that the law is clear.
Media and media-related organisations	
BBC Scotland	This would be helpful for clarity, even allowing for the inevitability of some post-codification test cases
NUJ	In the event of retention, codification would assist clarity and understanding.
SNS	As above.
Representative bodies (Legal)	
Faculty of Advocates	We are aware of the different interpretations of the origins and categorisation of verbal injury and would support an attempt to resolve that confusion in statute. We will be happy to comment further on any of the specific proposals in due course.
Law Society of Scotland	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.
Senators of the College of Justice	There are uncertainties in this area of the law. There would be merit in clarification in statute.

General Comments	
Christian Angelsen	As someone working on reforming the outdated laws, I'm sure you'd be interested in taking your current opportunity to prevent the libel tourism values to hit London frequently, from simply moving up to Scotland. As someone living in England, I was fairly ignorant of the libel law, free expression in print and how law(s) outdated by the pace of technology were being used to intimidate and stifle public interest and concerns. Well, until Simon Singh got sued by American chiropractors couple of years ago. I'm sure you are well aware of how Sense in Science along with the libel reform campaign and the widespread support both publicly and across political parties in the Parliament led to the justice system undergoing some much-needed reformation. As someone now with an interest in Libel Reform, I would encourage you to bring Scotland's to match England and Wales. Or rather, since Scotland is increasingly becoming famous for leading the way on different issues (such as charging for plastic bags or a named individual for every child in care) I'm sure Scotland can build on the five key issues identified by Libel Reform: • The inclusion of a serious harm test that discourages trivial claims that can chill free expression and inundate Scottish courts with 'vanity' cases; • The creation of a statutory public interest defence that protects the publication of information that benefits public debate and informs civil society across Scotland; • Restricting corporate and public bodies suing for defamation. Corporate bodies do not have a private life, personal identity or psychological integrity. In the spirit of a law to protect citizens and the rights of citizen critics, corporate bodies and associations should be restricted in their ability to sue for defamation; • A single publication rule to replace the multiple publication rule, which currently counts every hit on a website as a new publication of the material on it and therefore a potential fresh cause of defamation action. A single publication rule best reflects communication in the digital age; • Defamation law to be brought up to date for the digital age. The law as it stands makes internet service providers (ISPs), forum hosts and similar entities liable for material published by them/on them. The law should ask claimants to approach authors of material before ISPs become liable for it, to prevent ISPs being forced to take material down in the face of defamation threats. Thank you for taking the time to read my thoughts on this.

Paul Bernal	Scottish Law has a chance to avoid the mistakes that the law of England and Wales made over defamation law, and to make Scotland a place with a good balance between free speech and protection of reputation. Further it could be a place where both of these are accessible to ordinary people rather than just to 'media professionals' and litigious politicians and celebrities. The key to this is to make the new laws clear, comprehensive and as simple as they can be. A number of the responses to the questions that I have made above are along these lines: removing distinctions that create possibilities for excessive legal arguments, for example. The other key here is how Scots Law deals with online defamation – the law of England and Wales to an extent dropped the ball here, failing to provide either proper protection for ordinary people who use social media or clarity for those operating websites. There is an opportunity for Scots Law to take a lead here.
Francis Berry	I would like to add to the requests made for your support to amend the liable laws in Scotland. For too long, unscrupulous individuals and organisations suppress truths via legislation meant to provide safeguards to all who are innocent, rather than those who may be guilty but who have deep pockets. Among the topics for your attention, I would include: Establishing a test to decide the degree of harm, if any, to deter 'vanity' cases cluttering the courts. A restriction on the number of times the same material counts. In these days of mass media posts and/or emails, a single item may appear many times. Attacking each one as if it were a premeditated action would be akin to suing a newspaper, not for a false story, but for every edition in which it appeared. Rather than holding media platforms responsible for all data they carry, create a system to ensure the authors of the information know their material is suspect. At present, the law is willing to act against the courier, regardless of their awareness of the contents of the messages they convey. Create a public interest defence to protect the public's right to receive and, if necessary, debate information concerning civil affairs. Restrict the ability of organisations and/or corporate bodies to sue for defamation. These constructs have no feelings to hurt, and should not have the right to use legislation designed to protect those who do.
Eric Clive	The Commission is to be congratulated for publishing this excellent Discussion Paper. The proposed reforms are important and timely, not because of the 2013 Act but because reform is highly desirable. The law of defamation in its present state does more harm than good.

Campbell Deane	I have previously raised with the Honourable Lord Pentland, Chairman of the Commission, the issue of whilst there is much to benefit the Defender by way of proposed reform the question to the fore is "What is in it for the Pursuer?" I raise that because of the likely impact that such proposed reform will have, as I see it, the likelihood that litigation (and indeed instruction) will all but dry up in this field (particularly should there be harmonisation between English law and Scots) as parties will choose to explore matters in the English courts rather than in Scotland, to the detriment of Scottish practitioners and the Scottish bar. I would submit that there has to be some incentive to proceed in the Scottish jurisdiction and whilst that is not an encouragement to run to litigation in Scotland, there needs to be some divergence either in practical terms through procedural rules or in the substance of the legislation which creates or retains an element of uniqueness in the Scottish defamation field. Historically, under the primary place of publication rule, there was a stream of litigation in Scotland given the level of publication within Scotland. The internet and online publication and the formulation of case law (eg *Dow Jones v Gutnick and Sheville v Press Alliance)* resulted in claimants being able to proceed to litigation where the publication was downloaded. As a consequence from a practitioner opsition, proceedings which would have once found their way in the Scottish system are now litigated south of the border. The reforms brought in to play in England and Wales were done so as a consequence of continuingly high level of cases being brought before the English Courts, many of which were to use the language of the Jameel, "not worth the candle" and many others which were at best forum shopping to use the awards and associated costs aligned with the English jurisdiction as a deterrent to those publishing or defending. That has never been the position in Scotland. That is partly because the costs regime is nowhere near as disproportionate as in England and because the number of cases being litigated in Scotland has historically always remained low. With the exception of those in academic study, most of those practitioners involved in the initial Consultation Group have a propensity towards Defender led work. My own firm for example has probably a division of 70% Defender led work to 30% Pursuer based. Even on those figures however, I am not aware of any other firm in Scotland raising on behalf of Pursuers, more litigation on Defamation matters, than my own. On that basis, given that the majority of those assisting the Commission will have a Defender slant (quiet naturally) to any response provided to the Consultation Paper, my responses herein are provided on the basis of issues which the proposed Consultation Paper will have on any potential Pursuer and particularly where that remedy will be harder and indeed substantially harder to achieve under the new proposals. I do not intend to answer every question contained within the paper but

	will use the same numbering as per the paper in response.
Sameen Farouk	The response finished with a general endorsement of the following general points tendered by the Libel Reform Campaign, namely: • **The inclusion of a serious harm test** that discourages trivial claims that can chill free expression and inundate Scottish courts with 'vanity' cases; • **The creation of a statutory public interest defence** that protects the publication of information that benefits public debate and informs civil society across Scotland; • **Restricting corporate and public bodies suing for defamation**. Corporate bodies do not have a private life, personal identity or psychological integrity. In the spirit of a law to protect citizens and the rights of citizen critics, corporate bodies and associations should be restricted in their ability to sue for defamation; • **A single publication rule** to replace the multiple publication rule, which currently counts every hit on a website as a new publication of the material on it and therefore a potential fresh cause of defamation action. A single publication rule best reflects communication in the digital age; • **Defamation law to be brought up to date for the digital age**. The law as it stands makes internet service providers (ISPs), forum hosts and similar entities liable for material published by them/on them. The law should ask claimants to approach authors of material before ISPs become liable for it, to prevent ISPs being forced to take material down in the face of defamation threats.
David Goldberg	Dr Goldberg expressed general agreement with the response submitted by the BBC.
George Gretton	I incline to think that the law of defamation has done, and continues to do, more harm than good. Accordingly I incline to think that the delict of defamation should be abolished. No doubt the abolition would have some adverse consequences, but these would be likely to be outweighed by the benefits of abolition. Of course, I entirely understand that the ideal of abolition is not possible at the present time. (There is also the question of why we have a separate nominate delict, called defamation, whereas the rest of the law of delict is in principle unitary, ie our law is in general a law of delict, whereas in England there is a law of torts, not a law of tort. In other words, the existence of the delict of defamation is arguably anomalous in terms of the principles of private law. But I merely mention this thought, and do not seek to develop it or to derive any conclusions from it. In this response my objection to the delict of defamation is substantive, not taxonomic.) Given that the delict of defamation will continue to exist, I favour a vigorous haircut, ie as much alteration of the law in favour of defenders as can reasonably be achieved.

Graeme Henderson	Introduction I am an Advocate who called to the Bar in 1987 and have continuously been involved in cases in relation to Defamation and related matters. Much of my specialist knowledge has been gleaned from information that is not available from the provisions contained in the Statutes or published judgments. My knowledge of the law is based on my experience in handling Defamation actions. In most actions there is no Court involvement. Even where there is Court involvement there are unlikely to be written opinions issued. In most cases where interim interdict is sought a decision is made without the Court issuing an opinion. My knowledge is also based on discussions of cases that I have not been involved in where no judgment has been issued. The Scottish Law Commission is to be congratulated on raising the issue of what is to happen to the development of Scots Law in the light of changes that have taken place in England and Wales. It should be noted that there appears to be no gathering force of public sentiment in Scotland, analogous to the events that led up to the passing of the Defamation Act 2013.
Dr Brooke Magnanti	I am writing as a supporter of the Libel Reform Campaign to support the Scottish Law Commission's work to reform defamation legislation in Scotland. I am also writing as someone who has been significantly affected by the outdated laws. There needs to be a serious harm test that discourages trivial claims that inundate Scottish courts with 'vanity' cases. Cases which have already been heard in other jurisdictions eg. England and Wales, with only minor changes to be brought to Scottish courts, aka 'jurisdiction shopping', also need to be eliminated. Also where the complainant was not resident in Scotland at the time of injury, the suit should not be accepted. There must be creation of a statutory public interest defence that protects publishing information that benefits public debate. We also need restrictions on corporate and public bodies suing for defamation. Corporate bodies do not have a private life, identity or psychological integrity. In the spirit of a law to protect citizens and the rights of citizen critics, corporate bodies and associations should be restricted in their ability to sue for defamation. A single publication rule must replace the multiple publication rule, which currently counts every hit on a website as a new publication of the material on it and therefore a potential fresh cause of defamation action. A single publication rule best reflects communication in the digital age. The time period in which suits can be brought should also be reduced. I hope you can take these issues into account as you consider reform in Scotland. **[***Remainder of response deleted as confidential***]**
Sibyl (Member of the public, Australia)	We are no longer looking to USA for guidance. We see that the people's lives in Scotland and Britain are improving. So we can look to your legal system

	for guidance. I see that in Scotland you are looking into Libel Reform. Here in Australia, the fact that the public cannot find out what is going on, are kept in the dark about so many important things, is abhorrent. For Democracy to succeed, the people need lots of accurate information. and to know of suspicions of wrong doing, and not be afraid of telling others what they have found. As you can see we are especially interested in "The Creation of a statutory Public Interest Defence". Please make sure that, if a verbal or written statement, is given out so that we, the public, are better informed the person doing so CANNOT BE TAKEN TO COURT.
Simon Singh	I do not live in Scotland, but I am a science writer and my work in published (and hopefully enjoyed) in Scotland, so I have a direct interest in libel reform. Moreover, I was sued for libel in 2008 in London, and my case helped galvanise the campaign for libel reform in England & Wales. I very much support the Scottish Law Commission's work to reform defamation legislation in Scotland. In particular, they are highlighting the impact of libel law on those who operate beyond the mainstream media, namely citizen journalists, community bloggers and social media users, who can play an important role in informing the wider community about a range of issues. Achieving a defamation law that protects free expression and the role of the citizen critic in a free society will require fundamental changes to the law. Your work to reform our out-dated laws offers an unprecedented chance to strengthen Scotland's commitment to free expression. As part of your public consultation process I would like reinforce the Libel Reform Campaign's call for: - The inclusion of a serious harm test. - The creation of a statutory public interest defence. - Restricting corporate and public bodies suing for defamation. - A single publication rule to replace the multiple publication rule. - Defamation law to be brought up to date for the digital age. I think it is fair to say that similar changes already implemented in England & Wales have had a positive impact in encouraging free speech, while still balancing this against the right to reputation.

	I hope you can take these issues into consideration as you look to identify what reform looks like in Scotland. This is an important step to reassure Scottish citizens that free speech will be given stronger protections and that the vexatious culture that has grown around the law of defamation will finally be reformed.
Ursula Smartt	There are clearly increasing problems in relation to defamation conducted on the internet ('internet libel') and there has to be a concept of self-governance in cyberspace as opposed to governmental territorial legislation. The Defamation Act 2013 has already had some success in England and Wales due to the threshold of the 'serious harm' test under s 1(1) of the 2013 Act. Arguably, the existing definition of what is defamatory has not changed with the 2013 Act, and there is still no clear definition of what is meant by 'defamatory' (or indeed 'qualified privilege'). This might be the chance for the Scottish law-makers to improve on the 'English' Act. One thing is clear though: it has become more challenging to bring an action in defamation in the English/ Welsh courts and libel tourism may well have shifted to the Scottish and Northern Irish courts.
Mark Whittet	• **The inclusion of a serious harm test** that discourages trivial claims that can chill free expression and inundate Scottish courts with 'vanity' cases; • **The creation of a statutory public interest defence** that protects the publication of information that benefits public debate and informs civil society across Scotland; • **Restricting corporate and public bodies suing for defamation**. Corporate bodies do not have a private life, personal identity or psychological integrity. In the spirit of a law to protect citizens and the rights of citizen critics, corporate bodies and associations should be restricted in their ability to sue for defamation; • **A single publication rule** to replace the multiple publication rule, which currently counts every hit on a website as a new publication of the material on it and therefore a potential fresh cause of defamation action. A single publication rule best reflects communication in the digital age; • **Defamation law to be brought up to date for the digital age**. The law as it stands makes internet service providers (ISPs), forum hosts and similar entities liable for material published by them/on them. The law should ask claimants to approach authors of material before ISPs become liable for it, to prevent ISPs being forced to take material down in the face of defamation threats
Campaign group	
Libel Reform Campaign	Reform is necessary in the light of the criticism of UK defamation laws from the UN Committee on Human Rights in the 2008 report on the implementation of the International Covenant on Civil and Political Rights: "The Committee is concerned that the State party's practical application of the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as "libel tourism." The advent of the internet and the international distribution of foreign media also creates the danger that a State party's unduly restrictive libel law will affect freedom of expression world-wide on matters of valid public interest."

	CCPR/C/GBR/CO/6 at para 25
Insurance interest	
Aviva	We feel there is a real opportunity for reform of defamation in Scots Law, learning from the experience in England and Wales and adopting in Scotland those parts from the 2013 Act which are seen to be successful, whilst also retaining particular elements of Scots law to bring into law a system which is proportionate in terms of costs and at the same time, fair to all parties.
Media and media-related organisations	
BBC Scotland	The SLC paper is appreciated for the incisiveness, 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.
Tom Brown (Journalist)	The need for reviewing and modernizing the law of defamation in Scotland is self-evident to anyone practicing journalism as a profession. Not least because of disturbing developments in which cost-cutting managements are over-riding and dispensing with the traditional safeguards for sourcing, checking facts, ensuring accuracy and establishing public interest as opposed to tabloid-style prurience. In any case, it is hard to see why anyone would object to having the defences of truth, honest opinion and publication on a matter of public interest enshrined in statute and for those claiming to be victims of defamation to have to show they have suffered serious harm. The advent of social media, blogging and Internet publication also demands that Scottish law be updated. **[***Paragraph deleted as confidential***]** The principles of justifiable truth and fair comment should be the same across jurisdictions and similarly with provable damage to reputation, financial loss and public opprobrium caused by a defamation. In cases involving mass-circulation newspapers and other media outlets which originate in London and are widely published in Scotland, the law should be comparable and applicable on both sides of the border; even more so in Internet cases where jurisdictions outside the UK may be used as refuges from legal action. Freedom of information is too precious a principle to jettison in the way that is happening under existing law. For a practical journalist, nothing is more frustrating than being unable to publish a well-founded and accurate story because of restrictive laws in this country when that same story is receiving wide attention and comment everywhere else, and is freely available to those where to seek it out on the Internet. There have now been numerous cases of ‘celebrities’ gagging the British

	media even when the stories affecting them are already in the public domain. If the story is untrue or causes disproportionate harm, their remedy should be the time-honoured 'publish and be damned' and then seek punitive damages and apologies in the public courts. **[***Remainder of response deleted as confidential***]**
Google	Google welcomes the opportunity to provide comments on the many important issues addressed by the Scottish Law Commission in their Discussion Paper on Defamation (the "Paper"). As the development of information technology, the internet and social media empowers individuals with more effective tools with which they can share and access information, we believe that all of the relevant stakeholders must work together to ensure that the correct balance is maintained between the rights of individuals to take action to protect their reputation where appropriate, and the rights of individuals to express themselves freely without being unjustifiably impeded by actual or threatened legal proceedings. We believe, therefore, that Scotland should develop a legal framework that facilitates free expression online whilst giving individuals the tools to enable them to protect their reputation. Such a framework should discourage those who would seek to use defamation law to stifle legitimate public debate and criticism, whilst also helping to educate the new generation of authors online that they remain responsible for the content that they produce. Such a framework should reflect the laws governing ecommerce in the EU (particularly, the Ecommerce Directive, Directive 2000/31/EC), which provide clarity to internet intermediaries regarding the legal protection regime that applies to the activities on their services. We also agree that it is important for the development and maintenance of a vibrant digital economy that pressures to shift liability for online content away from those who are actually responsible for generating and posting that content are properly scrutinised and ultimately resisted. In the main, internet intermediaries are neither the primary nor secondary publisher of content, nor the authors or editor of content. Innovative new online products and services, such as tools and platforms for users to create, share and find content, cannot be expected to develop if they are not provided with legal protection. The services that many of us take for granted today would not exist without such legal protection. **The Defamation Act 2013 and EU Framework** The Defamation Act 2013 of England and Wales (the "2013 Act") introduced significant improvements to the defamation law of England and Wales. The reforms brought about by the 2013 Act provided welcomed legal clarity and codification of the law by defining some of the boundaries of free speech, protecting an individual's reputation from harm caused by the publication of defamatory statements, and recognising the need to educate those who create content that they remain responsible for that content.

	Google supports the view that Scotland should not be seen to be left behind by the developments in England and Wales in this important area of law, and we echo the concerns, noted by the Law Commission, that real practical disadvantages are likely to arise if defamation law is formulated differently in the jurisdictions making up the UK. As well as agreeing with the desirability of adopting a consistent approach to defamation law across the UK, we believe that it is essential that any amendments or new legislative provisions made to the law on defamation in Scotland are consistent with the regime set out in the Ecommerce Directive. This was established in the late 1990's following a careful assessment of all of the relevant factors to ensure that the resultant online intermediary liability regime was practical, uniform, acceptable to industry and also protective of consumers, citizens, institutions and businesses. Such factors remain just as relevant today as they did in 2000. As an OECD report on the role of Internet intermediaries stated in 2011, "[s]ince growth and innovation of ecommerce and the Internet economy depend on a reliable and expanding Internet infrastructure, an immunity or "limited liability" regime was, and is, in the public interest" **Freedom of Expression** We believe that any reform of defamation law must be carefully implemented in order to avoid undue interference with the right to freedom of expression, including the right to seek, receive and impart information online. As is noted in the Law Commission's Paper, without sufficient and clear protection from liability, internet intermediaries may well simply decide that the easiest path to take is to delete or block content upon receipt of an allegation that the content is defamatory, even where that content is not obviously unlawful. In the context of defamation law reform in England and Wales, some have appeared to suggest that a 'take down first, ask questions later' approach to allegations of online defamation is an appropriate one, suggesting that the content authors can always complain if they take issue with the removal of their content. Google firmly believes that such an approach is not appropriate, as it fails to attempt any meaningful balancing of the rights at issue, and dismisses the potential "chilling effect" of such hasty removals. Google takes the issue of online defamation seriously. We appreciate that there is a delicate balancing act to be done in seeking to protect an individual's reputation from harm caused by the publication of false statements, whilst preventing a "chilling effect" on freedom of expression with the censorship of meritorious communications for fear of potential claims. The challenges of striking this balance have been discussed at length by the UN Special Rapporteur on Freedom of Expression, who has noted that the internet has become a key means by which individuals can exercise their right to freedom of opinion and expression, as guaranteed by Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The right to freedom of opinion and expression is as much a fundamental

	right on its own accord as it is an "enabler" of other rights, including economic, social and cultural rights, such as the right to education, the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications, as well as civil and political rights, such as the rights to freedom of association and assembly. Any reform of the law of defamation must therefore avoid imposing undue restrictions on freedom of expression which go further than is necessary to achieve the desired objective of vindicating a person's reputation when defamatory statements have been published.
Publishers	
The Publishers Association/Publishing Scotland	The Publishers Association, based in London, and Publishing Scotland, in Edinburgh, bodies representing the book publishing sector in the UK, are writing to endorse the submission made by the Libel Reform Campaign to the Scottish Law Commission's discussion paper on Defamation. Book publishers publish titles in print and digital formats for UK and international markets. The differences between the laws pertaining to defamation/libel within the UK, particularly between Scotland and Northern Ireland on the one hand, and England and Wales on the other, mean that there is an uneven terrain of different rules that is not conducive to freedom of speech and to publish, and can be a barrier to both. An update on the laws would also be desirable to take into account the new platforms and methods of publication used by publishers that have developed in the past twenty years.
Representative bodies (Legal)	
Senators of the College of Justice	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 our 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.
Sheriffs' Association	Thank you very much for alerting the Sheriffs' Association to this publication, the hard copy, and the opportunity to respond to this consultation. We have considered the contents of the publication with great interest. However, I have been asked by the Council of the Sheriffs' Association to advise you thank we do not wish to offer any comment on this consultation.