Scottish Law Commission

promoting law reform

(SCOT LAW COM No 248)

Report on Defamation

report

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Report on Defamation

Laid before the Scottish Parliament by the Scottish Ministers
under section 3(2) of the Law Commissions Act 1965

December 2017

SCOT LAW COM No 248
SG/2017/263

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 (as amended) for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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ISBN: 978-0-9935529-8-4

Produced for the Scottish Law Commission by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA.

SCOTTISH LAW COMMISSION

Item No 5 of our Ninth Programme of Law Reform

Report on Defamation

To: Michael Matheson MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on Defamation.

(Signed) PAUL B CULLEN, *Chairman*
C S DRUMMOND
D E L JOHNSTON
HECTOR L MACQUEEN
ANDREW J M STEVEN

Malcolm McMillan, *Chief Executive*
7 November 2017

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Abbreviations

1973 Act,
: Prescription and Limitation (Scotland) Act 1973 (c. 52)

1996 Act,
: Defamation Act 1996 (c. 31)

2013 Act,
: Defamation Act 2013 (c. 26)

Electronic Commerce Directive,
: Directive on Electronic Commerce (2000/31/EC)

2002 Regulations,
: Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013)

2013 Regulations,
: Defamation (Operators of Websites) Regulations 2013 (SI 2013/3028)

The Discussion Paper,
: Discussion Paper on Defamation (Discussion Paper No 161 (2016)), available at: https://www.scotlawcom.gov.uk/files/5114/5820/6101/Discussion_Paper_on_Defamation_DP_No_161.pdf

The Draft Bill,
: Draft Defamation and Malicious Publications (Scotland) Bill, as consulted upon by SLC between 31 July and 31 August 2017, available at: https://www.scotlawcom.gov.uk/files/5715/0123/0435/Defamation_and_Malicious_Publications_Scotland_Bill_-_consultation_draft_-_Bill.pdf

The Northern Irish Report,
: Dr Andrew Scott's Report to the Northern Ireland Executive, entitled "Reform of Defamation Law in Northern Ireland", published June 2016 and available at: https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/report-on-defamation-law.pdf

NUJ,
: National Union of Journalists

SNS,
: Scottish Newspaper Society

Chapter 1 Introduction

Introduction

1.1 In this Report, we recommend a number of important reforms to the law of defamation and verbal injury. Our aim is to modernise and simplify Scots law in these areas so as to ensure that it strikes the correct balance between the fundamental values of freedom of expression on the one hand and protection of reputation on the other. Achieving the right balance between these two principles is a particularly sensitive issue in the age of the internet and social media. Whilst defamation litigation has not been especially common in Scotland in recent years, the law on the subject is of considerable importance in modern society, not least because of the ease and speed with which information can now be transmitted. Whilst the internet has allowed people to communicate far more effectively and much more widely than ever before, it has also meant that reputations can be quickly and, in some cases, unfairly tarnished. This has given rise to new challenges for defamation law. We believe that our recommendations would serve to improve and strengthen the law in a modern context, as well as making it more accessible and easier to understand.

1.2 Defamation may be described as the civil wrong committed when a person makes a false and damaging imputation against the character or reputation of another person.[1] The essence of what makes a statement defamatory is whether it would damage the reputation of the pursuer in the eyes of the ordinary reader, viewer, or listener.[2] Verbal injury is a civil wrong analogous to, though distinct from, defamation. One important difference between these two civil wrongs is that in an action based on verbal injury the pursuer must prove that the defender acted with malice in the sense that he or she intended to cause injury by making the statement complained of; this is not (usually) a requisite of a successful action based on defamation.

1.3 The general background to our project lies in the reforms made to defamation law in England and Wales by the Defamation Act 2013 ("the 2013 Act"). The 2013 Act was the culmination of a long-running civil society campaign for libel[3] reform: this developed over the course of a decade or more in the years following the millennium.[4] The campaign was motivated by concerns over the practice described as 'libel tourism'[5] and what was perceived to be its resultant chilling effect on freedom of expression. Another influence behind the campaign was concern over the increase in the volume of libel actions brought against non-governmental organisations, scientists, and academics with a view, it was said, to

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[1] See F T Cooper, *The Law of Defamation and Verbal Injury* (2nd edn, 1906), p 1; K McK Norrie, *Defamation and related actions in Scots law* (1995), pp 8 to 11; E C Reid, *Personality, Confidentiality and Privacy in Scots law* (2010), p 131; Gloag and Henderson, *The Law of Scotland* (14th edn, 2017), para 29.01.

[2] *Sim v Stretch* [1936] 2 All ER 1237, per Lord Atkin at 1240.

[3] Libel in this context may be taken to include oral and written defamation. In the law of England and Wales oral defamation is known as slander and written defamation as libel. Scots law does not recognise any such distinction.

[4] See our Discussion Paper on Defamation (Scot Law Com DP No 161, 2016) ("the Discussion Paper"), at paragraphs 1.4-1.10.

[5] The practice of bringing defamation claims in England and Wales despite the case having no real connection with that jurisdiction.

suppressing legitimate criticism of authority and alleged abuses of power. A third factor leading to the campaign was the enactment by a number of legislatures in the United States of legislation designed to prevent the enforcement of libel judgments issued by courts in England and Wales.[6]

1.4 The civil society campaign and the political support it gathered led eventually to the enactment of the 2013 Act.[7] It introduced important reforms intended to reset the law of defamation for modern times: amongst other changes in the law discussed more fully later in the present Report, the Act introduced a threshold requiring a claimant to show serious harm before an action could competently be brought; greater protection was provided for website operators; repeated publication would no longer trigger new limitation periods; and actions could be brought only if England and Wales was shown to be clearly the most appropriate jurisdiction for hearing them.

1.5 The Scottish Government decided not to move to extend most of the provisions of the Act to this country, with the exception of a small number of provisions relating to privilege in academic and scientific activities.[8]

Background to this project

1.6 Consultation on our Ninth Programme of Law Reform in 2014 elicited a substantial number of submissions proposing that we should examine the law of defamation in Scotland. Amongst those supporting a project in this area were the Law Society of Scotland, the Faculty of Advocates, BBC Scotland, and the Libel Reform Campaign. They and other respondents drew particular attention to the major reforms of the law of England and Wales introduced by the 2013 Act.

1.7 We formed an advisory group to assist us in understanding how the current law works in practice and in developing our ideas for reform of the law. We are grateful to the members of the advisory group for their assistance throughout the project. We published our Discussion Paper in March 2016. We thank all those who took the time to respond. In April 2016, in association with Edinburgh University Law School Centre for Private Law, we held a seminar on reform of defamation law and verbal injury; this was attended by a wide range of stakeholders, including delegates from England and Wales and Northern Ireland. A further seminar on defamation law reform was hosted on our behalf by Pinsent Masons LLP in June 2016. In October 2016 we held a roundtable discussion on defamation and the new media. In August 2017, we launched a consultation on the draft Defamation and Malicious Publications (Scotland) Bill ("the draft Bill"), and asked for comments on it. A revised version of the draft Bill is attached to the present Report. In formulating the recommendations set out in this Report we have attempted to take account of views expressed to us by stakeholders during the project. In what follows we refer, where appropriate, to the consultation responses on the Discussion Paper and the draft Bill. They are published in full on our website.

[6] See paragraph 1.5 of the Discussion Paper.
[7] For a more detailed account of the background to the 2013 Act see paragraphs 1.4-1.8 of the Discussion Paper.
[8] See paragraph 1.2 of the Discussion Paper.

Our approach

1.8 We did not confine our approach to examining whether and to what extent the reforms reflected in the 2013 Act might be suitable for adoption in Scots law, subject to any appropriate modifications or improvements. We also considered other aspects of Scots defamation law that we thought might be in need of reform. These included: whether publication to a third party should become a requisite of an action for defamation; reform of remedies; and defamation of deceased persons. As mentioned above, we also examined the law relating to verbal injury.

Structure of the Report

1.9 The Report is divided into ten further chapters and three appendices. In chapter 2 we consider whether Scots law should continue to allow defamation actions to be based on private communications without a need for publication of the statement complained of to a third party. We recommend that publication to a third party should become a necessity for a competent action. We also address the need for a threshold test of serious harm and propose that one should be introduced. We consider too whether and to what extent there should be a bar on the bringing of defamation proceedings by public authorities. We make a number of recommendations in this connection. In chapter 3 we look at whether the main common law defences of truth, publication on a matter of public interest, and fair comment should be put on a statutory basis. We recommend that they should be; and that the existing defences should be abolished. Chapter 4 is concerned with the bringing of proceedings against internet intermediaries, such as search engines and blogging sites. We recommend new rules providing stronger protections for such secondary publishers. In chapter 5 we examine the law on absolute and qualified privilege; we recommend that the rules should be set out in a new Act. Chapter 6 deals with the remedies available in defamation proceedings, including the system for offering to make amends. We recommend a number of increased powers for the courts, including power to order publication of a summary of the court's judgment and to require removal of statements by website operators. The law on limitation of actions is considered in chapter 7. Here we recommend, amongst other changes, that there should be a restriction on the opportunity to bring proceedings in relation to republication of material, as well as a reduction in the limitation period within which defamation actions can be brought from three years to one. In chapter 8 we consider the rules on jurisdiction and examine whether there should continue to be an automatic right to trial by jury; we recommend that this should be modified. In chapter 9 we look at the law on verbal injury and recommend a number of reforms. Chapter 10 discusses whether the law should allow cases to be brought where a deceased person has been defamed; we recommend that this should not be permitted. Finally, we list our recommendations in chapter 11. Appendix A sets out the draft Defamation and Malicious Publication (Scotland) Bill. In Appendix B we provide a list of those who responded to the Discussion Paper. Appendix C contains a list of respondents to the consultation on the draft Bill.

Legislative competence

1.10 As we explain in the following paragraphs, we take the view that the issues covered by this Report fall within the legislative competence of the Scottish Parliament.

1.11 The subject matter of this Report is of primary relevance to two European Convention rights: the right under Article 8 ECHR to respect for private and family life and the Article 10 ECHR right to freedom of expression. We consider that the draft Bill strikes an appropriate balance between the two. For example, the threshold of serious harm, and the requirement of communication to a third party, as provided for in section 1 of the draft Bill, serve to narrow the opportunity to bring proceedings in defamation to protect Article 8 rights. On the other hand, evidence from the courts' application of the threshold test south of the border is that serious harm is capable of being inferred in appropriate circumstances.[9] So a disproportionate effect on Article 8 rights cannot be said to have resulted from the introduction of the new threshold for bringing proceedings.

1.12 It is likely to be in the interests of both those seeking to bring defamation proceedings, and those faced with defending them, that key principles of defamation law, along with the substance of the main defences, be placed on a statutory footing. This should serve to enhance certainty and clarity as well as making the law more transparent and accessible. Similarly, the move to bring provisions currently in 'outlying' statutes – namely those relating to privilege and offers to make amends – into the Bill should enhance the overall accessibility of defamation law, meeting the "in accordance with law" test in Article 8 ECHR.

1.13 In relation to Article 10 ECHR, we are of the view that any potential restrictions on freedom of expression in the draft Bill are justified on the basis that they are prescribed by law and are necessary in a democratic society for the protection of the reputation or rights of others.

1.14 In the Discussion Paper we raised the possibility that any provision relating to responsibility and defences of internet intermediaries might come up against the reservation in relation to internet services in section C10 of Schedule 5 to the Scotland Act 1998. On further reflection we tend now to think that section C10 should be regarded as relating to the regulation and operation of the provision of internet services at a high level rather than to more detailed issues such as the law of defamation as it applies to the publication of material online. To that extent it should not be of relevance. Even if this argument is not accepted, however, we consider that there would be scope to rely on section 29(4) of the Scotland Act 1998. The effect of section 29(4) is that modifications of Scots private law as it applies to reserved matters are outside competence unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise. The relevant provisions of the Bill – sections 3 and 4, relating to proceedings against secondary publishers – will apply to such publishers operating offline, in contexts clearly falling within the legislative competence of the Scottish Parliament, as well as those online. As mentioned in Chapter 4 below, an example may include the situation of a person 'moderating'[10] letters to the editor of a magazine which is printed in hard copy.

[9] See *Lachaux v Independent Print Ltd and others* [2017] EWCA Civ 1334.

[10] Moderation of content involves editing it to remove obscene, abusive or irrelevant material. The term is typically (although not exclusively) used in the context of internet forums and blogs.

Commencement and transitional provisions

1.15 If the Scottish Government decides to implement the recommendations contained in this Report, it will clearly be important that appropriate commencement and transitional provisions are made. In terms of section 35 of the draft Bill, commencement will take place predominantly in accordance with dates appointed in regulations made by the Scottish Ministers. This is subject to a limited number of exceptions, namely sections 34 to 38, which are to come into force on the day after the draft Bill becomes law. Included among these provisions are those governing interpretation and ancillary matters.

1.16 Some provisions of the draft Bill make clear on their face that they do not have effect in relation to defamation proceedings if the right to bring the proceedings accrued before the relevant section came into force. These are section 1, dealing with threshold of seriousness; section 8(2), dealing with abolition of common law defences and the replacement statutory defences in sections 5 to 7; section 12, dealing with the provisions on privilege in sections 9 to 11 and the schedule; section 18, relating to the offers to make amends provisions in sections 13 to 17; and section 27, dealing with abolition of common-law verbal injury. The provisions relating to jurisdiction (section 19), jury trials (section 20) and remedies (sections 28 to 30) do not have effect in relation to defamation proceedings begun before commencement of the section in question. The result is that, for example, where the right to bring proceedings accrued before the relevant provision came into force, it will be competent, as appropriate, to rely on the relevant common-law defence or common law verbal injury. Moreover, it will not be necessary to satisfy the statutory serious harm threshold in order that proceedings in defamation be allowed to go ahead. As regards the changes to application of the rules on limitation of actions, section 32(5) of the draft Bill makes clear that these changes are not to be taken to have any effect insofar as an action is brought in relation to a statement which was published before section 32 came into force. This reflects the fact that the changes serve to reduce the scope for bringing actions in defamation and what was formerly known as verbal injury. In addition to these specific provisions on transitional matters, contained within the Bill, section 37 confers on the Scottish Ministers the power to make regulations relating to commencement which include, amongst other things, the power to make further transitional provision if necessary.

Business and Regulatory Impact Assessment

1.17 The Scottish Government requires a business and regulatory impact assessment to accompany proposed legislation. This is published on our website[11]. We are grateful to those who provided information that assisted in its preparation. Its principal conclusions are:

- maintaining the existing law is not desirable;
- our recommendations can only be achieved by the introduction of new legislation;
- our recommendations would bring increased clarity, certainty and fairness and reduce the need to resort to court action; and
- the implementation of our recommendations would be likely to reduce costs.

[11] See Defamation project page at - https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/defamation/.

Acknowledgements

1.18 We are grateful to all those who have assisted us in the course of this project. In particular, we extend our thanks to members of our advisory group; those who attended the seminars held at the University of Edinburgh on 22 April 2016 and Pinsent Masons LLP on 29 June 2016; participants in the roundtable discussion on defamation and new media held on 11 October 2016; those who responded to the consultation on the Discussion Paper and those who responded to the consultation on the draft Bill.

Chapter 2 Third party communication requirement and the threshold test

Introduction

2.1 This chapter makes recommendations on several aspects of actionability of defamatory statements, including in relation to the bringing of proceedings by non-natural persons which exist for the primary purpose of trading to make a profit, and by public authorities. The term "statement" is given a wide definition in the draft Bill, to include visual images, gestures etc.[1] We use the term 'proceedings' in the Bill to reflect the fact that an *action* may not always be involved. Where interdict is all that is sought the proceedings may be brought under petition procedure in the Court of Session.

Requirement of communication of a defamatory statement to a third party

2.2 In Scots law defamation can arise where a damaging imputation is communicated only to the person who is the subject of it; in other words if it is seen, read or heard only by its subject and by no one else.[2] We raised in the Discussion Paper the question whether communication of a defamatory imputation to a third party should become a requisite of a cause of action in defamation.[3] The majority of respondents to the question expressed support for this. The flavour of the majority view was reflected in the comments of Roddy Dunlop QC, who described the existing state of the law as archaic and indefensible in a modern legal system. He indicated that the current law failed to give appropriate weight to (a) the fundamental purpose of defamation, namely to protect reputation; (b) Article 10 ECHR rights, which include the right to shock or offend; and (c) a need for proportionality, as reflected in cases such as *Jameel (Mohammed) v Wall Street Journal Europe Sprl*[4] and *Ewing v Times Newspapers* Ltd.[5]

2.3 Those who were not in favour, including the Faculty of Advocates and Stephen Bogle, thought that the principle might have continuing relevance in the online age, most notably in the context of emails where only the recipient reads the defamatory email. They pointed to restrictions on the availability of the alternative forms of recourse. These are discussed in greater detail below. The Law Society of Scotland highlighted that the making of a defamatory statement could cause severe hurt to feelings; they took the view that there should be a remedy available for this. For that reason they tended to the view that it should continue to be competent for an action in defamation to be brought even where an imputation was conveyed only to its subject.

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[1] See section 34(b).
[2] *Mackay v McCankie* (1883) 10 R 537; Discussion Paper, paragraph 3.1.
[3] See paragraphs 3.1-3.4 of the Discussion Paper and question 3.
[4] [2007] 1 AC 359.
[5] [2010] CSIH 67.

2.4 We have decided that a defamatory statement should only be actionable where it is published to someone other than the person who is the subject of it. The draft Bill provides in section 1(2)(a) that one of the requisites of a right to bring defamation proceedings is that a statement that is alleged to be defamatory is conveyed to a person other than the subject of it. This is consistent with the approach favoured by the majority of respondents to this question. Equally, it is consistent with the recommendation, discussed below, that a threshold of serious harm to reputation should be introduced. A threshold based on harm to reputation is clearly irreconcilable with the idea that proceedings in defamation can be brought where a statement has not been circulated beyond its subject. This may give rise to hurt feelings or damage to self-esteem, but there can be no reputational damage if no third party is aware of what has been said. Even leaving aside the question of reconciling the rule about no need for communication to a third party with the new threshold, we regard this rule as antiquated, not to mention being out of step with the position in most, if not all, other parts of the world. It fails to recognise what is the fundamental purpose of defamation law, namely to protect *reputation.* Offensive emailing and texting seem to be dealt with more appropriately by the law against harassment and by communications legislation. We consider each of these in more detail in turn below, along with the perhaps less commonly relied upon delict of intentional infliction of mental harm. Suffice it to say that all of these areas carry requirements or characteristics which mean they are unlikely to offer a substitute in every situation. However, we think that they are likely to go a considerable way towards filling gaps in cases where legal intervention is truly justified.

Protection from harassment

2.5 Section 8 of the Protection from Harassment Act 1997 prohibits the pursuit of a course of conduct which amounts to harassment. "Conduct" includes speech and "harassment" is defined to include causing a person alarm or distress. One limiting factor is, however, the fact that the section operates only in relation to a *course of conduct*. This means that the conduct must have taken place on at least two occasions.[6] Injury may, though, in practice, be caused by the making of a single, one-off statement. Case law in relation to the meaning of harassment in the equivalent provision for England and Wales – section 1 of the 1997 Act – suggests that conduct must reach a certain level of severity before it will constitute harassment. In other words, it must pass from what may be described as everyday annoyances and irritations, with which people must put up as part of life, to 'conduct which is oppressive and unacceptable.'[7] It seems reasonable to assume that a similar approach would be taken in Scotland.[8] Otherwise conduct that was simply thought irritating or undesirable would be caught.

Offensive communications

2.6 Of potential relevance in this context is the offence under section 127(1) of the Communications Act 2003 of sending a grossly offensive, indecent, obscene or menacing message by means of a public electronic communications network, or causing such a message to be sent. There is also the offence in section 127(2) of sending, or causing to be

[6] See section 8(3) and *McGlennan v McKinnon* 1998 SLT 494.
[7] *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 at paragraph 30 (per Lord Nicholls).
[8] For recent Scottish case law on section 8 see *Vaickuviene and Others v J Sainsbury Plc* 2014 SC 147, *Green v Chalmers* 2017 SLT (Sh Ct) 69 and *McWilliams v Russell* 2017 GWD 32-510.

sent, via a public electronic communications network, a message known to be false, for the purposes of causing annoyance, inconvenience or needless anxiety to another person.[9]

Intentional infliction of mental harm

2.7 The wrong of intentional infliction of mental harm may also come into play here, assuming the Scottish Courts are willing to accept the reformulation in *O (a child) v Rhodes.*[10] This has given rise to a re-casting of the wrong, departing from the formulation in the much earlier case of *Wikinson v Downton.*[11] The *Rhodes* case involved reliance on the principle laid down in *Wilkinson* to prevent psychological harm being caused to a child by the publication of a semi-autobiographical book containing graphic details about the troubled life of his father. The court in *Wilkinson* had recognised as a tort wilful infringement of the right to personal safety. This had three elements – a conduct element, a mental element and a consequence element. The court in *Rhodes* took the view that recklessness should not be sufficient to satisfy the mental element. In other words, a fair balancing of the interests affected required that the mental element involved *actual intention* to cause physical harm or severe mental or emotional distress, rather than recklessness as to whether this happened. This meant that a person who intended to cause another person to suffer severe mental or emotional distress bore the risk of liability in law if the deliberately-inflicted distress caused the other person to suffer a recognised psychiatric illness.

2.8 We therefore recommend that:

1. It should be competent to bring defamation proceedings in respect of a statement only where the statement has been communicated to a person other than its subject, with that person having seen or heard it and understood its gist.

(Draft Bill, section 1(2)(a) and (4))

Threshold of serious harm

2.9 Section 1 of the 2013 Act introduced a new requirement to show serious harm to reputation before a statement could be held to be defamatory. We, therefore, raised in the Discussion Paper the question whether a statutory threshold should be introduced in Scots law requiring that a certain level of harm to reputation should be caused by the statement complained of, in order that a defamation action could be brought.[12] The majority of those who responded to this question – a total of 21 out of 29 – supported such a move. These included Roddy Dunlop, NUJ, BBC Scotland, Google and the Libel Reform Campaign. The Libel Reform Campaign noted that the section 1 test had not proved to be an insurmountable hurdle for those with a reputation which was localised. Moreover, there was evidence that it tended to incentivise prompt correction of statements in England and Wales. The chances of a defamation action being brought in the first place were therefore thought to be diminished. With this came increased space for freedom of expression in England and

[9] For a Scottish case on section 127 see *Brown v Procurator Fiscal, Ayr* 2017 SLT (Sh Ct) 63. *Brown* refers to the English of case of *DPP v Collins* [2006] UKHL 40.
[10] [2016] AC 219.
[11] [1897] 2 QB 57.
[12] See paragraphs 3.5-3.24 of the Discussion Paper and question 4.

Wales. On the other hand eight respondents expressed either qualified support for a statutory threshold, or opposition. Among those opposed to the idea, the Faculty of Advocates expressed concern that the introduction of a statutory threshold test could add unnecessary complexity and cost. Campbell Deane considered that a test equivalent to that in section 1(1) may tilt matters unduly in favour of the defender. He did not wish to see pursuers faced with overcoming an additional hurdle in order to bring a matter to proof, particularly where this could involve the extra expense of providing a greater level of evidence at an earlier stage in the proceedings than is currently required. Similar views were expressed by both of these respondents during consultation on the draft Bill. SNS expressed concern that making the law in Scotland identical to that of England and Wales as regards the existence of a threshold may cause proceedings to be brought in England and Wales rather than Scotland. The higher costs of proceedings there could operate to the significant detriment of newspaper publishers in Scotland, who were already suffering as a result of falling revenue.

2.10 The clear weight of opinion of respondents has to be taken together with other considerations pointing in favour of the introduction of a statutory threshold. As considered in the Discussion Paper, it appears that, in light of the judgement of Warby J in *Lachaux v AOL (UK) Ltd*,[13] and the trend since, the issues of costs and complexity thought in the early days of the 2013 Act to be associated with the section 1(1) test are not as significant as was initially feared. In *Lachaux,* an inference of serious harm was drawn on the basis of published allegations that the claimant had subjected his wife to years of domestic abuse, falsely accused her of kidnapping their son, thereby subjecting her to a risk of being imprisoned, and abducted their son. This decision was upheld by the Court of Appeal in September 2017, although the Court of Appeal took the view that an unnecessarily elaborate procedure, extending to a two day hearing with the presentation of evidence and detailed written arguments, had been adopted at first instance.[14] In giving the leading judgment (with which the other members of the Court of Appeal agreed) Davis LJ made clear that serious reputational harm was capable of being proved by a process of inference from the seriousness of the defamatory meaning.[15] As regards costs, we can see no reason why the courts should not be able to control costs by effective use of case management powers. There seems to be a firm move in this direction in England and Wales. This can be seen, for example, in the view expressed by the Court of Appeal in *Lachaux* that complex pre-trial hearings on the serious harm question should be discouraged and would usually not be necessary.[16]

2.11 It is to be borne in mind, too, that if our recommendation that third party communication becomes a requisite of a right to bring proceedings in defamation is implemented, it is likely that the Scottish courts would move towards adopting the abuse of process test laid down in the case of *Jameel (Yousef) v Dow Jones & Co Inc*[17] and subsequently developed in *Thornton v Telegraph Media Group Ltd.*[18] This approach is now well-established in England and Wales and, in our view, has much to commend it. It allows

[13] [2015] EWHC 2242 (QB).
[14] *Lachaux v AOL (UK) Ltd* [2017] EWCA Civ 1334. See especially Davis LJ at paragraph 81.
[15] Paragraph 72.
[16] Paragraph 77.
[17] [2005] EWCA Civ 75.
[18] [2010] EWHC 1414.

the courts to strike out actions as an abuse of process if they consider that there is so little at stake that they should not be allowed to proceed. The specific test laid down in *Thornton* was whether the statement would be expected to affect substantially in an adverse manner the attitude of other people towards the claimant. Such an approach by the courts would be consistent with the fact that the function of defamation law is, first and foremost, to protect reputation. In practice there seems to be little between the *Jameel/Thornton* jurisdiction and the statutory test laid down in section 1 of the 2013 Act. As has been pointed out, it is difficult to envisage a situation in which an imputation is made which has the tendency adversely to affect a person's reputation to a substantial degree, but is not likely also to cause serious harm to reputation.[19] It seems preferable to formulate a statutory test for Scotland, rather than to rely on the common law. It is preferable also to avoid the difficulties which could arise from having a different approach on either side of the border in such a key area of defamation law. Moreover, there seems much to be gained from creating a situation in which Scots law can benefit from jurisprudence emerging in England and Wales, where there is much more activity in the field of defamation litigation. As the Faculty of Advocates pointed out in responding to the consultation on the draft Bill, the fact that the number of defamation cases in Scotland is so much lower than in England and Wales can give rise to uncertainty as to which decisions of the English courts will be followed in Scotland. The enactment of statutory provision can assist in limiting that uncertainty.

2.12 On weighing up all of the arguments set out above, we recommend the introduction of a statutory threshold of harm governing the bringing of proceedings in defamation. The threshold test is not intended to lay down a statutory definition of what is meant by "defamation", nor to alter, from the common law position, what amounts to defamation as a form of wrong. Rather, it is intended to deal only with the question of when proceedings in defamation may competently be brought. This is reflected in section 1(2) of the Bill – it is the *right to bring defamation proceedings* that will only arise if the conditions set out there are met.

2.13 The draft Bill provides that "publishing", unless the context requires otherwise, involves communication of a statement to a person, by any means, in a way which the person can access and understand. It provides, also, that a statement should be taken to be published only at the point in time when the person receiving it has seen or heard it. This approach accords with the common law position as to what amounts to publication for the purposes of defamation law.

2.14 We therefore recommend that:

2. It should be competent to bring defamation proceedings in respect of a statement only where the publication of the statement has caused, or is likely to cause, serious harm to the reputation of the person who is the subject of the statement.

(Draft Bill, section 1(2)(b) and (4))

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[19] Sir John Gillen, "Defamation Act 2013: More to Admire than to Despise?", (2014) 23 Journal of the Commonwealth Lawyers' Association 25. See also *Gatley on Libel and Slander* (12th edn, 2013), para 2.7; Alastair Mullis and Andrew Scott, "Worth the Candle? The Government's Draft Defamation Bill", (2011) 3 Journal of Media Law 1 at 4.

Potential modifications required to procedural rules to fit with a statutory threshold test

2.15 In the Discussion Paper we raised the question whether, assuming that communication to a third party was to become a requisite of a right to bring defamation proceedings in Scots law, any other modifications would be required so that a test based on harm to reputation would "fit" with Scots law.[20] Fourteen respondents offered comments in response to this question, but none made any suggestions amounting to a substantive modification to accommodate a threshold test. We consider that questions around what, if any, procedural changes are needed, and how they should be effected, is a matter to be dealt with by means of secondary legislation if measures are in train to implement our recommendations. Accordingly we make no recommendations here but we intend to draw to the attention of the Scottish Civil Justice Council the fact that potential issues of procedure and efficient case management may arise. We note that the Court of Appeal, in its decision in *Lachaux,* provided some guidance which may be useful in this context. It was suggested that, if there is an issue as to meaning (or any related issue as to reference), that can be resolved at a meaning hearing,[21] applying the usual objective approach in the usual way. If there is a further issue as to serious harm, there may be cases where such issues can also appropriately be dealt with at the meaning hearing. If the meaning as assessed at that hearing is evaluated as seriously defamatory it will ordinarily be appropriate to draw an inference of serious reputational harm. Courts should be slow to direct a preliminary trial involving substantial evidence on a dispute as to whether serious reputational harm has been caused or is likely to be caused by the published statement.[22]

Proceedings at the instance of profit-making bodies

2.16 The Discussion Paper raised two related questions on this topic: whether, as a matter of principle, bodies which exist for the primary purpose of making a profit should continue to be permitted to bring actions in defamation; and whether, assuming they should continue to be so permitted, statutory provision should govern the circumstances in which proceedings could competently be brought.[23]

2.17 Dealing with the question of principle, most respondents who offered views were in favour of a continued right for bodies existing to make a profit to bring actions in defamation. Google pointed out that the online presence and reputation of a business could be important aspects of its commercial potential. To that extent it was important that businesses should be able to take effective action against damaging defamatory statements, albeit it was at the same time important to avoid stifling legitimate online criticism of a business's performance or services. On the other hand the Libel Reform Campaign expressed strong opposition to the continued opportunity for bodies existing primarily to trade for profit to bring actions in defamation. It cited examples of companies using the threat of defamation actions to avert publicity about illicit practices in which they were engaged. For small businesses the

[20] See question 5 of the Discussion Paper.
[21] A preliminary hearing at which the court determines the single meaning of the words complained of.
[22] The principal conclusions of the Court were summarised by Lord Justice Davis at paragraph 82 of the judgement. The Court's position that preliminary trials should be something of a last resort was also highlighted by Warby J in his discussion of the Court of Appeal decision in *Lachaux* during an address to the Annual Conference of the Media Law Resource Centre, entitled "Media Litigation in the High Court" (26 September 2017).
[23] See paragraphs 3.25-3.37 of the Discussion Paper and questions 6-7.

Campaign suggested that the owners or senior officers should continue to have the right to sue as individuals for damage to their reputations and that this should suffice. The same would be true of executives of large companies whose reputations were impugned by false allegations of wrongdoing. The Libel Reform Campaign adopted the same position in responding to the consultation on the draft Bill. NUJ expressed a similar view to that of the Campaign.

2.18 We have considered the competing arguments carefully. On balance we take the view that bodies whose primary purpose is to trade for profit should continue to be permitted to bring actions in defamation. This is the position in most other jurisdictions. Insufficient justification has, in our view, been advanced for the radical step of stripping away the rights currently enjoyed by trading companies and other entities existing for the primary purpose of trading for profit under the existing law. This is particularly the case against the background that to introduce such a limitation would largely set Scots law apart from other systems. Such bodies should continue to be entitled to protect their reputations, which can be of great value to them, against defamatory attacks.

2.19 We take on board the comment that it may, in some instances, be possible for owners or executive officers of businesses to sue, as individuals, for damage to their own reputations. This could include reputation in their business or professional capacity, rather than their personal capacity. However, it seems likely that not all such actions would be allowed to proceed, some being dismissed as an abuse of process, particularly if their true underlying purpose is to seek redress for damage to corporate reputation under the guise of an individual suit. Moreover, it is questionable whether such actions will be capable of bringing about proper vindication of a corporate reputation, given that any damages will be assessed by reference to the effects on an individual rather than on the reputation of the business concerned.

2.20 We therefore recommend that:

3. Bodies which exist for the primary purpose of making a profit should, in principle, continue to be permitted to bring proceedings in defamation.

2.21 The second question raised in the Discussion Paper in this context turned essentially on whether bodies existing primarily to make a profit, assuming they were to continue to be permitted to bring proceedings in defamation, should require to meet additional requirements, over and above those applicable to a non-natural person not concerned primarily with making a profit. The majority of those who offered comments on the question thought that they should. Of those who disagreed, Roddy Dunlop took the view that if a "serious harm" threshold along the lines of that in section 1(1) of the 2013 Act was to be introduced, this should be enough to protect against unmeritorious claims by non-natural persons. He further commented that, whilst a corporate pursuer may ordinarily be expected to demonstrate a fall in trading receipts, requiring this in every case would not cater adequately for the situation where there were a number of factors impacting on the profitability of trading. Similarly, it would not deal with the situation where a corporate pursuer was newly formed and so had not yet had an opportunity to demonstrate profitability. Other responses were more nuanced in nature. The Law Society of Scotland did not come down firmly for or against the imposition of an additional hurdle. However, they expressed

concern that this could create confusion about the status of charities and other not-for-profit groups.

2.22 On balance we do not think that there is currently a sufficient case to set Scotland apart as a jurisdiction in which there are fewer hurdles than in other jurisdictions of the UK to the bringing of actions in defamation by bodies which exist for the primary purpose of making a profit. We have, therefore, included provision in the draft Bill to the effect that such bodies may bring proceedings only where the statement which is the subject of the proceedings has caused, or is likely to cause, serious financial loss.

Background to the framing of the Bill provision

2.23 We understand that the meaning of 'a body that trades for profit', in terms of section 1(2) of the 2013 Act, has given rise to some uncertainty in England and Wales. On one view the language is apt to cover everything from a manufacturing company engaged in full-time profit-making to a charity running an occasional car boot sale. The policy behind the provision was clearly directed at the former but not the latter. As indicated above, this was raised as a concern by some respondents to the Discussion Paper. The draft Bill seeks to address this in section 1(3) by restricting actionability to cases involving serious financial loss only insofar as the body seeking to bring the proceedings exists *for the primary purpose* of trading for profit. We acknowledge that this could prompt debate as to what is the primary function of an organisation – that question may not always be straightforward. However, we think that the courts could safely be left to answer this question, on a case-by-case basis.

2.24 Since one of our main concerns is to exclude from the requirement to demonstrate serious financial loss bodies which exist only for charitable purposes, we have given thought to tying the serious financial loss requirement to the charity test in section 7 of the Charities and Trustee Investment (Scotland) Act 2005. In other words, the requirement to demonstrate serious financial loss would not apply where the entity in question had been registered in the Scottish Charities Register, or an equivalent register outside Scotland, or would be likely to be so registered if it applied for registration in Scotland, applying the test in section 7.[24] We can envisage that this could prompt complex and time-consuming arguments as to whether a particular body would, hypothetically, meet the statutory test for registration. And we understand that a fairly narrow view is taken as to what constitutes a "charitable purpose" in terms of section 7. There may, therefore, be a risk that bodies that should in principle be exempt from the serious financial loss requirement because they are essentially charities would fail a test based on section 7; a local bridge club might be an example. We consider that this issue is best addressed by providing that only non-natural persons which have as their primary purpose trading for profit should be subject to the requirement to show they have suffered (or are likely to suffer) serious financial loss.

2.25 We therefore recommend that:

4. A non-natural person whose primary purpose is to trade for profit should be permitted to bring defamation proceedings only where it can

[24] This means that it exists only for one or more of the charitable purposes set out in section 7(2) and that it provides public benefit in Scotland or elsewhere.

demonstrate that the statement complained of has caused or is likely to cause it serious financial loss.

(Draft Bill, section 1(3))

Prohibition of proceedings in defamation by public authorities

2.26 In its response to the Discussion Paper the Libel Reform Campaign raised an issue that had not been addressed in the Paper: the possibility of placing on a statutory footing the principle laid down in the case of *Derbyshire County Council v Times Newspapers Ltd and Others.*[25] The principle is that a public authority has no right at common law to sue for defamation. The common law is of course the common law of England and Wales. So far as we are aware, no similar case has been decided in Scotland. However, given the principles which underpin the decision, there does not seem to be any reason to expect that the Scottish courts would take a different approach. The essence of the judgment appears to be that there is an overriding public interest in allowing uninhibited comment on the operations of democratically elected bodies, and on agencies of such bodies. It does not matter whether those bodies, or the relevant agencies, are carrying out functions of a commercial nature; applying *Derbyshire* they are prohibited from bringing proceedings even in that case. This is not because the body concerned has no public reputation to protect, but because any such reputation must be protected by political rather than litigious means.

2.27 We consider that the *Derbyshire* principle should be placed on a statutory footing. The draft Bill gives effect to this proposal in section 2(1). In our view this would serve to enhance the clarity and accessibility of the law. This move was widely supported by respondents to the consultation on the draft Bill. Some concern was, however, raised as to whether an individual who discharges functions of a public nature, in some capacity, would be deprived of the opportunity to bring proceedings in respect of matters arising in his or her private life. It is not our intention that this should be the case. Similarly, it is not our intention that such a person should be prevented from defending his or her moral or professional/occupational reputation against allegations relating to his or her discharge of public functions, insofar as the matter related clearly to his or her position as an individual, rather than the functions they were required to perform.[26] Restrictions of this nature would amount to an expansion of the *Derbyshire* principle, which we do not wish to bring about. For these reasons the draft Bill provides expressly that nothing prevents an individual who holds some form of public office from bringing proceedings in a personal capacity, as distinct from his or her capacity as an office- holder.[27]

2.28 A key question underlying the statutory encapsulation of *Derbyshire* is, of course, what amounts to a public authority. This is defined in broad terms, in section 2(2) of the draft Bill, to include any person whose functions include functions of a public nature. It is intended to cover what may be regarded as obvious candidates – including local authorities, the Scottish Parliament, the Scottish Parliamentary Corporate Body, Scottish Ministers and agencies of the Scottish Government. We would not, though, wish it to cover companies and charitable organisations contracted by Government or local authorities to discharge

[25] [1993] AC 534.
[26] This reflects the approach of the court in *McCann v Scottish Media Newspapers Ltd* 2000 SLT 256.
[27] See section 2(5) of the draft Bill.

functions on their behalf only intermittently, and without coming under their ownership or, to a significant degree, their control. Section 2(3) provides for the appropriate exception, preventing an unjustifiably wide scope. It is supplemented by a regulation-making power in subsection (5), intended to fill any gaps in relation to bodies where the exception does not bite, but the view is taken that they should not be treated as public authorities for the purposes of preventing them from bringing proceedings in defamation. Any such regulations are to be subject to the affirmative procedure, meaning that they will undergo a high level of parliamentary scrutiny. They should also be the subject of consultation, among any persons whom the Scottish Ministers consider appropriate, before they are made. The question whether there is ownership or control, for the purposes of the Bill, is to be judged with reference to section 2(4). Indicators of ownership or control include that a particular public authority holds the majority of the shares or voting rights in the non-natural person concerned or has the right to appoint or remove a majority of its board of directors. These are designed to draw a distinction from bodies which are in fact corporate vehicles *set up by* central or local government.

2.29 We therefore recommend that:

5. Persons which are classed as public authorities for the purposes of the Bill should not be permitted to bring proceedings for defamation.

(Draft Bill, section 2(1))

6. A person should be classed as a public authority if the person's functions include functions of a public nature.

(Draft Bill, section 2(2))

7. A person should not fall into the category of a public authority if it is a non-natural person which has as its primary purpose trading for profit or is a charity or has a charitable purpose and is not owned or controlled by a public authority and only carries out functions of a public nature from time to time.

(Draft Bill, section 2(3)-(4))

8. There should be a power for Scottish Ministers to make regulations specifying persons or descriptions of persons who are not to be treated as a public authority, where this result is not achieved already by section 2. Such regulations should require public consultation before they are made and be subject to the affirmative resolution procedure.

(Draft Bill, section 2(6)-(8))

An extension of the Derbyshire principle to private companies?

2.30 During the consultation on both the Discussion Paper and the draft Bill, the Libel Reform Campaign suggested that the *Derbyshire* principle should be extended to cover private companies in so far as they are providing the same or equivalent services to those offered by local authorities. This proposition was also supported by NUJ during the draft Bill

consultation. While we have given thought to this possibility, it is not a measure which we intend to pursue. Such a change would extend the *Derbyshire* principle significantly beyond its reach under the common law of England and Wales. It does not seem appropriate that this should be done only in relation to Scotland, particularly given that the principle derives from the law of England and Wales. Moreover, it is likely that it would spark considerable discussion and debate as to the functions of companies and other entities and how far they are, or are not, the same or equivalent to those discharged by local authorities. It is unlikely to be possible to devise a provision which is close to being comprehensive in this respect. Accordingly, we make no recommendation to expand *Derbyshire* to this effect.

Chapter 3 Defences

Introduction

3.1 This chapter is concerned with defences to an action of defamation, and the possibility that they be placed on a statutory footing. It covers the material discussed in chapters 4 to 6 of the Discussion Paper, namely the defences of truth; fair comment; and publication in the public interest.

Truth

3.2 Scots common law recognises the defence of truth (or *veritas*).[1] An imputation which is the subject of a defamation action must be untrue, so if its truth is established, there is a good defence to the action, regardless of any question of malice. In the Discussion Paper we asked just one question in relation to the defence of truth: whether it should be encapsulated in statutory form.[2]

3.3 Twenty-one respondents answered this question. The vast majority (eighteen) supported in principle encapsulating the defence in statutory form. They thought this would be conducive to clarity. Some supported this approach with qualifications, others without. Three respondents expressed opposition.

Responses supporting a statutory defence of truth in principle

3.4 Those supporting a statutory defence of truth without qualification included Paul Bernal, BLM, the Libel Reform Campaign and Google.

3.5 Campbell Deane and Stephen Bogle took the view that the operation of the defence at common law was satisfactory. But they had no objection to the enactment of a clear and workable version of the defence. The Law Society of Scotland also took the view that the defence of truth was operating satisfactorily but thought, if other defences were to be placed on a statutory footing, that it seemed sensible to treat the defence of truth in the same way. Gavin Sutter supported the idea in principle but urged that the defence be re-cast as one of fact or provable fact rather than truth. He queried whether a court was appropriately placed to determine the notion of "truth".

3.6 Eric Descheemaeker suggested that any statutory version of the defence of truth in Scots law should go further than replicating section 2 of the 2013 Act. Section 8 of the Rehabilitation of Offenders Act 1974 provides (i) that the defence of truth is available in relation to an allegation that a person has committed, been charged with, prosecuted for, convicted of, or sentenced for an offence, even if as a result of the 1974 Act the conviction is regarded as 'spent'; and (ii) that this defence is not available if it is proved that the statement

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[1] See eg *Scott v McGavin* (1821) 2 Mur 484, *Hamilton v Hope* (1827) 4 Mur 222 and *Mackellar v Duke of Sutherland* (1859) 21 D 222. See also the discussion in Gloag & Henderson, *The Law of Scotland* (14th edn, 2017), para 29.03.

[2] Question 8 of the Discussion Paper, as read with chapter 4.

was made with malice. Professor Descheemaeker suggested that provision (ii) should be repealed.

Responses opposing a statutory defence of truth

3.7 Three respondents raised objections to a statutory formulation of the defence of truth. The Senators of the College of Justice commented: "We believe that the current *veritas* defence works well and there is no reason to bring about the "resetting" effect that codification may have." A similar objection was raised by the Faculty of Advocates, who noted that the current law was clear and that the scope for confusion and reinterpretation that a statutory defence might create was not justifiable. Graeme Henderson also referred to possible difficulties in interpretation of any new provision.

Our view

3.8 Our considered view is that a statutory defence of truth should be introduced, as the majority of respondents agree. The main reasons for this conclusion are the following. First, since we are recommending encapsulation of other defences in statutory form, it would be appropriate, if this can be satisfactorily achieved, to give statutory form to the defence of truth too. Second, the reservations which were expressed about this course of action were based on the apprehension that the new statutory definition might give rise to difficulties of interpretation. But we note that problems of this kind do not appear to have arisen to date with section 2 of the Defamation Act 2013, which replaced the common-law defence of truth in England and Wales with a statutory version.[3] The relevant section in the draft Bill largely reproduces the terms of section 2 of the 2013 Act.

3.9 Section 1 of the draft Bill establishes a statutory threshold of serious harm. Consistent with this provision (and in line with section 2(3) of the 2013 Act), section 5(2) of the draft Bill provides that, if a statement contains more than one distinct imputation and not all imputations are shown to be substantially true, the defence of truth will still succeed if the pursuer sues in respect of more than one of the imputations, and any imputation not proved to be true does not "seriously harm" the pursuer's reputation.

3.10 The clarity of the law would not be enhanced if we were to introduce a statutory defence of truth while retaining the existing common-law defence. We therefore recommend that the common-law defence of truth (or *veritas*) be abolished. Section 8 of the draft Bill makes provision to that effect. We think it unlikely that the rules of English common law which are currently taken to apply to the defence of *veritas*[4] in Scots law would be regarded by the courts as being swept away as a result of the abolition of *veritas.* Rather, we envisage that they would be considered to be rules of interpretation or procedure, secondary to the core defence. The substantive defence of *veritas* is fundamentally about proving that an imputation is substantially true in fact; it does not go any further.

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[3] See eg the invocation of the section 2 defence in *Theedom v Nourish Trading Ltd* [2016] EWHC 1364 (QB).

[4] These include what are referred to as the 'conduct' rule and the Chase levels of meaning, as well as the rule, derived from *Polly Peck (Holdings) plc v Trelford* [1986] QB 1000, that the defender is entitled to prove the truth of any meaning that the words complained of are capable of bearing. The single meaning and repetition rules are also taken to operate in relation to the defence of *veritas*. See further the discussion in James Price QC and Felicity McMahon (eds) *Blackstone's Guide to the Defamation Act 2013*, (2013), paras 3.34-3.42.

3.11 Similarly, we recommend repeal of sections 5 and 14 of the Defamation Act 1952, which relate to the defence of justification. Section 33(1) of the draft Bill makes provision to that effect. While it would of course have been possible to introduce the new statutory defence by way of amendment to the 1952 Act, it seems to us clearly preferable that this defence should be set out, along with others, in the draft Bill annexed to this Report.

3.12 We have considered the suggestion that the opportunity should be taken to repeal section 8(5) of the Rehabilitation of Offenders Act 1974. We do not recommend this. It is relevant to note that this is not a matter which the Discussion Paper raised for consultation; and a change of this kind would be more than purely technical. It is also worth pointing out that section 8 of the 1974 Act already takes account of sections 2 (truth) and 3 (honest opinion) of the 2013 Act, and the draft Bill makes equivalent provision. That being so, any change to the 1974 Act would be more desirable on a UK-wide basis. Finally, we note that this is an area of some complexity, not least owing to the existence of detailed exclusions and exceptions from section 4 of the 1974 Act: these might need to be considered if this issue were to be pursued.[5] For all these reasons we make no recommendation on this point. Instead, section 33(2) of the draft Bill makes provision to the effect that, just as section 8(3) and (5) of the 1974 Act apply to the common law defence of *veritas*, so they should apply to the new statutory defence of truth.

3.13 We therefore recommend that:

9. A statutory defence of truth should be introduced. The defences of *veritas* at common law and justification under the Defamation Act 1952 should be abolished.

(Draft Bill, sections 5, 8(1)(b) and 33(1))

Fair comment

3.14 The defence of fair comment is based on the distinction between a statement of fact (on the one hand) and a comment (on the other). Statements of fact purport to be true. But comments are expressions of view, with which members of the public are free to agree or disagree. Provided they are recognisably comments or opinion, comments are not liable to mislead anyone, since they do not purport to state the truth but only to convey a point of view.

3.15 The defence of fair comment currently exists as a matter of common law as well as under section 6 of the Defamation Act 1952. We asked seven questions about the defence, which we discuss here. We have rearranged the order of the questions set out in the Discussion Paper in order to assist the presentation of our recommendations.

[5] They have recently been amended by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 (SSI 2015/329) amending SSI 2013/50, following the UKSC decision in *R (T) v Secretary of State for the Home Department and another* [2015] AC 49, to the effect that blanket disclosure of spent convictions is incompatible with article 8 ECHR.

Should the defence of fair comment be set out in statutory form?

3.16 Of the twenty-one respondents who answered this question,[6] eighteen were in favour of encapsulating the defence of fair comment in a statutory provision. In line with its general stance, the Libel Reform Campaign stated that putting common-law principles into statute would help to reduce ambiguity, uncertainty and confusion. Roddy Dunlop observed that, following the decision of the Inner House in *Massie v McCaig*,[7] the precise boundaries of the defence were in some doubt. In his view, the shortage of Scottish case law on the defence meant that statutory provision to clarify matters would be sensible and useful. The Faculty of Advocates considered that there would be benefit in having a clear statement of the terms of the defence; its nature and extent would have to be carefully thought through. The Law Society of Scotland took the view that, as any new incarnation of the defence would not mirror precisely the existing law, placing it on a statutory footing would be necessary. CommonSpace suggested that setting out the defence in statutory form would clarify the law.

3.17 Eric Descheemaeker was of the opinion that the common-law position on fair comment ought to be changed, and that this was best achieved by statutory provision. Stephen Bogle supported in principle the idea of putting the defence of fair comment on a statutory footing and thought there was an opportunity for Scots law to improve upon and learn from the shortcomings of the 2013 Act in this respect.

3.18 Only Graeme Henderson expressed outright opposition to encapsulating the defence in statutory form; he suggested that any reformulation of the defence was likely to create uncertainty. Campbell Deane did not express a view one way or the other, although he thought that in practice the boundaries of the defence had become blurred: he considered that, if there was to be a statutory provision, it should require there to be a sufficient underlying factual foundation for the comment and that the relevant facts should be in existence at the time the comment was made (we address these points below).

3.19 There is ample support from respondents for the view that the defence should be put on a statutory footing. This seems to us desirable in view of the uncertainties surrounding the current scope of the defence, and the dearth of Scottish case law on the point. As we go on to discuss, the defence is both technical and complex and has tended to become confusing, difficult to apply in practice, and so less effective than it should be in protecting freedom of expression. Statutory provision could address this by making the law clearer and more accessible.

Honest opinion

3.20 We conclude that the defence of fair comment should be given statutory form. Section 7 of the draft Bill does that. The Bill refers to the defence as "honest opinion" rather than fair comment. We think the key features of the defence are that it protects the right to express opinions freely, provided they are honestly held. "Honest opinion" focuses clearly on these key features. We think it is preferable to the vaguer expression "fair comment".

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[6] See question 11 of the Discussion Paper and paragraphs 5.20-21.
[7] 2013 SC 243.

3.21 We also conclude that the existing defence of fair comment should be abolished, in order to avoid the potential for inconsistency and uncertainty. Section 8(1)(d) of the draft Bill does this for the common law defence of fair comment. Section 33(1) of the draft Bill repeals the defence of fair comment set out in section 6 of the Defamation Act 1952.

3.22 We therefore recommend that:

10. A statutory defence of honest opinion should be introduced. The defences of fair comment at common law and under the Defamation Act 1952 should be abolished.

(Draft Bill, sections 7, 8(1)(d) and 33(1))

Should it be a requirement of the defence of fair comment that comment be on a matter of public interest?

3.23 Eighteen respondents replied to this question.[8] Fifteen supported our provisional view that the defence should no longer be restricted to comment made on a matter of public interest. Amongst those of this view, Roddy Dunlop thought that parties should be allowed to comment freely on private matters as well as public ones, as long as they did so honestly. Eric Descheemaeker pointed out that, once it was accepted that the law of defamation was no longer based on the concept of malice in the sense of an intention to cause harm, the only logical basis for the defence was that the comment was genuine, in the sense that it reflected an honestly held viewpoint. There was therefore no logical justification for a requirement that the comment be on a matter of public interest. The Libel Reform Campaign, in common with other respondents, observed that the publication of honestly held opinion was an important part of the right to freedom of expression; the expression of critical opinion should not be subject to a public-interest test. SNS observed that the public-interest requirement introduced a significant element of subjectivity, the removal of which would be welcome. The Law Society of Scotland expressed the view that, with the advent of social media, and in order to promote consistency between jurisdictions, the public-interest requirement should be removed.

3.24 Of those who took a contrary view, Graeme Henderson made the point that the concept of public interest in this context had been so greatly expanded as to result in its being of limited practical relevance. In view of this, he could see little practical purpose in abolishing the requirement. Gavin Sutter was of a similar opinion, observing that the threshold of what was in the public interest was so low that it did not impose an onerous burden on those seeking to rely on the defence.

3.25 The Faculty of Advocates agreed that the expansive concept of public interest developed in the case law meant that in most cases it did not amount to a significant restriction. Nonetheless, the Faculty went on to question whether removal of the requirement was appropriate. The Faculty made reference to the reasoning of the Joint Committee on the draft Defamation Bill (referred to in paragraph 5.11 of the Discussion Paper), which expressed the view that sufficient protection for private matters was available under the laws of privacy and confidentiality; and that retaining the requirement for the

[8] See question 9 of the Discussion Paper, and paragraph 5.11.

purposes of the defence of fair comment was an unnecessary complication which no longer served a useful purpose. The Faculty regarded this reasoning as flawed and observed that the law of privacy was less developed in Scotland than in England and Wales. The possible availability of alternative remedies was, in the Faculty's view, insufficient to justify outright removal of what it regarded as an important safeguard for private matters in the context of actions for defamation; a claim based on infringement of privacy rights might not always be open. The courts should be left to develop the inherently elastic concept of public interest in the particular context of the defence of fair comment.

3.26 We take the view, in common with the majority of respondents, that the defence should not require that comment be on a matter of public interest. First, that concept has not played a significant role in practice for many years, owing to the scope of the notion of "public interest" having been greatly expanded. Second, a key requisite in the defence of fair comment is that a statement is recognisable in context as a comment. We think a person should be equally free to make a comment on a private matter as on a public one. Third, abolition of the requirement for comment to be on a matter of public interest would, we believe, help to simplify the defence and make it more straightforward to apply in practice. It would mean that parties would not have to contend with the uncertainty arising from the imprecise boundaries of the concept of public interest. We accept the point made by the Faculty of Advocates that defamation cases may, at times, involve imputations in relation to which a claim for infringement of privacy rights may not be available. The existing requirement of public interest may fill this gap in some but not all cases. Nevertheless, we think that the limited role played by the public-interest requirement in the context of the fair comment defence in recent years suggests that any gap is unlikely to be a significant one. Fourth, it is true to say that the Scottish courts have so far had limited opportunity to consider cases involving privacy issues but, as and when such cases arise, they are likely to be decided against the background of English and European case law. Finally, we note that Andrew Scott's[9] Northern Irish Report recommends abolition of the public-interest requirement for the purposes of reform in that jurisdiction.[10]

3.27 For these reasons we think there is a good case for Scots law no longer to require that a comment be on a matter of public interest in order for the defence of fair comment to be available.

3.28 Accordingly, we recommend that:

11. It should not be a requirement of the defence of honest opinion that the opinion expressed relates to a matter of public interest.

Honest opinion and the basis for it

3.29 The statutory defence of honest opinion should be available, as is the common-law defence of fair comment, in relation to statements of opinion rather than statements of fact; this reflects the distinction which we set out at the beginning of this discussion (above, at paragraph 3.14). Section 7(2) of the draft Bill refers to the requirement that the statement

[9] Dr Andrew Scott was project lawyer on the defamation project of the Northern Ireland Law Commission, prior to the Commission becoming non-operational in June 2015.
[10] See paragraphs 2.21-2.22 of that Report.

complained of be a statement of opinion rather than fact as the "first condition" for the availability of the defence. Subsection (7) provides that this also extends to statements which draw an inference of fact.

3.30 The next four questions posed in the Discussion Paper all relate to the issue of honest belief in a comment or opinion, and the basis on which it is to be determined whether the defence of honest opinion is made out. It is convenient to discuss these issues together and then to set out our recommendations on all of them at the end of this section.

Should it be a requirement of the defence that the author of the comment honestly believed in the comment or opinion expressed?

3.31 Seventeen respondents offered views on this question.[11] Fourteen supported retention of the requirement that the comment or opinion must be one in which its maker honestly believed. Eric Descheemaeker considered the requirement to be an analytical necessity: he observed that if fairness means honesty (which it always has) then a fair comment must, by definition, be a comment in the truth of which there is an honest belief. Roddy Dunlop suggested that absence of honest belief would deprive the defence of fair comment of any legitimacy. In his view, a system which allowed malicious (that is, dishonest) comments 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 ECHR. Gavin Sutter suggested that, as in English law, honest belief should be the core of the defence. The Law Society of Scotland took the view that the requirement of honest belief was consistent with an overall approach which valued freedom of expression provided it was exercised responsibly. The Libel Reform Campaign believed that the "honest opinion" formulation in section 3 of the 2013 Act was the best approach. Paul Bernal was opposed to a requirement of honest belief; in his view, it was likely to be difficult, expensive and time-consuming to try to determine whether there was an honest belief in a comment or opinion. Eric Clive thought that the requirement was likely to cause difficulty where the publisher of a comment was not the original author, for example where a blogger allowed a comment to appear on his or her blog page. At the very least one would need to have a provision equivalent to section 3(6) of the 2013 Act, providing that the defence is defeated if the claimant shows that the publisher knew or ought to have known that the original author did not hold the opinion (we return to this point below).

3.32 The Faculty of Advocates referred to the decision of the Inner House in *Massie v McCaig*,[12] in which the defenders succeeded in a defence of fair comment at the stage of interim interdict, notwithstanding that they admitted never having believed the comment (as it was interpreted by the court) to be true. The Faculty observed that, if section 3(5) of the 2013 Act had applied to the circumstances of *Massie*, the outcome of the case would have been different: the defence of fair comment would have been defeated because the defenders admittedly did not "hold the opinion." The Faculty's position, in light of the decision in *Massie*, was that a requirement that the commentator actually held the opinion expressed was not consistent with the policy of supporting free comment.

[11] See question 10 of the Discussion Paper and paragraph 5.12.
[12] 2013 SC 343.

3.33 Having considered the various responses, we incline to the view expressed by the majority of respondents, namely that the position in Scots law should be aligned with the current position in England and Wales. That is that the defence of honest opinion may successfully be relied upon only where the commentator genuinely believes in the truth of the comment made. The defence should be available in respect of a comment which is honestly made, even if it is made with the intent to cause hurt or damage to the person who is its subject. By contrast, the defence should be defeated if the comment is proved to have been dishonest, regardless of the motivation behind it. This reflects the position encapsulated in section 3(5) of the 2013 Act, which in turn reflects the approach of Lord Nicholls in *Tse Wai Chun Paul v Cheng*.[13] It involves a narrow interpretation of the idea of malice, since, for the purposes of the defence, malice entails only dishonesty and motive is entirely irrelevant.

3.34 This approach reflects what we regard as the proper function of the defence, namely protecting the expression of genuinely held views. During consultation on the draft Bill, a concern was raised among some respondents, including the Libel Reform Campaign and NUJ, that this could deprive authors of the protection of the defence where they use rhetorical devices. We tend to the view that where such devices are used to express a view that is not the author's own, for example purely for the purposes of satire or parody, the defence should not be available. Where, however, such a device is used to illustrate an underlying view which is genuinely held, there would be nothing to prevent the defence from applying. This seems to us to be an appropriate ambit for the defence.

3.35 Adoption of the "genuinely held opinion" approach in Scots law would involve departing from the line taken by the Inner House in *Massie v McCaig*. But we think some of the reasoning in *Massie* has introduced uncertainty which it would be better to avoid. This applies in particular to the court's assertion that "malice is not part of the equation".[14] If the court intended "malice" here to refer to intention to cause harm as opposed to a lack of honest belief in a comment, then the decision is consistent with the law in England and Wales as explained in *Tse Wai Chun Paul v Cheng* and affirmed in *Joseph v Spiller*.[15] Yet in *Massie* the Inner House concluded that the defence was available, even though the defenders admitted that they did not believe in the truth of the comment made. That conclusion is presumably to be explained by the fact that the meaning which the pursuer contended the comment bore was not the meaning which the defender had intended to convey.

3.36 Given the "single meaning" rule, difficulties will inevitably arise where there is a difference between the comment which the defender intended to make, and the meaning of the comment as interpreted by the court. There is persuasive authority that in that situation malice needs to be assessed by reference to the comment which the defender thought he or she was making, rather than that which the court decides, under the single meaning rule, was in fact made. Thus in a case where words are ultimately held objectively to bear meaning A, if the defendant subjectively intended not meaning A but meaning B, and honestly believed meaning B to be true, malice is unlikely to be made out: *Loveless v Earl*

[13] [2001] EMLR 31 at paragraph 79.
[14] At paragraph 30.
[15] [2011] 1 AC 852 at paragraph 108.

and Another,[16] cited in *Massie*. That is consistent with the view that intent to injure does not defeat the defence, as long as there is honest belief in the comment that was intended.

3.37 In common with a number of respondents, we think statutory provision could usefully clarify these complexities. In our view the approach reflected in section 3(5) of the 2013 Act represents a balanced policy solution: it requires the opinion to have been honestly held.

3.38 Section 3(6) of the 2013 Act deals with the situation where the defendant was not the original author of the statement. Here the relevant issue is not whether the defendant genuinely held the opinion conveyed by the statement, but whether the defendant knew or ought to have known that the author of the statement did not genuinely hold the opinion it conveyed. Section 3(6) of the 2013 Act therefore provides that in cases of this kind section 3(5) does not apply. Subsection (6) provides that the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author of the statement did not hold the opinion. This is an important provision, not least for commentators on social media.

3.39 We think equivalents of section 3(5) and (6) of the 2013 Act should be adopted in Scots law.

Should the defence require that the fact or facts on which it is based provide a sufficient basis for the comment?

3.40 Seventeen respondents answered this question.[17] No consistent theme emerged from the responses. Some respondents, including Eric Descheemaeker and Paul Bernal, referred to the position of commentators who use social media to comment on issues that are widely known or that have been published or broadcast elsewhere. In general, the view was that users of social media should be free to comment on facts they reasonably believe to be true.

3.41 Paul Bernal suggested that if the facts were common knowledge it should not be necessary to state them in the comment to avail oneself of the defence. Stephen Bogle took the view that the concept of reasonableness was preferable to that of sufficiency. He suggested that the term "sufficient" connoted quantity; there was a danger that this might be misinterpreted as requiring a large amount of evidence.

3.42 Eric Clive thought that a requirement along these lines would be too restrictive. Roddy Dunlop thought it might tend to introduce notions of censorship and would be difficult for the courts to apply.

3.43 Eric Descheemaeker took the view that the existing defence of fair comment conflated two distinct concepts that are properly relevant to different defences, one to the defence of truth and the other to the defence of fair comment. The correct analysis, he suggested, involved separating out underlying facts from comment. When this line of thought was followed through, the need for the statement in question to indicate implicitly or explicitly the facts on which it was based would be eliminated as a requirement of the

[16] *Loveless v Earl and Another* (CA) [1999] EMLR 530.
[17] See question 13 of the Discussion Paper and the discussion at paragraphs 5.13-5.19.

defence. All that was needed was that the comment was recognisable as having been derived from some pre-existing facts. If, however, the requirement to identify the facts providing a basis for a statement were to subsist, the law should make it easier to defend those facts; it should be enough to show that the commentator *reasonably believed* in the truth of them (the solution now recommended in Northern Ireland[18]). In other words, in contrast with the position at common law, they should not need to be true in fact or protected by privilege. It is worth setting out in full the relevant part of Professor Descheemaeker's response:

> "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 (eg hyperlink);
>
> ii. no source is given but the facts relied upon are generally known or knowable, eg 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, ie 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 ("John Smith 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.

[18] See paragraphs 2.28-2.34 of the Northern Irish Report.

Scenario (iv), on the other hand (eg "Joe Bloggs 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."

3.44 On balance, we do not think it either necessary or desirable for the statutory defence to spell out that the facts on which a comment is based must provide a sufficient basis for the comment. A requirement of this kind seems unduly restrictive, would be difficult to apply in practice, and – since the concept of sufficiency is intrinsically open-textured – might give rise to uncertainty.

3.45 On the other hand, we are not inclined to recommend that facts should be decoupled altogether from comment, to the extent that there would be no need to indicate even in general terms the facts on which a comment is based. That might extend the scope of the defence unduly. A more nuanced solution would be to adopt the scheme proposed in the Northern Irish Report[19] and at one stage favoured by the UK Government[20], which would extend the defence to a comment made on the basis of facts which the commentator reasonably believed to be true at the time the statement was made. We note that Eric Descheemaeker acknowledges that this approach would result in the defence having the capacity to address difficulties he identifies in the present law, without the need to go as far as decoupling fact from comment. This would address, for example, the position of social media users and others who comment on the basis of facts published by someone else.

3.46 We therefore conclude that the right balance is struck by adopting a provision which replicates the requirements in section 3(3) of the 2013 Act, namely that the statement complained of should indicate in either general or specific terms the basis of the opinion.

Should it be necessary that the fact or facts on which the comment is based exist before or at the same time as the comment is made?

3.47 Fifteen respondents answered this question, which essentially raises two issues, one about knowledge and the other about timing.[21] The first is whether, for the purposes of the defence, the fact or facts on which a comment is based must have been known to the person making it at the time it was made. The second is whether the comment must be based on a fact or facts which existed prior to, or at the time, the comment was made. Thirteen respondents addressed the question of timing without commenting on the question of knowledge. All of them supported the view that the fact or facts must have been in existence prior to or at the time the statement was made. These included the Libel Reform Campaign, Aviva, and NUJ.

3.48 Eric Clive alluded in his response to the question of knowledge, particularly in situations involving social media commentators, where there may be less of an expectation of knowledge, and there may also be a public-interest element. He asked why a commentator should not be permitted to make a statement to the effect that, if the facts alleged in a given report are true, then a particular person is unfit for public office. Graeme Henderson appeared to support the need for a basis in knowledge:

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[19] Again, see paragraphs 2.28-2.34 of the Northern Irish Report.
[20] See paragraphs 5.18-5.19 of the Discussion Paper.
[21] See question 14 of the Discussion Paper and the discussion at paragraphs 5.13-5.19.

> "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."[22]

3.49 So far as timing is concerned, we note that the condition set out in section 3(4)(b) of the 2013 Act is that an honest person could have held the opinion expressed on the basis of anything asserted to be a fact in a privileged statement published before the statement complained of. At least on a literal construction, this would make the defence unavailable where the comment was based on facts contained in a privileged statement published at the same time as the statement complained of. It is difficult to see why this should be the case. We understand that it can create problems in practice, for example where a blogger comments in an article on facts published within the same article. It is possible that, as suggested in the Northern Ireland Law Commission Consultation Paper on Defamation Law in Northern Ireland,[23] this is simply a quirk in the legislative history of the 2013 Act. We recommend that this issue should be addressed. Section 7(8) of the draft Bill therefore refers to facts contained in a statement "made available before, or on the same occasion as" the statement complained of.

3.50 As for knowledge, on basic principles of fairness we think that in general a person making a comment ought at the time of making it to have at least a general awareness of the true facts which are ultimately relied upon as the basis for the comment. In other words, a person should not be able to make a comment on the basis of false "facts" and subsequently unearth and rely on true facts as the basis for the comment. We think this point is adequately covered by a requirement that the statement complained of indicates, whether in general or specific terms, the facts on which it was based. As we pointed out in paragraph 5.15 of the Discussion Paper, it seems unlikely that the legislature intended to allow a comment to be based originally on entirely false "facts" but later to be defended at trial on the basis of other facts not referred to or indicated in the comment. This would run counter to the spirit of the "honest person" condition.

3.51 We also recommend that provision be made to the effect that the defence of fair comment may be relied upon where an honest person could have held the opinion on the basis of any fact that the defender reasonably believed to be true at (or before) the time the statement complained of was published. This mirrors the approach recommended by the Northern Irish Report. It would protect the position, for example, of a commentator on social media who published an opinion on the basis of facts which subsequently turned out to be false; such a commentator would not be faced with seeking to prove the validity of privilege, possibly entailing a *Reynolds* defence (see below, in relation to the defence of publication in the public interest).

Should the defence be available where the factual basis for an opinion expressed was true, privileged or reasonably believed to be true?

3.52 Of the seventeen respondents to this question, eleven supported the view that the defence of fair comment should be available in circumstances where the comment was

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[22] For *Reynolds* privilege, see paragraph 3.65 below.

[23] NILC 19 (2014) at paragraphs 3.35-3.37. The Consultation Paper is available at: http://www.nilawcommission.gov.uk/final_version_-_defamation_law_in_northern_ireland_consultation_paper_-_nilc_19__2014_.pdf.

based on facts that were true, privileged or reasonably believed to be true.[24] Eric Clive expressed a preference for the decoupling of fact and comment but indicated that, if that was not to be pursued, he would support this proposal.

3.53 The Libel Reform Campaign made it clear that they regarded it as being of particular importance that the defence should extend to facts reasonably believed to be true. This would give protection to social media commentators and to those commenting on facts alleged by another media outlet. The Campaign believe that it was reasonable to assume that facts are true if they appear in a "prominent media outlet". The original author could still be sued for defamation if there were grounds for doing so.

3.54 The Faculty of Advocates opposed the extension of the defence to comments based on facts reasonably believed to be true. They thought this would introduce uncertainty as to what amounted to reasonable belief in any given set of circumstances. They thought the current law provided clarity and certainty and struck the balance correctly as between freedom of expression and protection of reputation. A similar view was expressed by Roddy Dunlop. He suggested that to allow 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 extend it too far.

3.55 While we can see some validity in the arguments against the defence of fair comment extending to comments whose factual basis is reasonably believed to be true, we consider this extension to be an appropriate and proportionate solution, especially to addressing the position of social media commentators. This solution seems also to sit comfortably with the notion that the defence is properly regarded as existing to protect the expression of views which are honestly held. For an ordinary person, an honestly held view might reasonably be expected to have some proper basis in fact. We also note that this is the approach now recommended for Northern Ireland.[25] We accordingly recommend that the defence be made available where the facts on which a comment was based are true, privileged or reasonably believed to be true.

3.56 In placing the defence on a statutory footing, we recommend that the opportunity be taken to clarify that the defence is available in relation to inferences of verifiable fact. An example of an inference of verifiable fact is the contention that because a person has been charged with an offence he must be guilty of it. It is not entirely clear that section 3 of the 2013 Act extends to such inferences, and we think it desirable that the draft Bill should place this matter beyond doubt.[26] The result is that such inferences would be treated as comment and covered by the defence of fair comment, rather than as statements of fact which would require to be defended on the ground of truth.

Summary of conclusions on honest opinion and the basis for it

3.57 We now summarise our conclusions on the various questions bearing on honest opinion.

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[24] See question 15 of the Discussion Paper and the discussion at paragraphs 5.13-5.19.
[25] See paragraphs 2.28-2.34 of the Northern Irish Report.
[26] See again the Northern Irish Report, at paragraphs 2.25-2.27.

3.58 The statement should indicate in general or specific terms the evidence on which it is based. This is the "second condition" set out in the draft Bill: see section 7(3). Subsection (8) defines "evidence": as discussed above, this covers three distinct situations: facts which existed when the statement was published; anything asserted as a fact in a privileged statement made available before or on the same occasion as the statement complained of; and anything the defender reasonably believed to be a fact at the time the statement was published. Subsection (9) defines "privileged statement".

3.59 Some respondents to the consultation on the draft Bill suggested that the second condition should be qualified to make clear that, where the relevant facts are known, or likely to be known by the readership or recipients of the publication, it should not be necessary to establish their evidential basis. This view was expressed by the Libel Reform Campaign, BBC Scotland and the Law Society of Scotland. We think such a qualification could spark debate about whether particular facts were known or likely to be known. We have not made provision in relation to this point in the draft Bill. Section 7(3) of the Bill provides that evidence may be indicated either in general or specific terms, so (where the relevant facts are taken to be known or likely to be known) a general outline would be sufficient. In addition, subsection 7(8)(c) provides that evidence may include anything the defender reasonably believed to be a fact at the time the statement was published, which affords a degree of latitude.

3.60 The "third condition" is that an honest person could have held the opinion conveyed by the statement on the basis of any part of the evidence: see section 7(4) of the draft Bill. Subsection (5) provides that the defence fails if the pursuer shows that the defender did not genuinely hold the opinion conveyed by the statement.

3.61 Finally, in cases in which the defender published a statement made by another person the relevant issue is not whether the defender genuinely held the opinion conveyed by the statement, but whether the defender knew or ought to have known that the author of the statement did not genuinely hold the opinion it conveyed. Subsection (6) makes provision to that effect and disapplies subsection (5) for cases of this kind.

3.62 Accordingly, we recommend that:

12. The statutory defence of honest opinion should be available in relation to a statement of opinion including a statement drawing an inference of fact which:

(a) indicates either in general or specific terms the evidence on which it is based; and

(b) is such that an honest person could have held the opinion conveyed by the statement on the basis of any part of that evidence.

(Draft Bill, section 7(2), (3) and (4))

13. The statutory defence of honest opinion should fail if it is shown that the person who made the statement did not genuinely hold the opinion conveyed by the statement.

(Draft Bill, section 7(5))

14. Where the statement complained of was published by one person but made by another, the previous recommendation should be inapplicable and the statutory defence of honest opinion should fail if it is shown that the person who published the statement knew or ought to have known that the author of the statement did not genuinely hold the opinion conveyed by the statement.

(Draft Bill, section 7(6))

Should there be any other substantive changes to the defence of fair comment in Scots law?

3.63 We asked this general question, and several points were raised in response to it.[27] We summarise the main points as follows. Since we think all of these points are covered in one or other of our recommendations, we make no further recommendations arising from this question.

3.64 The Faculty of Advocates and Roddy Dunlop commented that the decision of the Inner House in *Massie v McCaig* left open the question what exactly was meant by the court's statement that "malice is not part of the equation".[28] They considered that the meaning of malice and its impact needed to be clarified. Eric Clive said that he would like to see a formulation of the defence that was quite general. It should not be linked to facts set out in a statement; the focus should be on the whole substance of the comment, so that if the comment as a whole was fair the defence would be available. Eric Descheemaeker emphasised that the defence had always been concerned with comment rather than opinion. Even after the 2013 Act, the defence was not confined to opinion in the sense of an assertion of non-falsifiable matter. The defence was focused on authoritativeness as opposed to falsifiability; something that is represented to be true must be justified under the defence of truth or *veritas*; whereas a commentator's own view of primary facts is comment and need not be proved to be true. Gavin Sutter thought that it should be enough for a commentator reasonably to have believed that his or her opinion was based on fact. BBC Scotland commented that this area of the law was very elusive, but that the difficulties were more of interpretation than of substance. On that basis they did not suggest any further substantive changes to the law of fair comment. The Libel Reform Campaign and the National Union of Journalists remarked that any new public-interest defence should apply to comments as well as to factual statements.

Publication on a matter of public interest

3.65 Scots law recognises the defence of publication in the public interest, which in current practice derives from *Reynolds v Times Newspapers Ltd*.[29] The essence is that a

[27] See question 12 of the Discussion Paper and the discussion at paragraphs 5.13-5.19.
[28] See paragraph 3.35 above.
[29] [2001] 2 AC 127 (HL).

publisher who has published defamatory allegations on a matter of public interest may have a defence, provided that the publication was responsible. A number of factors are taken into account in determining whether the requirement of responsible journalism is satisfied (see the summary in paragraphs 6.2-6.4 of the Discussion Paper).

3.66 Once again, we began by asking whether this defence should be placed on a statutory footing.[30] Twenty-five of twenty-seven respondents to this question supported in principle encapsulating a public-interest defence in statutory form. The vast majority were content that section 4 of the 2013 Act be used as a model. However, Eric Descheemaeker made clear that he would not wish to see an exact replica of the defence as found in the 2013 Act. The Faculty of Advocates took a similar view, expressing a preference either for an improved statutory provision which tackled the apparent shortcomings of the 2013 Act or, failing that, continued adherence to the common law position.

3.67 Two respondents were opposed to a statutory defence of publication in the public interest**.**

Arguments in favour of a statutory public-interest defence

3.68 Among those supporting a public-interest defence, few elaborated on their reasoning. It is, however, worth quoting an extract from the comments of the Libel Reform Campaign:

> "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."

Possible improvements to the 2013 Act model

3.69 The Faculty of Advocates questioned whether the new test set out in section 4(1)(b) of the 2013 Act ("the defendant reasonably believed that publishing the statement complained of was in the public interest") reflects and maintains the standards set out in *Reynolds*. They also raised the question how the section 4(1)(b) test interacts with the new statutory defence of honest opinion.

3.70 Eric Descheemaeker described the public-interest defence in the 2013 Act as "highly problematic":

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[30] See question 16 and paragraphs 6.5–6.11 of the Discussion Paper.

> "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."

Arguments against a statutory public-interest defence

3.71 Gavin Sutter indicated that he was uncertain how successfully a defence as nuanced as *Reynolds* could be replicated in statute. Only time would tell how successfully this had been achieved by means of section 4 of the 2013 Act. Graeme Henderson commented that he could see little purpose in codifying this area of law.

Our view

3.72 There was clear support among respondents for the introduction in some form of a statutory defence of publication in the public interest. In our view it is appropriate for such a defence to be introduced in the interests of clarity, certainty and accessibility of the law. We recommend that this should be done. The purpose in doing so is to reproduce in statutory form the essence of the *Reynolds* defence. In the interests of clarity the draft Bill makes provision in section 8(1)(c) to repeal the existing *Reynolds* defence.

3.73 We doubt whether it would be of any value to attempt to define "public interest", and the draft Bill does not do so. We recognise the concerns expressed as to whether section 4 of the 2013 successfully reflects the standards laid down in *Reynolds*. We have considered this and we remain of the view set out in paragraph 6.11 of the Discussion Paper that, in assessing whether the public-interest requirement is met, there is comparatively little difference between the tests set out in section 4 of the 2013 Act and *Reynolds*.[31] Nowadays it seems less appropriate for the focus of the defence to be on journalism, given the existence of a large number of what might be described as citizen journalists and bloggers.

3.74 With two qualifications, discussed immediately below and relating respectively to expressions of opinion and to reportage, we recommend that for the most part the draft Bill should replicate the model of section 4 of the 2013 Act. Section 6(1) and (2) of the draft Bill therefore make provision to the same effect as section 4(1) and (2) of the 2013 Act.

3.75 We therefore recommend that:

15. A statutory defence of publication in the public interest should be introduced. The *Reynolds* defence should be abolished.

(Draft Bill, sections 6 and 8(1)(c))

[31] For recent confirmation of this view, see *Economu v de Freitas* [2016] EWHC 1853 (QB).

Expressions of opinion

3.76 We asked whether any statutory defence of publication in the public interest should apply to expressions of opinion as well as statements of fact. Sixteen respondents answered this question.[32] Twelve took the view that any statutory incarnation of the defence should apply to expressions of opinion. These included Eric Clive, Aviva, NUJ, and Roddy Dunlop. It was pointed out that the purpose of the public-interest defence is to protect speech of any nature as long as the public interest favours the utterance, and that it would be anomalous for the defence to be unavailable 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.

3.77 The remaining four respondents did not support the application of the defence to expressions of opinion. Among them were Stephen Bogle and the Faculty of Advocates. They thought expressions of opinion were sufficiently dealt with under fair comment and that there would otherwise be a risk of conflating the two defences.

3.78 There is clear support for the defence to be applied to expressions of opinion. Since we recommend that the defence of honest opinion should not be subject to a public-interest requirement, we do not think conflict or confusion should arise about the respective roles of the defences of publication in the public interest and honest opinion.

3.79 We therefore recommend that:

16. The statutory defence of publication in the public interest should extend to statements of fact and to statements of opinion.

(Draft Bill, section 6(5))

Reportage

3.80 Reportage is in essence a special form of *Reynolds* privilege, based on the notion that it is in the public interest that the media should report neutrally allegations in a dispute between two parties. The key point is that the publisher has taken proper steps to verify that the allegations reported have indeed been made but does not adopt the allegations as true.

3.81 We asked whether a statutory defence of publication in the public interest should include provision on reportage.[33] Fifteen respondents answered this question. Twelve took the view that the defence should include provision about reportage. This view was expressed, among others, by SNS, George Gretton, BLM and the Faculty of Advocates. The Faculty described reportage in this context as "… a useful tool to encourage fair and accurate reporting." On the other hand, both the Law Society of Scotland and Eric Descheemaeker expressed opposition to the placing of reportage on a statutory footing in Scotland. The Law Society considered it should more appropriately be left to develop at common law. Eric Descheemaeker took a similar line:

[32] See question 17 and paragraph 6.12 of the Discussion Paper.
[33] See question 18 and paragraph 6.13 of the Discussion Paper.

> "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*[34] form) is not to be read as excluding other possible defences."

3.82 There is clear support for reportage to be placed on a statutory footing. Even so, we acknowledge that there is merit in the argument that the defence is not yet sufficiently well-developed to be encapsulated in statutory form and should be left to evolve at common law. As matters currently stand in Scots law, there are uncertainties as to the relationship between reportage and both the repetition rule and the provision in the Defamation Act 1996 for privilege in relation to fair and accurate reports of various forms of proceedings. Moreover, there is a clear distinction between *Reynolds* privilege and reportage in relation to the question of truth: with the exception of cases involving reportage, one of the requirements of successful reliance on the *Reynolds* defence is that steps should have been taken to verify the truth of the statement in question as a matter of fact.

3.83 Having considered the matter, we have concluded that it would be appropriate to include statutory provision for reportage. We are influenced by the fact that the status of reportage as a special form of *Reynolds* privilege was recently confirmed by the Supreme Court in the case of *Flood v Times Newspapers Ltd*.[35] Since our wider aim is to incorporate the *Reynolds* principle into statute, we think that pursuit of that aim makes it appropriate to incorporate within statutory provision on public interest specific reference to reportage.

3.84 Section 6(3) and (4) of the draft Bill makes provision to this effect. In doing so, it mirrors in its essentials the terms of section 4(3) and (4) of the 2013 Act. Accordingly, provided the report is accurate and impartial, a publisher's failure to take steps to verify the allegations reported is irrelevant. And, in determining whether publication of the statement was in the public interest, the court must make such allowance for editorial judgment as it considers appropriate.

3.85 We therefore recommend that:

17. The statutory defence of publication in the public interest should make specific provision for reportage. In particular, it should be provided that in determining whether it was reasonable for a defender to believe that publication was in the public interest,

(a) allowance must be made for editorial judgment, where appropriate; and

(b) no account should be taken of any failure by a defender to take steps to verify the truth of the imputation conveyed by a statement if the

[34] (2009) 3 SCR 640.
[35] [2012] 2 AC 273, upholding *Roberts v Gable* [2008] QB 502.

statement was or formed part of an accurate and impartial account of a dispute to which the pursuer was a party.

(Draft Bill, section 6(3) and (4))

Chapter 4 Defamation and secondary publishers

Introduction

4.1 This chapter makes recommendations in relation to the scope for bringing defamation proceedings against secondary publishers. It also makes suggestions as to how issues relating to responsibility and defences for internet intermediaries in particular may be approached in future.

Background to the approach of this chapter

4.2 We raised in the Discussion Paper a number of questions concerning responsibility and defences for internet intermediaries. The first was the overarching one of whether there should be a full review of responsibility and defences for publication by internet intermediaries.[1] By internet intermediaries we mean persons who make material available online and who have the capacity to delete, amend or edit the material, but from whom the material does not originate. Typical examples may include those operating web pages, search engines etc.

4.3 Eighteen respondents to the Discussion Paper offered comments on this question. The vast majority of these – a total of 17 - supported the need for such a review in principle. These included NUJ, BBC Scotland, Aviva, SNS, the Faculty of Advocates and the Libel Reform Campaign. Many noted that the law had not kept pace with developments in modern technology and was in need of rationalisation and clarification. There was a general acknowledgement that defamation law should be brought up to date for the digital age. Paul Bernal thought the exercise should include a review of the different types of internet intermediaries; an internet service provider was very different from an operator of a social media service or a search engine.

4.4 As regards *how* a review should be undertaken, two respondents - Eric Clive and Roddy Dunlop - had reservations as to whether it was sensible and practicable for an exercise of such technical complexity to be attempted within the boundaries of a single legal system, rather than on a UK-wide basis. Eric Clive suggested that a full review might be better undertaken at supra-national level. Roddy Dunlop said that the scale of the task should not be underestimated. He made the point that the law as it presently stands is something of a patchwork quilt, which is neither easy to advise upon nor to apply. He questioned whether it would be a proportionate exercise in terms of money and other resources to attempt such a review in Scotland given the low level of internet-related litigation here; most cases were likely to be litigated in London in view of the specialist expertise concentrated there.

[1] See paragraphs 7.29-7.33 of the Discussion Paper and question 19.

4.5 On the other hand, Graeme Henderson did not support a review of this nature. He suggested that the Electronic Commerce Directive[2] ought already to provide sufficient protection.

4.6 There was clear support in principle among the majority of respondents for a full review of responsibility and defences for publication by internet intermediaries. Notwithstanding this, we tend to think there is considerable merit in the view that it would be more appropriate for such a review to be undertaken on a UK-wide basis. The issues involved are of relevance throughout the UK. They are far more commonly litigated in England than elsewhere. On that basis it seems right that any statutory provision regulating them should apply on a uniform basis insofar as that is compatible with the differing legal regimes in the various jurisdictions.

4.7 We therefore recommend that:

18. Any review of responsibility and defences for publication by internet intermediaries should be carried out on a UK-wide basis.

4.8 Against this background, we recommend below what may be described as an interim measure, based on an exclusion, subject to limited exceptions, of the bringing of proceedings against anyone who is not the author, editor or publisher of a given statement. This is based, to a large extent, on the model recommended in the Northern Irish Report.[3] While this will clearly extend to internet intermediaries, it will have a wider ambit; it may be said to cover secondary publishers in general.[4] Moreover, it will potentially cover activity offline as well as online activity. In deciding to follow this route we have taken into account, also, answers given to questions asked later in the chapter of the Discussion Paper dealing with internet intermediaries. We discuss these shortly. It seems preferable that an attempt be made to address issues around secondary publishers on an interim basis, rather than leaving matters to lie until such time as a UK-wide review can be undertaken.

Section 5 of the 2013 Act: a suitable model for Scots law?

4.9 In the Discussion Paper we then asked whether the introduction of a defence for website operators along the lines of section 5 of the 2013 Act would address sufficiently the liability of intermediaries for publication of defamatory material originating from a third party.[5] Section 5 provides a qualified defence for an operator of a website who can show that it was not the operator who posted the statement on the website.[6] This could have functioned either as an interim solution or as an alternative to a full review. Fifteen respondents offered comments on this question, with three expressing outright opposition to an equivalent of section 5. Among these, Graeme Henderson repeated the view that the Electronic Commerce Directive already provided sufficient protection in Scots law, without the need for an equivalent of section 5.

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[2] Directive on Electronic Commerce 2000/31/EC.
[3] See paragraphs 2.50-2.79 of the Northern Irish Report.
[4] In terms of the draft Bill, what we are labelling in this Chapter as a "secondary publisher" is anyone who is neither the author, editor or publisher of a statement, nor an employee or agent of such a person with responsibility for the content of the statement or the decision to publish it. See section 3(1).
[5] See paragraphs 7.34-7.39 of the Discussion Paper and question 20.
[6] We discuss section 5 more fully in paragraphs 4.15 to 4.20 below.

4.10 A narrow majority of respondents (a total of eight) expressed support for a defence following the basic model of section 5 as something helpful in addressing the issue of liability of intermediaries but wanted to see various improvements. These were divided between respondents concerned about reliance on the defence as a matter of principle, and respondents concerned about the timescales and complex procedural arrangements underpinning the Defamation (Operators of Websites) Regulations 2013[7] ("the 2013 Regulations"). We deal with both these sets of concerns in turn.

Concerns on matters of principle

4.11 Paul Bernal took the view that section 5 of the 2013 Act might offer a starting point for addressing issues relating to liability of internet intermediaries. It should not, however, simply be imported in the form set out in the 2013 Act; this was neither clear enough nor detailed enough to be of any real benefit. Section 5 left unclear, for example, how far the term "website operator" extended or even what was included as a "website." Would "website operator" extend to those responsible for the provision of apps on smartphones? More complex social media sites have tiers of control, leading Dr Bernal to ask what the term "operator" meant in the context of a Facebook group. Where responsibility rested should be made clearer than was the case under section 5. Liability should not be placed on those running message boards or discussion groups. Nor should it be placed on moderators of blogs and internet forums in view of the valuable service they provide. Dr Bernal was of the view that concerns over anonymous comments were often overblown. Anonymity offers a crucial protection to many people, including whistle-blowers and those who are victims of stalking or at risk of abuse or bullying. It would be important not to introduce in Scots law a defence which in practice had the effect of preventing anonymous or pseudonymous comments from being made. A similar point was raised by the Libel Reform Campaign.

4.12 Stephen Bogle took the view that it is not appropriate to convene website operators or other internet intermediaries as defenders in defamation actions, given that frequently they do not have editorial control over material nor are they publishers in a real sense. A similar stance on this issue was taken by Eric Descheemaeker:

> "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."

4.13 Eric Descheemaeker suggested also that the section 5 defence is misplaced in the 2013 Act. Properly understood it is a means of policing the internet rather than a defence in an action of defamation. In practice, it requires the intermediary to do one of two things: establish a line of contact between the poster and complainant, allowing the complainant to sue directly, or remove the statement complained of. Professor Descheemaeker pointed out that this seems to create the surprising situation where liability can be escaped by pointing the finger of blame elsewhere. This, he suggested, is not the norm in the law of delict and provides clear evidence that the scheme is functioning as a policing mechanism rather than a defence.

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[7] SI 2013/3028.

Complexity and timescales of the 2013 Regulations

4.14 Turning to the responses which addressed problems with the 2013 Regulations, Aviva described the Regulations as cumbersome in practice and pointed out that they were much less used in England and Wales than the former practice of "take down" notices. They took the view that a simple mechanism for requesting an intermediary to take down defamatory material would enable justice to be served quickly, effectively and at proportionate cost.[8] It was, Aviva thought, unfair to expect the claimant to engage with the author of a highly unpleasant posting. Google considered that section 5 brought advantages in that it should discourage vexatious claims which targeted website operators, notwithstanding that the author of a statement was known. But they referred also to downsides to the 2013 Regulations. The procedures created by the Regulations were unnecessarily complex and imposed disproportionate and impractical burdens on website operators. In particular, the timescales were too short.

Is there a need for an equivalent of section 5 of the 2013 Act?

4.15 Against the background of these concerns and criticisms, the key question to be addressed is whether we need a provision modelled on section 5 of the 2013 Act. We look at this from the point of view of whether other provisions in the suite of provisions currently relevant to online defamation offer a satisfactory solution. If there is overlap with section 5, it seems to arise mainly from Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002[9] ("the 2002 Regulations"),[10] dealing with hosting, and section 1 of the 1996 Act.

4.16 Section 5 seems wider than Regulation 19 in protecting intermediaries because of the latter's approach to awareness by a service provider of the presence of defamatory material. Knowledge by the operator of a website that defamatory material is on the site will not necessarily rule out the application of the defence in section 5. Indeed, section 5(12) makes clear that the defence is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others. It seems that moderation would include subjecting to scrutiny material posted on a website by others; it may even involve deleting part of a post, as long as this did not encompass any re-working of it. This is all in contrast to Regulation 19; it limits liability of service providers involved in hosting only where the service provider (a) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of the facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful or (b) upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the information.

4.17 Section 5 seems also to be wider than section 1 of the 1996 Act when looked at from the point of view of the effect of knowledge on the defence. Section 1(1)(c) makes clear that the defence under the 1996 Act is available only where, among other requirements, the defender is able to show that he did not know, and had no reason to believe, that what he or

[8] Such a mechanism is provided for in section 30 of the draft Bill. See also Chapter 6, on remedies.
[9] SI 2002/2013.
[10] As the name suggests, the purpose of these Regulations is to implement the Electronic Commerce Directive in the UK.

she did caused or contributed to the publication of a defamatory statement. Moreover, in terms of the 1996 Act there is nothing to prevent moderating, if it goes so far as to involve deletion of material, from bringing a website operator into the category of editor. In the event of being classed as an editor, reliance on section 1 of the 1996 Act would be excluded automatically.

4.18 One respect in which section 5 is without doubt wider in its protection than both section 1 of the 1996 Act and Regulation 19 of the 2002 Regulations is in respect of statements by authors whom the claimant is able to identify sufficiently to bring proceedings. In the 2013 Act only malice by the website operator in posting the statement will defeat the defence – see section 5(11).

4.19 Notwithstanding the above discussion of the scope of section 5, it is to be remembered that reliance on the defence for website operators will be subject always to compliance with the onerous requirements of the 2013 Regulations, so far as anonymous postings are concerned, from which the author of a statement cannot be sufficiently identified to enable the pursuer to bring an action against him or her. This will be subject only to the exception of the situation where the website operator does not have a means of contacting the poster (see paragraph 3 of the schedule of the Regulations). In that event the only duties incumbent on the website operator will be to remove the statement from the locations on the website specified in the complaint within 48 hours, and inform the complainer when that has been done. However, this may tempt website operators to avoid requiring posters of material to record contact information – a less than desirable outcome in terms of managing abuse online.

4.20 In our view it is doubtful whether section 5 fulfils a useful function over and above Regulation 19 of the 2002 Regulations and section 1 of the 1996 Act. We understand from our discussions with stakeholders that it is seldom used in practice and is regarded as unworkable by most website operators. It is to be noted, too, that shortcomings in relation to addressing defamation online seem to arise primarily from lack of clarity and understanding as to which defence or mechanism for limiting liability applies most appropriately to which online activity. Section 5 adds a further defence to the mix and in that sense may be said to compound these problems rather than alleviate them. For these reasons, we do not recommend that a direct equivalent of section 5 of the 2013 Act should be introduced in Scots law.

The possibility of detailed provision as to responsibility and defences for internet intermediaries

4.21 There then followed in the Discussion Paper a series of more detailed questions about responsibility and defences for internet intermediaries.[11] These included whether responsibility and defences for those who set hyperlinks, operate search engines etc. should be defined in statute and whether intermediaries who search the internet according to user criteria should be responsible for the search results. We deal with these questions only briefly here, and collectively, given our decision against carrying out a full review of the issues as part of the current project.

[11] See paragraphs 7.40-7.47 of the Discussion Paper and questions 21-25.

4.22 One theme emerging from the responses to this group of questions was encapsulated in the view expressed by Roddy Dunlop that liability should rest only with those who make, publish, repeat or endorse defamatory statements. To impose liability on a party who merely allows others to find such statements goes too far. Similarly, Google questioned any underlying assumption that intermediaries might be liable under the law of defamation in the first place. Google further suggested that an appropriate framework of defences had been established by the Electronic Commerce Directive, articles 12 to 15 of which provided a robust and well thought-out regime that had stood the test of time and was sufficiently flexible to cover all relevant services – setting hyperlinks, operating search engines etc.

4.23 In response to questions 21 and 22 in the Discussion Paper (on liability for setting hyperlinks), Gavin Sutter thought that it would be useful to clarify the law and that there should be a defence similar to that available to those who "host" material. On question 23 (on responsibility for intermediaries searching the internet according to user criteria) he drew a distinction between a search return that was the result of a purely automatic operation of software, on the back of user-inputted search terms, and that which resulted from the search engine's own auto-complete function. Liability in respect of the latter seemed appropriate. The Libel Reform Campaign thought that the pace of technological change presented pitfalls for enacting legislation on matters such as liability for setting hyperlinks. In their view many of the current issues about freedom of expression have arisen due to old laws being applied to new technologies; for example, the multiple publication rule originates from case law first decided in the 1840s. In a similar vein, hyperlinking, the use of search engines and the practice of aggregation could all become outmoded in the near future with the development of mobile apps.

4.24 Eric Descheemaeker did not think that the types of activities under consideration were suitable candidates for statutory provision. The issues raised should in his view be dealt with by the application of general principles and not by ad hoc provisions. In any event, it would be impossible to future-proof any provisions; they are liable to become quickly out of date. More fundamentally, most of the intermediaries referred to should not be regarded as publishers. It was unacceptable to hold someone accountable for something they had no control over.

4.25 Leaving aside questions of principle, it seems that, as matters currently stand, any attempt to define in statute the responsibility and defences of internet intermediaries would run the risk of further complicating an already complex and scattered array of provisions which may be taken to be of relevance to the liability of intermediaries in Scots law (especially section 1 of the 1996 Act and Regulations 17-19 of the 2002 Regulations). Moreover, in the case, for example, of setting hyperlinks, it may not always be a clear-cut matter of responsibility for a particular activity resting with a particular intermediary. There may potentially be greater benefit in seeking to clarify how the current provisions apply in general to different forms of online activity. There may, however, be a question as to how far even this lends itself to being dealt with in statute. Given the speed with which online matters advance, it may be difficult to devise a formulation which will not become quickly outdated. On the basis of this, and the likely need ultimately to carry out a full review of responsibility of internet intermediaries, but on a UK-wide basis, we make no specific recommendations here in relation to liability and defences of internet intermediaries involved in particular activities. Rather, we recommend that:

19. As part of any UK-wide review of liability and defences of internet intermediaries, consideration should be given to (a) whether there is scope to clarify the operation of existing provisions, rather than creating new provisions and (b) if so, whether this would be most appropriately achieved by means other than legislation.

The substantive approach which we recommend: exclusion of proceedings against secondary publishers

4.26 The draft Bill provides for an interim solution (pending a UK-wide review) which will *encompass* internet intermediaries, rather than making provision relating exclusively to them and directly governing their liability and defences. The effect of section 3 of the draft Bill is that, subject to the possible exercise of the regulation-making power in section 4, no defamation proceedings can be brought against a person unless the person is the author, editor or publisher of the statement which is complained about, or is an employee or agent of that person and is responsible for the content of the statement or the decision to publish it. Section 3 includes a list of functions that are not to be taken to place a person in any of the categories of author, editor or publisher. This may be modified by regulations where appropriate. Furthermore, practical examples are provided as to conduct which may be regarded simply as moderating and will not, therefore, exclude reliance on the provision. This could potentially cover functions performed offline, such as in relation to letters to the editor of a hard copy newspaper or magazine, as well as conduct online. This aims to reflect the principle underlying section 5(12) of the 2013 Act, as well as tackling uncertainty as to what is caught by the term 'moderate.' In responding to the consultation on the draft Bill, TripAdvisor suggested an expansion of the description in section 3(3) of 'moderating', to include reference to automated moderation tools, such as filters, and to manual screening processes used with a view to accepting, or rejecting, statements against internal policy. We have decided, on balance, not to pursue this suggestion, given the likelihood of examples becoming quickly outdated. We feel that the question of what amounts to 'moderating' should most appropriately be left to be dealt with over time by the courts.

4.27 The approach of section 3 of the draft Bill is modelled to an extent on section 10 of the 2013 Act and section 1 of the 1996 Act. Section 1 of the 1996 Act provides a defence to a person who shows that he or she was not the author, editor or publisher of the statement complained of. As noted earlier,[12] this operates on the condition that the person can show also that he or she took reasonable care in relation to the publication of the statement complained of and that he or she did not know, and had no reason to believe, that what he or she did caused or contributed to the publication of the defamatory statement. By contrast, section 3 of the draft Bill provides for a simple, and unqualified, removal of the court's jurisdiction in relation to secondary publishers, other than in circumstances where regulations under section 4 are made. In other words, there is no need for the defender to show that he or she took reasonable care, nor that what was a reasonable lack of knowledge caused or contributed to the publication of the statement. Otherwise the section replicates the terms of section 1 of the 1996 Act, including, with the exception of moderating, the description of functions which are not to lead to a person being classed as an author, editor or publisher. The provision also resembles the approach of section 10 of the 2013 Act,

[12] See paragraph 4.17.

insofar as its effect is to prevent proceedings being brought successfully against any person other than the author, editor or publisher of a statement. Significantly, however there is no exception to allow persons other than the author, editor or publisher to be sued on the basis that it is not possible to bring proceedings against one of those parties.

4.28 We acknowledge that the absence of a "not possible to bring proceedings" exception could be seen by some as being disproportionately favourable to internet intermediaries, particularly where they are hosting third party reviews of goods or services provided by others, and which may be apt to contain expressions of criticism. There is, however, scope to apply to the court for an order under section 1(1A) of the Administration of Justice (Scotland) Act 1972, in the event that it is not possible to identify the party against whom proceedings should most appropriately be brought. This amounts, broadly, to the Scottish equivalent of a Norwich Pharmacal order,[13] used in England and Wales where information needed by a claimant to bring proceedings in defamation is sought to be recovered in the hands of a third party.

4.29 There may also be the possibility of proceedings being brought against "Person(s) Unknown". We would envisage that the Scottish courts would be prepared to follow the approach of the High Court in *Brett Wilson LLP v Person(s) Unknown*.[14] There the action was brought against "Persons Unknown responsible for the operation and publication of material on the website SFHUK.com." The Court regarded the "Person(s) Unknown" as editors. Applying *Brett Wilson*, an action against "The person(s) unknown who posted X comment on Y website" is likely to be competent. In this scenario it seems probable that a court will regard the person sued if not as an author then as an editor of the statement in question, meaning that the action will be allowed to proceed. This could lead to the making of an order for removal or cessation of distribution of a statement. Such orders can be granted against persons who are not parties to the proceedings.

4.30 All of these options will operate, of course, against the background of the power in section 4 of the draft Bill for Scottish Ministers to make regulations specifying categories of persons to be treated as publishers for the purposes of defamation proceedings who would not otherwise be classed as authors, editors or publishers in terms of the Bill, nor as employees or agents of such persons. This will be subject to any provision made by such regulations for a defence available to any person who did not know and could not reasonably be expected to have known that the material disseminated contained a defamatory statement. In effect, this replaces the common law defence of innocent dissemination. The regulation-making power is intended to enable a specific situation to be targeted in which a new category of intermediary is acting to facilitate actively the causing of harm. We appreciate that the task of producing regulations appropriately tailored to a particular situation is unlikely to be a straightforward one, especially where it involves a specific online intermediary and a specific form of conduct online. However, we would envisage that this would operate as something of a last resort, given the availability of the other avenues as set out. In addition, any regulations made under this power should, we suggest, be made subject to the affirmative procedure in the Scottish Parliament, as well as a requirement of consultation before any regulations are made. During consultation on the

[13] *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133.
[14] [2015] EWHC 2628 (QB).

draft Bill, some respondents, including NUJ, Open Rights Group and the Libel Reform Campaign, expressed the view that any specification of persons to be treated as secondary publishers should require to be by means of primary legislation, to ensure that the process was sufficiently democratic and transparent. We remain of the view, however, that use of the affirmative procedure, along with the need for consultation, will be sufficient to afford the appropriate level of legislative scrutiny and debate. Reliance on secondary rather than primary legislation has the practical advantage of allowing specification to take place reasonably quickly, if necessary.

4.31 The consultation on the draft Bill generated some suggestion that the definition of "editor" should be narrowed, in common with that of "publisher", so as to cover only those discharging editorial functions on a commercial basis. Underlying this proposition was a concern that some pursuers might attempt to argue that individual social media users should be seen as "editors" of content which they re-tweeted or provided links to on online platforms, and that they would accordingly be liable in defamation proceedings. At a general level we have reservations as to whether a person making use of a social media service such as Twitter can realistically be viewed as an "editor". But, in any event, it seems to us that the question as to whether someone qualifies as an editor when using social media is inherently a fact-sensitive one, the answer to which will depend critically on the particular circumstances of each case. The nature and terms of the individual communication or posting and the extent of the input of the social media user would, we think, be relevant factors in deciding whether an editorial function is involved (or indeed if authorship of an entirely new statement is involved). In our view, the right solution is to leave it to the courts to apply the well-established definitions of the terms "editor" and "author" on a case by case basis and in the light of developments in online practice and evolving technologies. Accordingly, we have decided not to attempt to devise a statutory provision to narrow the definition of "editor" in the way suggested by some stakeholders; this would be, in our view, an exceptionally challenging task.

4.32 The approach of section 3 alleviates the need for concern over interaction between the provision excluding proceedings against secondary publishers and the dispensations of the Electronic Commerce Directive, as implemented in the UK by the 2002 Regulations. These apply only insofar as liability is in fact attributed to intermediaries.

4.33 We therefore recommend that:

20. Generally, defamation proceedings should not be capable of being brought against a person, unless the person is the author, editor or publisher of the statement in respect of which the proceedings are to be brought or is an employee or agent of such a person and is responsible for the content of the statement or the decision to publish it.

(Draft Bill, section 3)

21. A regulation-making power should be created to allow for exceptions to the general rule so that specified categories of person may be treated as publishers of a statement for the purpose of defamation proceedings despite not being the author, editor or publisher of the statement or an employee or agent of such a person. A draft of such regulations should

be the subject of consultation before they are made. The regulations should be subject to the affirmative resolution procedure.

(Draft Bill, section 4(1), (3) and (4))

22. Any such regulations may also provide for a defence that the person treated as a publisher did not know and could not reasonably be expected to have known that the material disseminated contained a defamatory statement.

(Draft Bill, section 4(2))

Chapter 5 Absolute and qualified privilege

Introduction

5.1 In this chapter we discuss and make recommendations about reform of the law relating to absolute and qualified privilege.

5.2 In the Discussion Paper[1] it was noted that the 2013 Act made numerous changes to the existing privileges in England and Wales provided for in the Defamation Act 1996. It was also noted, however, that the increased protection attached to publication, in certain circumstances, of scientific and academic material is one of the few provisions of the 2013 Act as a whole which has been extended to Scotland.

Absolute privilege

5.3 Absolute privilege attaches on relatively few occasions, but where it attaches it provides protection even for a false statement made with malice. Where privilege is absolute, no action will lie.

5.4 In the Discussion Paper we asked consultees[2] whether they considered that there was a need to reform Scots law in relation to absolute privilege for statements made in the course of judicial proceedings or in parliamentary proceedings.

5.5 Seventeen respondents commented in response to this question. None of these was in favour of any reform of Scots law in relation to absolute privilege for statements made in parliamentary proceedings or in the course of judicial proceedings (though we note that the Senators of the College of Justice answered the question only with regard to judicial proceedings). The Senators expressed the view that the existing application of absolute privilege to statements made in judicial proceedings was appropriate and helpful to the court. Roddy Dunlop suggested that, unless a full codification of the law of defamation is being contemplated, the current law of privilege in the context of statements made in judicial or parliamentary proceedings is sufficiently clear and should remain as it stands. Other respondents answering in similar vein included Campbell Deane, BBC Scotland and the Law Society of Scotland.

5.6 In the Discussion Paper we also asked consultees[3] whether they agreed 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[4] 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 extension was

[1] See paragraph 8.1 of the Discussion Paper.
[2] See question 26 of the Discussion Paper.
[3] See question 27 of the Discussion Paper.
[4] See section 14(3) of the 1996 Act as it applies to Scotland.

made for England and Wales by section 7(1) of the Defamation Act 2013. We commented in the Discussion Paper[5] that it is not obvious why these changes were not made for Scotland.

5.7 Of the 18 respondents who offered comments in response to this question, all of them supported in principle the extension of absolute privilege in the manner proposed, reflecting the change effected by section 7(1) of the 2013 Act for England and Wales but not currently applicable to Scotland. The Senators of the College of Justice drew particular attention to the merit in being able to draw upon the widest possible range of sources of law. Others in agreement included Campbell Deane, BLM, Gavin Sutter and BBC Scotland.

5.8 We accept the unanimous views of the respondents to this question.

5.9 We therefore recommend that:

23. There should be no change to Scots law in relation to absolute privilege for statements made in the course of parliamentary proceedings.

24. Section 14 of the Defamation Act 1996 should be repealed and re-enacted in a new Defamation Act so as to reflect in Scots law the change effected by section 7(1) of the 2013 Act for England and Wales in relation to absolute privilege for contemporaneous reports of court proceedings anywhere in the world and of any international court or tribunal established by the Security Council or by an international agreement.

(Draft Bill, section 9)

Qualified privilege

5.10 A statement which is false and defamatory is presumed to be made with malice; that presumption is rebutted if the statement is subject to qualified privilege. In the event of qualified privilege attaching it is for the pursuer to prove malice.

Statutory qualified privilege in the Defamation Act 1996

5.11 Qualified privilege arises both at common law and under statute. The Discussion Paper briefly described the common law position[6] but then went on to describe the scheme of statutory qualified privileges as provided for by section 15 of and schedule 1 of the Defamation Act 1996 and how some statutory privileges in Part II of schedule 1 were extended in a number of respects for England and Wales by the 2013 Act.[7] The thrust of those changes is to "internationalise" certain of those privileges by extending them to occasions where statements (or summaries of statements) are issued by a legislator, public authority or court located anywhere in the world. In Scotland these qualified privileges are currently limited to statements issued by authorities based in the UK and in other member states of the European Union. Similarly, the 2013 Act "internationalised", for England and Wales, other qualified privileges such as fair and accurate reports of press conferences

[5] See paragraph 8.12 of the Discussion Paper.
[6] See paragraph 8.15 of the Discussion Paper.
[7] See paragraphs 8.16-8.18 of the Discussion Paper.

discussing matters of public interest and general meetings of listed companies held anywhere in the world.

5.12 It seemed to make little sense in the internet age that similar privileges were still territorially limited in terms of the current law applicable in Scotland and we saw no reason why the law in this area should differ as between Scotland and England and Wales.

5.13 The Discussion Paper[8] therefore asked consultees whether they agreed 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.

5.14 Of the 14 respondents who commented in response to this question, all agreed in principle with the proposed extension of qualified privilege. These included Eric Clive, Graeme Henderson, the Faculty of Advocates and BBC Scotland. The proposed extension was thought to amount to a suitable modernisation of the current law on privilege.

5.15 We accept the unanimous views of the respondents to this question.

5.16 We therefore recommend that:

25. The law on privileges should be extended by allowing qualified privilege to cover communications issued by 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.

(Draft Bill, section 11 and schedule)

5.17 The Discussion Paper[9] also asked if it would be of particular benefit to restate the privileges in the Defamation Act 1996 in a new statute and why.

5.18 Of the 16 respondents who offered comments on this question, 15 supported in some way a restatement of the privileges in the 1996 Act. Eleven supported it outright, citing the increased clarity and consistency of the law that such a restatement would produce. These included BBC Scotland, BLM, Paul Bernal and the Libel Reform Campaign. The Libel Reform Campaign observed: "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."

5.19 The Faculty of Advocates expressed support for a restatement, but only in so far as any statutory provision would be able to address the difficulties outlined at paragraph 8.18 of the Discussion Paper, namely in relation to territorial limitation of privilege to reporting of matters taking place in the UK or member states of the EU. Roddy Dunlop and Gavin Sutter took the view that, while a restatement could improve clarity, the current structure of the 1996 Act and its various schedules did not appear to cause difficulty in practice. To that

[8] See question 28 of the Discussion Paper.
[9] See question 29 of the Discussion Paper.

extent there did not seem to be a pressing reason to proceed with a restatement, albeit that they were not actively opposed to it.

5.20 The Law Society of Scotland saw 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).

5.21 Taking into account the views of respondents, we think that there would be merit in bringing all provisions relating to privilege into the new defamation statute, eliminating the need to cross-refer to the 1996 Act. We think this would promote accessibility and transparency of the law. The draft Bill therefore provides for the repeal and re-enactment of all provisions of the Defamation Act 1996 relating to privilege, insofar as they apply to Scotland. Consistency of approach as between Scotland and England and Wales has much to commend it in relation to privilege, given the complexities which could otherwise arise. Accordingly, the draft Bill provides for re-enactment of the 1996 Act provisions on privilege in such a way as to reflect the amendments made for England and Wales by section 7 of the 2013 Act. Similarly, those provisions of the 2013 Act which already apply to Scotland are repealed insofar as they apply to Scotland, with equivalents being re-enacted in the draft Bill.[10] While this amounts to a restatement of the relevant provisions, it does not encompass any element of reformulating. We acknowledge that there may be some areas of overlap or apparent tension between the various provisions of the 1996 Act, as they apply to England and Wales, following the amendments made by the 2013 Act. To the extent that this is the case, these are replicated in the draft Bill.[11] However, we do not think that these make the approach of the 1996 Act and the draft Bill unacceptably complex or unclear. In any event, any attempts to address them would more appropriately be made in a UK-wide statute, again in the interests of consistency.

5.22 In response to the consultation on the draft Bill, whilst the Law Society of Scotland referred to the drafting of section 11 of the draft Bill as "unnecessarily confusing", Gavin Sutter described the relevant provisions on privilege as "well drafted" and "straightforward". Also, SNS commented in their submission that the clarity of the provisions in the draft Bill on absolute and qualified privilege "should be of great assistance in helping public understanding of what can or cannot be reported and should prevent needlessly prolonged disputes, particularly over reporting of evidence in criminal proceedings". Given the broad consensus amongst respondents on this issue, we therefore recommend that:

26. The privileges of the Defamation Act 1996 should be restated for Scotland in a new statute.

(Draft Bill, sections 9 and 11 and schedule)

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[10] Section 10 of the draft Bill repeats section 6 of the 2013 Act, relating to statements in scientific or academic journals. See further the discussion at paragraphs 5.33-5.44 below. Paragraph 16 of the schedule repeats the provision made by section 7(9) of the 2013 Act, in relation to scientific or academic conferences.

[11] There may be a tension between section 9 of the draft Bill, which provides for absolute privilege in relation to contemporaneous publication of a statement which is a fair and accurate report of proceedings in public before a court, and paragraph 3 of the schedule, conferring *qualified* privilege on a fair and accurate report of proceedings in public before a court. Conversely, and as discussed further below, with reference to paragraphs 7 and 9 of schedule 1 of the 1996 Act, there may be overlap between paragraphs 2 and 9 of the schedule of the draft Bill, to the extent that both confer qualified privilege on notices or other matters issued by or on behalf of a government or legislature.

Extract from or abstract of a parliamentary report etc.

5.23 The Discussion Paper noted[12] that the publication of any extract from or abstract of a parliamentary report etc. is covered by qualified privilege according to section 3 of the Parliamentary Papers Act 1840. This was later extended to cover extracts from or abstracts of a parliamentary report broadcast by means of wireless telegraphy, according to section 9(1) of the Defamation Act 1952. We observed in the Discussion Paper that these provisions seem to create some overlap with the qualified privilege attached to a copy or extract from matter published by a legislature anywhere in the world, according to paragraph 7 of schedule 1 of the Defamation Act 1996. This in turn appears to have some overlap with the qualified privilege (subject to explanation or contradiction) attached to a copy of or extract from a notice or other matter issued for the information of the public by or on behalf of a legislature in any member state of the EU, according to paragraph 9 of schedule 1 of the 1996 Act.

5.24 We also pointed out in the Discussion Paper[13] that section 41(1) of the Scotland Act 1998 provides that absolute privilege applies to any statement made in proceedings of the Scottish Parliament and the publication under the authority of the Scottish Parliament of any statement. Section 1 of the Parliamentary Papers Act 1840 provides that proceedings against persons for publication of papers printed by order of Parliament are to be stayed upon delivery of a certificate and affidavit to the effect that such publication is by order of either House of Parliament.

5.25 A Private Member's Bill on defamation,[14] introduced in the House of Lords by Lord Lester of Herne Hill QC in May 2010, proposed a clause providing for absolute privilege to apply not only to reports of proceedings in Parliament but also to a report of anything published by the authority of Parliament as well as to a copy of, extract from or summary of anything published by such authority.

5.26 The extension of absolute privilege to copies and extracts of anything published by the authority of Parliament was not taken up in the Defamation Act 2013. The reference in section 9(1) of the 1952 Act to "broadcasting by wireless telegraphy" does not take account of more modern means of communication such as the internet. In the Discussion Paper we said it would be helpful at least to clarify whether there is a need for the provision in section 9 of the 1952 Act given the protections of extracts or copies of a matter published by a legislature under paragraphs 7 and 9 of schedule 1 of the 1996 Act.[15]

5.27 As such, we asked consultees[16] whether 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.

5.28 Of the 14 respondents who offered comments on this question, five supported in principle application of absolute privilege to publication of copies of or extracts from reports of proceedings in Parliament and other papers published by or on the authority of

[12] See paragraph 8.20 of the Discussion Paper.
[13] See paragraph 8.8 of the Discussion Paper.
[14] https://publications.parliament.uk/pa/ld201011/ldbills/003/11003.i-ii.html
[15] See paragraph 8.22 of the Discussion Paper.
[16] See question 30 of the Discussion Paper.

Parliament. BBC Scotland expressed support for the original proposals by Lord Lester.[17] Others supporting absolute privilege included the Law Society of Scotland.

5.29 The Faculty of Advocates were in favour of an examination of the issues around privilege for publication of copies of and extracts from parliamentary papers but highlighted that any reform exercise in that area would involve significant additional work. BLM and Aviva commented: "We agree that it would be sensible to review Scots law in relation to qualified privilege for publication of parliamentary papers (or extracts thereof)." None of these respondents came down firmly in favour of an application of absolute privilege or, alternatively, an extension of qualified privilege as it currently applies. A similar stance was taken by SNS and the Libel Reform Campaign. They supported some expansion of privilege in this area, but did not specify the form it should take.

5.30 Two respondents - Roddy Dunlop and Graeme Henderson – were opposed to any alteration of the application of parliamentary privilege to publication of parliamentary papers. Roddy Dunlop suggested that the law in this area was sufficiently settled.

5.31 From the responses to the Discussion Paper it seems clear that there is a call at least for a review of the application of qualified privilege in the context of publication of copies of or extracts from parliamentary reports etc, including the possibility of applying absolute privilege instead. However, respondents were divided both as to whether there should be reform and, if so, what form it should take. Given this division of opinion and also given that we think there is much to be said for maintaining a broad consistency of approach as to the operation of parliamentary privilege throughout the UK, we do not consider that it is appropriate to recommend a change to the law in this area at the present time.

5.32 We therefore recommend that:

27. There should be no reform of Scots law in relation to qualified privilege for publication (through broadcasting or otherwise) of Parliamentary papers or extracts thereof, for the time being.

28. Consideration of any future reform relating to this area should be carried out on a UK-wide basis.

Qualified privilege in academic discourse

5.33 Section 6 of the 2013 Act provides for a new defence for publication in a scientific or academic journal of a statement relating to a scientific or academic matter if it can be shown that the statement has been subject to an independent review of its scientific or academic merit carried out by the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned. As with other forms of qualified privilege, the privilege is lost if it is shown that the publication was made with malice. This provision applies to Scotland.

5.34 Paragraphs 8.26 and 8.27 of the Discussion Paper questioned whether section 6 of the 2013 Act goes far enough to protect freedom of expression in academic discourse. For

[17] For more detail on Lord Lester's Bill, see paragraph 8.21 of the Discussion Paper.

example, it might be questioned why only statements in journals are protected and not those made in academic or scientific books.

5.35 As such the Discussion Paper asked consultees,[18] given the existing protections of academic and scientific writing and speech, if they thought it necessary to widen the privilege in section 6 of the 2013 Act beyond a peer-reviewed statement in a scientific or academic journal and, if so, how.

Brief summary of the balance of opinion

5.36 A total of 15 respondents offered comments in relation to this question. Of these, six were in favour of an expansion of the privilege provided for in section 6 of the 2013 Act whilst eight were against it. Another respondent, Eric Clive, took the view that the privilege should not be imported in its 2013 Act form, but was undecided as to what alternative arrangement should take its place.

Arguments in favour of expansion of section 6

5.37 Paul Spicker pointed out that, in terms of material subject to peer review, the net is much wider than journals – books and academic bids for funding tend also to be peer-reviewed. He observed that it is, in any event, questionable to what extent a focus on peer-reviewed material offers protection against defamation. The primary focus of peer review tends to be recognised as being to make judgements about the rigour and validity of a submission. This does not generally include any sort of duty to notify the editor as to whether or not academic comment or criticism might operate to the detriment of a person's commercial interests. He further commented that it was not clear why safeguards should only be applicable at the point of formal publication of material or submission to other bodies. Academic papers may, for example, be presented at seminars and conferences during the course of their development, before formal publication. It seemed that what was called for was a general exemption for all bona fide academic discourse. The nature of the discourse should be determined on a case by case basis rather than being treated as occurring only in specified locations or outlets. BBC Scotland observed that peer review was extremely narrow in its scope.

5.38 SNS expressed regret about the exclusion of books from the scope of section 6. A similar sentiment came from the Faculty of Advocates. The Faculty concluded their comments on question 31 by saying that they would support the extension of any provision equivalent to section 6 to cover a wider range of academic publications than was presently caught. However, they highlighted that that there were likely to be "very real challenges in producing a workable, logical and enforceable solution."

Arguments against expansion of section 6

5.39 The Libel Reform Campaign thought that any extension of protection focussed on peer- reviewed material would be misguided:

> "Protection of peer reviewed science would arguably not do a great deal to reduce the chilling effect of the defamation laws on academic discussion. Only a small

[18] See question 31 of the Discussion Paper.

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."

5.40 We are of course recommending elsewhere in this report (see chapter 3 on Defences) a defence of publication on a matter of public interest (see section 6 of the draft Bill) which will go some way to meeting the concerns of the Libel Reform Campaign.

5.41 On the other hand, the Law Society of Scotland took a different angle, namely that the coverage of peer-reviewed statements in scientific or academic journals was practical enough to meet the aim of promoting freedom of expression within the academic and scientific community. On that basis, they did not support any expansion of section 6.

Conclusion

5.42 Having weighed up these competing arguments, we recommend that the scope of section 6 should be left as it stands. It appears that more would be needed to make it fully effective than a simple extension of its application in terms of the types of publication that it covers. Fundamental questions have been asked about whether the focus on peer-reviewed material is sufficient in offering protection against defamation. There may be a need for a wider protection covering academic discourse in general. It seems preferable that any such changes be made at UK level, rather than the same provision applying in a different manner as between Scotland and England and Wales.

5.43 Nevertheless, we think it would be sensible, given the draft Bill restates other statutory provisions relating to privilege, to include a restatement of section 6 of the 2013 Act in the draft Bill so that the bulk of material relating to privilege in Scotland (except that relating to Parliamentary proceedings and publications) is located in one place in the statute book for ease of accessibility. In response to the consultation on the draft Bill, the Publishers Association and Gavin Sutter both welcomed the inclusion of section 10 of the draft Bill, which replicates the provision in section 6 of the 2013 Act.

5.44 We therefore recommend:

29. The scope of section 6 of the 2013 Act should not be expanded but its current terms should be restated in a new Act for Scotland.

(Draft Bill, section 10)

Chapter 6 Remedies

Introduction

6.1 In this chapter we consider possible expansion of remedies currently available in defamation proceedings in Scots law, as well as partial consolidation of relevant provisions.

Interdict and *interim* interdict

6.2 In the Discussion Paper we noted that our advisory group did not identify any need for reforming the law of interdict and *interim* interdict.[1] We observed that any general reform of these remedies would be well beyond the scope of this project. We expressed the provisional view that the law and practice were well-settled in relation to these orders. We asked whether consultees agreed.

6.3 The vast majority of respondents agreed that there was no need to reform the law relating to interdict and *interim* interdict for the purposes of defamation proceedings. Roddy Dunlop suggested that the only area where reform might be considered was in regard to whether the rule in *Bonnard v Perryman*[2] should be made part of Scots law. He acknowledged, however, that the effect of section 12(3) of the Human Rights Act 1998 might render such reform unnecessary. Mr Dunlop also observed that the rule in *Bonnard* arguably gave insufficient weight to Article 8 ECHR and had led to an artificial tendency to rely on other causes of action in an attempt to get round the rule.

6.4 In *Massie v McCaig*[3] the Inner House confirmed that the rule in *Bonnard* was not part of Scots law. The court observed that section 12(3) of the Human Rights Act 1998 had superseded the Scots common law test (based on the existence of a *prima facie* case and balance of convenience) in cases where the grant of *interim* interdict might affect a person's Article 10 ECHR right to freedom of expression. In such cases the pursuer must now satisfy the court that he or she is likely to succeed in obtaining interdict at the end of the action before *interim* interdict can be granted. The bar has accordingly been raised at the *interim* stage.

6.5 We consider that section 12(3) is likely to apply in most cases where interim interdict is sought in defamation actions or in proceedings brought under Part 2 of the draft Bill. In the circumstances and having regard to the settled state of Scots law and practice on interdict and interim interdict, we are not persuaded that it would be appropriate to adopt the rule in *Bonnard v Perryman*; this is especially so in view of the doubts that have been voiced as to the compatibility of the rule with Article 8 ECHR.

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[1] See paragraph 9.8 of the Discussion Paper.
[2] [1891] 2 Ch 269. This case lays down the general rule that where the defendant indicates his or her intention to rely on the defence of truth, the court will not grant an interim injunction unless satisfied that the defence cannot succeed.
[3] 2013 SC 343 at paragraph 34.

6.6 We therefore recommend that:

30. There should be no change to the law governing the granting of interdict and *interim* interdict in defamation actions or in proceedings under Part 2 of the Bill.

Offer to make amends

Incorporation in a new statute

6.7 Sections 2 to 4 of the Defamation Act 1996[4] lay down a settlement procedure under which the court is given power to enforce the settlement and, where appropriate, to award compensation. The idea is to allow those who accept that they have mistakenly published defamatory material to avoid litigation by offering to make reasonable amends.[5] The offer may relate to the statement generally or to a specific defamatory meaning which the statement is accepted to have conveyed.

6.8 In the Discussion Paper we explained that our advisory group told us that the offer of amends procedure is frequently used in practice by media organisations and others to settle claims.[6] We observed that a new defamation statute would present an opportunity for the procedure to be included in it so that the law could be easily found in one place. We therefore asked whether the offer of amends procedure should be incorporated in a new Defamation Act.

6.9 Most respondents supported the idea. Professor George Gretton referred to the statutory function of the Law Commissions to reduce the number of separate enactments.

6.10 It is clear that the offer of amends scheme has been found to be useful in practice and that it has served to facilitate the early and effective settlement of claims. We are satisfied that, in the interests of improving the accessibility of the law and of reducing the number of separate enactments, there would be merit in taking the opportunity to set out the scheme in a new defamation statute. Moreover, as we explain below, we have decided to recommend the introduction of a new requirement for an offer of amends to be accepted within a reasonable time; this would necessitate amendment of the existing law. In the circumstances, we consider that it is desirable that all of the provisions of the amended law should be contained in a single statute.

6.11 We therefore recommend that:

31. The offer of amends procedure should be incorporated in a new Defamation Act.

(Draft Bill, sections 13 to 17)

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[4] Enacting the substance of proposals made by the 1991 Neill Committee on Practice and Procedure in Defamation for a 'streamlined defence' where the publisher of a defamatory statement behaved 'fairly and reasonably'.

[5] *Abu v MGN Ltd* [2003] 1 WLR 2201, per Eady J at paragraph 4.

[6] See paragraph 9.12 of the Discussion Paper.

Approach of the draft Bill

6.12 While the draft Bill generally follows the approach of the Defamation Act 1996, we have separated out and reordered some of the provisions with a view to making the scheme easier to navigate and understand. We have also taken the opportunity to make some improvements to the drafting of the scheme, for example by making clear that an offer of amends need not offer to pay expenses (section 13(1)(d) of the draft Bill) and that an unqualified offer need not expressly state that it is not a qualified offer (section 13(2)(d) of the draft Bill).

Acceptance within a reasonable time

6.13 The one substantive policy change we recommend relates to the question as to whether an offer of amends requires to be accepted within a reasonable time. In the Discussion Paper we noted that the 1996 Act does not provide for a set period within which an offer of amends must be accepted or rejected.[7] We drew attention to a conflict between (a) the case law in England and Wales and (b) a decision in the Outer House of the Court of Session.[8] In the Scottish case it was held that an offer of amends, which had not been withdrawn, remained open indefinitely, allowing it to be accepted at a late stage in a defamation action. We pointed out that this view was contrary to the settled understanding of the law in England and Wales as to how the scheme was intended to work. Accordingly, we asked whether the procedure should be amended to make it clear that an offer of amends must be accepted within a reasonable time or it will be treated as having been rejected.

6.14 With one exception, all those who responded to this question supported the introduction of an express obligation to accept an offer to make amends within a reasonable time, failing which it would be treated by law as having been rejected.

6.15 The Senators of the College of Justice observed that judges would be able to give consideration to what amounted to a reasonable time in the particular circumstances of the case, focussing on, amongst other things, the pursuer's conduct subsequent to the offer being made, but also on the fact that the defender had not withdrawn the offer. The Senators made the point that it seemed unjust to allow a pursuer to continue litigation for a long time, only to accept the offer of amends, which might include terms relating to compensation and expenses.

6.16 In the light of the responses to consultation, we consider that it should be made clear by statutory provision that an offer of amends must be accepted within a reasonable time, failing which it will be deemed to have been rejected. To allow an offer of amends to remain open indefinitely, at the option solely of the pursuer, would have the effect of undermining the policy behind the scheme; as we have said, it is intended to promote early resolution of defamation claims by a process of conciliation. It seems to us that it is wrong to allow the pursuer to leave an offer unanswered and press ahead with the litigation, only to turn around and accept the offer of amends at an advanced stage of the case if so minded. Having

[7] See paragraph 9.11 of the Discussion Paper.
[8] See again paragraph 9.11 of the Discussion Paper, citing *Loughton Contracts Plc v Dun & Bradstreet Ltd* [2006] EWHC 1224 (QB); *Tesco Stores v Guardian News & Media Ltd* [2009] EMLR 5; and *Moore v Scottish Daily Record and Sunday Mail Ltd* 2007 SLT 217.

regard to the conflict between the Scottish and English case law on the question, we consider that it would be desirable for the position to be clarified by way of a statutory provision. We propose that it should be left to the courts to decide on what amounts to a reasonable time in the particular circumstances of any given case. Any attempt to lay down a standard period would be likely to give rise to difficulty since the facts and circumstances of individual cases vary so widely.

6.17 We therefore recommend that:

32. There should be a statutory provision to the effect that an offer of amends is deemed to have been rejected if not accepted within a reasonable period.

(Draft Bill, section 13(3)(c))

Other issues

6.18 We also asked in the Discussion Paper whether there were any other amendments that consultees thought should be made to the offer of amends procedure.[9]

6.19 Eric Clive suggested that it should be made clear that an offer of compensation and expenses was not always required; in some cases, a correction and apology would be sufficient. He thought that this might, however, be linked to the proposal that a threshold of serious harm should be introduced.

6.20 We do not think that under the present scheme an offer of amends requires to offer to pay any damages. Section 2(4)(c) of the Defamation Act 1996 has the effect that an offer need only include an undertaking to pay such compensation (if any) as may ultimately be agreed between the parties, or determined by the court. We consider that this should continue to be the case. We refer to section 13(1)(d) of the draft Bill.

6.21 Roddy Dunlop drew attention to what he saw as the procedural complications that could arise where a pursuer accepted a qualified offer of amends, but wished to proceed with the litigation insofar as the remaining aspects of the claim (ie those not covered by the qualified offer) were concerned; where, for example, a defender made an offer in respect of one but not all of the defamatory statements complained of – broadly the situation that arose in *Warren v Random House Group Ltd*,[10] or where the defender made an offer based on a less serious meaning than that pleaded by the pursuer. Under the rules of the Court of Session[11] in such circumstances the pursuer requires to lodge a minute in the court process seeking to enforce the qualified offer of amends and to proceed separately with his or her principal action. A better solution, in Mr Dunlop's view, would involve providing that the pursuer has a simple choice: either he or she should accept the qualified offer and enforce it alone; or accept it on the basis that he or she 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 he considered that potential difficulties were

[9] See question 35 of the Discussion Paper.
[10] [2007] EWHC 2860 (QB).
[11] RCS 54.1(2).

liable to arise in relation to double compensation, assessment of damage to reputation and the like.

6.22 Mr Dunlop's observations seem to us essentially to involve matters of court procedure and case management rather than to raise substantive questions suitable for inclusion in primary legislation. Insofar as any issue of principle is raised, the current legislation adopts the sensible stance of allowing the pursuer to accept a qualified offer of amends whilst reserving the right to pursue a claim insofar as it has not been met by the qualified offer. Exactly how such a situation falls to be handled in practical terms by the court may depend on the particular circumstances of the litigation; no doubt the court would be concerned to ensure that the overall damage to the pursuer's reputation was properly compensated for, but avoiding any possibility of double compensation. We do not consider that any substantive amendment to the terms of the scheme is necessary in order to allow the courts to do justice in these respects according to the particular facts and circumstances of a case.

6.23 The Libel Reform Campaign proposed that consideration should be given to the idea that the pursuer should be incentivised to accept a reasonable offer of amends, perhaps with regard to the level of damages and expenses awarded.

6.24 We consider that the offer of amends scheme already contains strong incentives designed to encourage early settlement. If an offer to make amends is rejected, the level of any damages will usually be discounted and the court has power to adjust awards of expenses to reflect the parties' conduct. In the circumstances, it seems to us that the points raised by the Campaign are already adequately addressed in the existing scheme.

6.25 Aviva and BLM suggested that in the event of the introduction of a threshold of serious harm an offer to make amends should be held to amount to an admission that serious harm had been caused or is likely to be caused to the pursuer's reputation. This would operate as a deterrent against defenders making offers of amends where it was not in the public interest for them to do so.

6.26 We doubt that there is any reason to suppose that offers to amend are likely to be made in circumstances where it is contrary to the public interest to make them. If a threshold of serious harm is introduced (as we recommend), offers to make amends will presumably usually be made only where the defender is satisfied that the pursuer has a reasonable prospect of getting over the threshold. In the final analysis it is, however, a matter for the defender to decide whether to make an offer of amends; that decision may be influenced by many factors: legal, commercial and pragmatic. There may be cases on the border line of serious harm where nonetheless the defender wishes to make an offer of amends because it judges that by doing so it would save expense and other resources or avoid unwelcome publicity. If the making of an offer was to be deemed automatically to imply an admission of serious harm that might persuade the defender not to offer since such a finding would have the potential to cause the court to award larger damages than the case truly merited.

6.27 The Faculty of Advocates made a number of points. First, they suggested that the wording of section 3(5) of the 1996 Act might be improved. It refers to the court being empowered to reduce or increase the amount of damages in view of the steps taken in

fulfilment of the offer, the suitability of the correction, the sufficiency of the apology and whether the manner of its publication was reasonable. The Faculty questioned whether it was appropriate for the provision to include reference to the possibility of damages being increased as opposed to their being reduced. So far as the Faculty was aware, there was no case in which this had happened. In the Faculty's view, the purpose of this part of the provision was not clear. There might be merit in drafting a clause which contained no reference to the possibility of damages being increased. The aim would be to provide a stronger incentive towards early settlement.

6.28 Secondly, the Faculty suggested that the opportunity might be taken to redraft the provisions of the scheme so that they reflect Scottish terminology and practice more accurately. For example, there was reference to statements in open court; this is not presently part of the procedure followed in the Scottish courts, although we recommend elsewhere that it should become so.[12]

6.29 Thirdly, the Faculty mentioned the potential confusion that could arise in relation to the impact of a qualified offer of amends. In the Faculty's view, the language used in section 3(2) of the 1996 Act left open the question as to whether acceptance of a qualified offer of amends had the effect of bringing any proceedings to an end. That was not the intention behind the provision. The uncertainty could be addressed by redrafting the provisions, perhaps by separating out the rules on unqualified offers from those affecting qualified offers.

6.30 We would respond to the Faculty's points as follows. First, we do not think that the powers of the courts to award damages should be limited in the way the Faculty suggests. There may occasionally be cases where the conduct of the defender following the making of an offer of amends is such that an increase in damages is appropriate: for example, where there has been an unconscionable delay in agreeing and publishing a suitable retraction, causing additional mental anguish for the pursuer.

6.31 Secondly, we note the points urging greater use of Scots terminology in the statutory provisions. We have sought to address this where appropriate, for example by replacing 'costs' with 'expenses' and 'defence' with 'defences' (see eg section 13(1)(d) and (2)(a) of the draft Bill).

6.32 Thirdly, again we note the Faculty's thoughts on the clarity of section 3(2) of the 1996 Act. We have separated the provisions relating to rejection of an unqualified offer from those governing rejection of a qualified offer (see sections 16 and 17 of the draft Bill).

6.33 The Law Society of Scotland thought that there might 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.

6.34 The Senators of the College of Justice suggested that should an offer of amends be rejected (or left open until the court's judgment), it would seem sensible for the offer and its terms to be factored into decisions on expenses. The Senators recognised, however, that this would not require to be addressed by primary legislation.

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[12] See paragraphs 6.45-6.51 below.

6.35 The points raised by the Law Society of Scotland and the Senators of the College of Justice do not, in our view, raise any issues that would require to be the subject of modified statutory provisions. We note, in particular, that the existing scheme confers unfettered powers on the court when it comes to determining issues of expenses and the matters that may be taken into account in so doing.

Publication of a summary of the court's judgment

6.36 In the Discussion Paper we observed that, unlike their counterparts in England and Wales, the Scottish courts do not at present have power to order an unsuccessful defender in defamation proceedings to publish a summary of a judgment.[13] Section 12 of the 2013 Act confers such power on the courts in England and Wales. We expressed the provisional view that there could be much to be said for the courts in this country being given a similar power. We accordingly asked for the thoughts of consultees on the point.

6.37 Fourteen respondents provided responses to this question. Nine of these unequivocally supported the proposal that the courts should be given the power to order publication of a summary of a judgement.

6.38 SNS observed that news editors were already used to such a procedure under the IPSO complaints process so that, in principle, the small number of defamation actions would not present a significant additional burden. The Society added that it would be important to have an understanding of what constituted a summary; it would be unreasonable for the summary to be disproportionate in length when compared to the offending article.

6.39 The Libel Reform Campaign opposed the introduction of such a power on the ground that it would amount to an unjustified infringement of the right to freedom of expression. There would also be practical difficulties, such as how to publish summaries of judgements relating to defamatory statements contained in books or serials and on Twitter. Such orders might cause confusion where an offer of amends had been made or where a correction had already been issued.

6.40 Google also opposed this reform on the grounds that it would be contrary to the right to freedom of expression, as well as being against public policy. In any event, Google submitted that the power should not extend to internet intermediaries; they were rarely able to defend a defamation action on the ground of truth, given that they did not generally know if the statement was true or not. Moreover, Google asked why should the pursuer be entitled, via the intermediary, to orchestrate the posting of the summary on the website or blog of the author of the material? Quite apart from not agreeing with the content of the summary, the author might not have been made a party to the proceedings. Any power to require publication of a summary should be capable of being exercised only against the primary author or primary publisher. In responding to the consultation on the draft Bill, Google reiterated its earlier suggestion that internet intermediaries should be carved out in such a way that they could not competently be ordered to publish a summary of a judgment. This suggestion was again made on the basis of the argument that intermediaries would not ordinarily be able to determine the truth, or otherwise, of statements.

[13] See paragraph 9.16 of the Discussion Paper.

6.41 In responding to the Discussion Paper the Faculty of Advocates was similarly not persuaded that the courts should be given this power. It would represent an unjustifiable invasion of freedom of speech and risked turning the judiciary into editors. The fact that IPSO enjoyed the power to order publication of its adjudications meant that there was less of a case for the courts to be given an equivalent power. It meant that a suitable alternative remedy to court action was already available and this could be invoked where a pursuer wished to have the outcome of his or her complaint published.

6.42 The Law Society of Scotland, whilst not opposing the introduction of such a power in principle, observed that it might not be conducive to the effective resolution of defamation disputes for the courts to become involved too closely in specifying the details of publication of summary judgements. It would be important to ensure that orders did not violate the Article 10 right to freedom of expression.

6.43 Whilst we acknowledge the concerns expressed by a minority of respondents, we are satisfied that the Scottish courts should be given statutory powers equivalent to those set out in section 12 of the 2013 Act. Publication of a summary of a court's judgment will often represent a more effective public vindication of a pursuer's rights than an award of damages could ever do. The fact that IPSO enjoys the power to order publication of summaries of its adjudications seems to us to be a powerful factor in favour of the courts being given an equivalent power. We consider that the concerns expressed by some respondents about interference with the right to freedom of expression can be sufficiently addressed by the courts being given discretionary powers to make appropriate directions as to the time, manner, place and form of publication. This will enable the courts to ensure that the new power is exercised in a sensitive and proportionate manner, appropriately tailored to the particular circumstances of each case. In this connection it should be noted that the power in section 12 is exercisable against all parties to the proceedings. We do not see any reason for exempting internet intermediaries who have been made parties to a defamation action, and are not persuaded that they should be carved out as Google proposed. The practical difficulties highlighted in some of the responses are likely to be capable of being overcome by judicious exercise of the power. It should be recalled also that the power will only be used where the court has held that the threshold of serious harm has been met. The recent Northern Irish Report takes the same line as we now recommend.[14] We consider that it should, in the first instance, be for the parties to agree the wording of the summary and the time, manner, form and place of its publication. If the parties cannot agree the wording of the summary then it will be for the court to determine that matter. Conversely, in the event that the parties are unable to agree as to the time, manner, form and place of publication, the court should be empowered to give such directions as it considers to be appropriate in regard to these matters. We propose that these powers should also be available to the court in proceedings brought under Part 2 of the draft Bill where new provision is made governing liability for malicious publications.

6.44 We therefore recommend that:

[14] See paragraph 2.125 of the Northern Irish Report.

33. In defamation proceedings and in Part 2 proceedings the court should have power to order that the defender must publish a summary of its judgment.

(Draft Bill, section 28)

Statement in open court

6.45 We pointed out in the Discussion Paper that in the courts of England and Wales and of Northern Ireland there is a long-standing power to allow for a statement to be made in open court as part of the settlement of a defamation action.[15] This is thought to be a valuable end point to a litigation brought to achieve vindication. It provides a means for more publicity to be given to a settlement than would otherwise occur. We observed that the reading of a statement in open court has never been part of the procedure relating to the settlement of defamation actions in Scotland. The reasons for this are unclear. We expressed the provisional view that the advantages of such a procedure were obvious and we accordingly sought consultees' views on whether the law should provide for such a procedure in the Scottish courts.

6.46 The vast majority of respondents who commented on this question supported the introduction of such a procedure. This would allow details of the settlement, and the case giving rise to it, to be read out in court. The Libel Reform Campaign suggested that such statements provided precisely the vindication that pursuers needed. Aviva and BLM made similar points. Campbell Deane considered that the procedure would be of considerable benefit to any pursuer from the perspectives of reputation management and restoration. Roddy Dunlop said that he understood the procedure was regarded as extremely useful in England and Wales.

6.47 The Faculty of Advocates stated that it was not opposed to the idea in principle, but mentioned a number of points which caused them to be cautious about it. First, the Faculty thought that there was no problem in settling actions under current rules. Why provide a remedy to a problem that does not exist? Secondly, pursuers had not identified the absence of a procedure for statements in open court as an impediment to settlement. Thirdly, making such a procedure available might serve only to provide a further potential point for disagreement and thus make resolution of cases more difficult and expensive than at present.

6.48 Stephen Bogle questioned the value of the procedure. He thought that modern judgments written in plain English should suffice and suggested that the Court of Session should prepare and publish summaries of all judgments on its website, as is done in the Supreme Court.[16] Eric Clive wondered if statements could not be read out in open court already.

6.49 We consider that the Scottish courts should be given statutory power to allow settlement statements to be read out in open court. It would ultimately be for the court to

[15] See paragraph 9.19 of the Discussion Paper.
[16] In fact, summaries of important judgments in the Court of Session are sometimes published on the website of the Scottish judiciary.

decide whether the making of such a statement was appropriate. A statutory provision would put the competency of the matter beyond doubt and serve to encourage the use of such statements in practice. It seems to us that agreed statements of this type can provide a powerful and effective means of public vindication. They are likely to receive substantially greater publicity than a court judgment, which will often be less accessible and accordingly less reportable. We believe that the availability of statements in open court will facilitate rather than hinder the settlement of claims; we note that under present practice advisers are already accustomed to negotiating the terms of apologies, often for publication.[17]

6.50 We propose that the court should be required to approve the terms of a settlement statement before it is read in open court. There might otherwise be a risk that vexatious or misguided litigants might attempt to use the court as a platform for publicising inappropriately worded statements. We also think that the pursuer should be permitted to make a unilateral statement (subject to the court's approval of its wording and being satisfied that the making of a statement is appropriate) at the stage of a settlement; this would be an alternative to the making of a bilateral or multi-party statement. In England and Wales the claimant has this option. Its availability could help to promote the making of joint statements. We recommend that the power should extend to proceedings under Part 2 of the draft Bill.

6.51 We therefore recommend that:

34. In defamation proceedings and in Part 2 proceedings the court should have statutory power to allow a settlement statement to be read out in open court.

(Draft Bill, section 29)

Power of court to order removal of statement from website etc.

6.52 We drew attention in the Discussion Paper to section 13 of the 2013 Act.[18] This provision is intended to cater for the situation where an author of material that is held to be defamatory is not in a position to remove the material or prevent its further dissemination. Section 13(1) empowers the court, if giving judgment in favour of the claimant in a defamation action, to order the operator of a website on which a defamatory statement is posted to remove the statement. Alternatively, it may make an order requiring a person who was not the author, editor or publisher of the statement, but who is distributing, selling or exhibiting material containing it, to cease disseminating the material.

6.53 We pointed out in the Discussion Paper that under the present law the Scottish courts have no powers that are directly equivalent to those conferred by section 13 of the 2013 Act.[19] We observed that it was undecided whether section 46 of the Court of Session Act 1988 might be invoked for the purpose of obtaining an order against a website operator to require removal of material. We noted also that such an order would not be available in the Sheriff Court and, unlike orders under section 13, could only be granted against a party to the proceedings. We therefore asked whether the Scottish courts should be given a

[17] In defamation actions there is a strong public interest in encouraging settlements: see *Mionis v Democratic Press SA* [2017] EWCA Civ 1194 at paragraphs 89 and 104.
[18] See paragraph 9.17 of the Discussion Paper.
[19] See paragraph 9.18 of the Discussion Paper.

specific power to order the removal of defamatory material from a website or the cessation of its distribution.

6.54 Most of those who replied to this question supported the introduction of such powers, albeit in some cases with qualifications. Amongst this group of respondents, Paul Bernal observed that care needed to be taken and proper guidance given so as to avoid the operators of websites being over-burdened. Roddy Dunlop thought that powers to require removal of material and/or cessation of distribution probably already existed under section 46 of the Court of Session Act 1988 or by way of granting orders *ad factum praestandum.*[20] Nevertheless, he agreed that it would be sensible to make specific provision for this, putting matters beyond doubt. Ursula Smartt drew attention to jurisdictional difficulties where websites and ISPs were located outside the United Kingdom.

6.55 The Libel Reform Campaign acknowledged that there was no justice or public interest in continuing to publish material that a court had declared to be defamatory. They made the point that the terms of any orders granted under such a provision would require to be highly specific so that there was no doubt about the exact text and links that were to be removed. The content of such orders should not be rolled up in an interdict against future publication. Graeme Henderson mentioned possible jurisdictional issues where a court was asked to make an order that could not be performed within its territorial jurisdiction. CommonSpace expressed concerns about orders for removal of material/cessation of distribution having the potential to shut down wider conversations that might be in the public interest. They asked how far the courts' powers would stretch in the context of dissemination on social media and how they would work in practice with emerging technologies and evolving methods of communication.

6.56 Google believed that an equivalent of the power under section 13 of the 2013 Act to order removal or cessation of distribution would be entirely appropriate where (a) perpetual interdict had been granted against online publication by the author of the statement complained of and (b) the author had declined to remove the statement. They observed that in practice such orders would often be unnecessary because website operators would take down the statement on being shown the court's order. Conversely, Google considered that it would be wrong in principle to order a website operator to remove a statement where perpetual interdict against the statement's author had been refused or where the court lacked jurisdiction to grant such an interdict.

6.57 SNS stated that there were considerable difficulties in this area because of the effect of aggregation and republication. It would be necessary to have a safeguard to the effect that republication elsewhere by a third party beyond the control of the person to whom the order was addressed did not amount to contempt of court.

6.58 Having regard to the responses we received from consultees, we are satisfied that the principles reflected in section 13 of the 2013 Act should be adopted in Scots law. The same is now recommended for Northern Ireland where the view was taken that such a measure cannot be said to be disproportionate and has much to commend it.[21] Like the Libel Reform Campaign, we can see no justification for allowing material which has been

[20] This is an order that a certain action be performed.
[21] See paragraphs 2.123-2.125 of the Northern Irish Report.

held by a court to meet the threshold for actionable defamation to remain on the web or to continue to be otherwise distributed. An equivalent of section 13 may be seen, also, as a necessary accompaniment to any provision modelled on section 10 of the 2013 Act (see further Chapter 4 above). Absent section 13, the effect of section 10 in English law would be that even if a claimant successfully sued the primary publisher of a statement, he or she would be unable to prevent its continued dissemination by a secondary publisher who may refuse to remove it from their website or may continue to distribute it in printed form. Moreover, as noted in Chapter 4, it could help to address potential criticism that an expanded version of section 10 could in some circumstances tilt matters unfairly in favour of internet intermediaries.

6.59 Whilst it is arguable, as Roddy Dunlop has pointed out, that the courts already have sufficient powers to order take-down and to prohibit further dissemination, there is much to be said for putting a clear modern provision on the statute book. We are not convinced that the provision needs to be predicated on perpetual interdict being granted. We consider that the court should be given power *at any stage* of defamation proceedings (or Part 2 proceedings) to order removal or cessation of distribution etc. In an appropriate case such an order could be granted at an *interim* stage, before the final outcome of the proceedings has been determined. It is important that the court should be able, in suitable cases, to take prompt and effective steps to provide redress. Whether interim relief would be granted in any specific case would no doubt depend on a careful evaluation of the strength of the applicant's case and where the balance of convenience lies. Moreover, the safeguards contained in section 12 of the Human Rights Act 1998 would be engaged. We would envisage that any take-down order/order for cessation of distribution will have to be directed against an identified operator of a website or distributor, editor or publisher. This should meet the concerns expressed by some respondents about inadvertent knock-on consequences for those using social media. As to the jurisdictional issues we are bound to accept these constraints; we do not propose that there should be any extension of the territorial jurisdiction of the Scottish courts.

6.60 Finally, we would note that we do not intend to pursue the suggestion of SNS that there should be a safeguard to cater for the situation where republication takes place which is beyond the control of the subject of an order to remove or cease distribution. Prosecution for contempt of court would happen only in the very unlikely event that the subject of the order could be proved to have been personally responsible for the republication.

6.61 We therefore recommend that:

35. In defamation proceedings and in Part 2 proceedings the court should have statutory power, at any stage in the proceedings, (a) to order the operator of a website to remove a defamatory statement or (b) to order the author, editor or publisher of such a statement to stop distributing, selling or exhibiting material containing it.

(Draft Bill, section 30)

Chapter 7 Single or multiple publication; limitation of actions; and prescription

Introduction

7.1 In this chapter we consider application of the rules of limitation where a statement which is alleged to be defamatory is published in the same or substantially the same form on more than one occasion. We give thought, too, to the possibility of altering the starting point of the limitation period in defamation cases, as well as altering the length of that period, and of the long-stop prescriptive period insofar as it applies to defamation actions.

Single or multiple publication

7.2 At present in Scots law a "multiple publication" rule applies. This means that each publication by the same publisher of the same material gives rise to a separate cause of action in defamation. Each time a new reader reads a publication, or each time it is republished by some other means, a new cause of action arises. In the Discussion Paper we raised the question whether this rule should be abrogated in favour of a "single publication" rule.[1] The essence of a rule of that kind would be that republication by the same publisher of the same or substantially the same material would not give rise to a new cause of action. A provision to that effect is made by section 8 of the 2013 Act. As the Discussion Paper explained, the issue of single or multiple publication is of particular importance in view of the increasing tendency towards publication of material online.[2]

7.3 This issue is closely connected with the question of limitation of actions. Under the multiple publication rule, since each publication constitutes a new cause of action, each triggers the start of a new limitation period. This clearly favours the pursuer in an action of defamation, while exposing the publisher to the risk of litigation without end.

7.4 The majority of those who responded to our question about a single publication rule – 19 of 22 – were in favour of a provision to the effect that republication of the same or substantially the same material by the same publisher should not give rise to a new cause of action and should not therefore trigger a new limitation period. The increasing tendency towards online publication was the main reason cited. Under the current law, each download of an article by a new reader constitutes a new cause of action which is subject to its own limitation period. Among those who were not in favour of an equivalent of the single publication rule, Graeme Henderson took the view that publishers should be liable for the

[1] See paragraphs 10.6-10.19 of the Discussion Paper and question 39.
[2] See paragraphs 10.4-10.5 of the Discussion Paper.

fact that material which was not considered to be defamatory at the time it was originally published might be considered as such if republished later.

7.5 It might be suggested – we canvassed this possibility in the Discussion Paper[3] – that introduction of a statutory threshold of harm (as we recommend) would obviate the need for a single publication rule. No doubt it is true that this would mitigate the worst excesses of the multiple publication rule; but the risk of perpetual liability would remain. We think adoption of a single publication rule would be preferable, since it is clear and certain. We are also influenced by the fact that the single publication rule applies in England and Wales under section 8 of the 2013 Act; its adoption is also proposed for Northern Ireland.[4] We think it would be desirable for Scotland to apply the same rule.

7.6 In the Discussion Paper we raised another possibility, that of retaining the multiple publication rule but making it subject to a defence of non-culpable republication.[5] If a person challenged the accuracy of archived material, its publisher could append a notice to the archived article indicating that its accuracy had been challenged. Or, if the publisher was persuaded of the inaccuracy, the article could be amended or a notice of correction appended to it. This would provide the basis for relying on the defence of non-culpable republication. The few respondents who commented on this suggestion were not in favour of it. The Libel Reform Campaign pointed out: "The defence of non-culpable republication places an undue strain on the publishers and operators of a website to retrospectively amend and label content to identify the fact that a challenge has been made." We accept that point and do not intend to pursue this suggestion further.

7.7 We recognise that there are arguments against the introduction of a single publication rule. But we think they are outweighed by those in favour of it. The increasing tendency towards publication of material online creates the risk of virtually perpetual liability. Archived material may be accessed and read by new readers long after it was first uploaded to a website. The law of defamation needs to strike a balance between enabling those who have been defamed to protect their reputation and avoiding unjustifiable interference with freedom of expression. It seems to us that, especially in relation to online publication, the law does not currently strike the right balance. We think it undesirable that a new cause of action and limitation period should arise each time the same material is accessed by a new reader. In our view introduction of a single publication rule would rebalance the law. It would also be complementary to the introduction of a threshold of serious harm, which we recommended in Chapter 2: a person who has suffered serious harm to reputation, such as to satisfy the threshold test, might reasonably be expected to become aware of it within a reasonably short period of publication. Section 32(3) of the draft Bill accordingly introduces the single publication rule.

7.8 We therefore recommend that:

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[3] See paragraph 10.18 of the Discussion Paper.
[4] This is a recommendation of the Northern Irish Report. See paragraphs 2.108-2.110 of the Report.
[5] See paragraphs 10.16-10.17 of the Discussion Paper.

36. Where a person publishes a statement to the public and subsequently publishes the same or substantially the same statement, any right of action in respect of the subsequent publication should be treated as having accrued on the date of the first publication.

(Draft Bill, section 32(3))

Limitation

7.9 The effect of the single publication rule is that, once a defamatory statement has been published, there will in general be only one limitation period which applies both to any action based on the original publication of the statement and to any subsequent republication. The cause of action will in general accrue on the date on which the statement is first published to the public. For these purposes, the ordinary meaning of "publication" in defamation law will apply, as encapsulated in section 1(4) of the draft Bill. The statement must have been communicated to the public in general, or at least a cross-section of the public, without restriction according to membership of, for example, a particular club, profession or similar. It must have been seen or heard by at least one person able to understand the gist of it.

7.10 Once the limitation period has expired, in general it will not be possible to bring an action. This is subject to two exceptions.

7.11 The first exception arises from the fact that section 19A of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act") will continue to apply to defamation actions. Accordingly, where it seems equitable to it to do so, the court may exercise its discretion to enable an action to proceed, notwithstanding that the limitation period has expired. That discretion would extend to an action based on republication of a statement once the limitation period had expired.

7.12 The second is where the manner of the subsequent publication of the statement is materially different from that of the original publication. If that is the case, we recommend that the single publication rule should not apply. We think it clear that fairness requires a provision of this kind. Without it, a pursuer might (for example) be faced with a plea of limitation based on first publication of the statement complained of in an obscure publication, although the pursuer's real concern was that the statement had since been republished in a publication with mass circulation.

7.13 The draft Bill provides a non-exhaustive list of factors to which the court may have regard in determining whether the manner of subsequent publication is materially different from the manner of first publication. The three factors listed in section 32(3) of the draft Bill are the level of prominence that the statement is given; the extent of the subsequent publication; and any other matter which the court considers relevant.

7.14 We therefore recommend that:

37. The previous recommendation should not apply where the manner of the subsequent publication is materially different from that of the first

publication, having regard to the level of prominence that the statement is given; the extent of subsequent publication; and any other matter which a court considers relevant.

(Draft Bill, section 32(3))

The length and starting point of the limitation period

7.15 Section 18A(1) of the 1973 Act provides that, subject to limited exceptions, an action for defamation must be brought within a period of three years after the date on which the right of action accrues. In the current law accrual takes place only when the fact of publication of the statement complained of comes to the attention of the pursuer. The combination of the length of the limitation period and the fact that a considerable period may elapse between the date of publication of the statement and the date on which the fact of publication comes to the pursuer's attention has the potential to perpetuate a publisher's liability beyond what may be thought appropriate, having regard to the importance of freedom of expression. This prompted us to ask whether the limitation period applicable to defamation actions should be reduced to less than three years; and whether the limitation period should run from the date of original publication, subject to the court's discretionary power to override it under section 19A of the 1973 Act.

A shorter limitation period?

7.16 The majority of those who responded to this question[6] (13 of 17 respondents) were in favour of a reduction in the length of the limitation period. A key reason for this view was that it was difficult to discern a legitimate reason why a pursuer who was aware of harm to his or her reputation resulting from a publication should delay in bringing action for redress. Allied to this is the consideration that a person who has suffered harm to reputation such as to satisfy the serious harm threshold might reasonably be expected to become aware of that before a period of three years had expired. Four respondents expressed a preference for retaining the current three-year period. These included Campbell Deane and the Law Society of Scotland, who pointed out that there appeared to be no evidence that the fact that the limitation period in Scotland is currently longer than that in England was leading litigants to resort to the Scottish courts. Graeme Henderson suggested that a longer period had the advantage that prospective litigants had time to get a feel for the impact of a defamatory statement before deciding whether to bring a claim. During consultation on the draft Bill, concerns were raised by the Law Society of Scotland and the Faculty of Advocates that a reduction in the limitation period from three years to one year could constrain access to justice. Such a reduction could, it was suggested, create situations in which the opportunity to bring proceedings had been lost before the prospective pursuer was in a position to bring them. This may be due to a shortage of time to complete the necessary steps, or, alternatively, a lack of knowledge that a cause of action had arisen. While we acknowledge these arguments, we think, at least in the majority of cases, that any publication capable of meeting the serious harm test would have come to the attention of the pursuer within a short period of time, and most likely less than a year.

[6] See question 41 of the Discussion Paper, along with the discussion at paragraphs 10.14 and 10.19.

7.17 It is true that there does not seem to be any real evidence that the longer limitation period in Scotland is leading to libel tourism. And it is true that in England and Wales it has been recommended that the current one-year limitation period for defamation actions should be extended; but this recommendation has not been implemented.[7] In any case neither of these points speaks against reducing the limitation period if there are sound grounds for doing so.

7.18 On balance we tend to the view that reduction of the length of the limitation period to one year is an appropriate course of action. Section 32(2) of the draft Bill gives effect to this recommendation. The 2013 Act has not been in force long enough to make it possible to form a view on whether claimants in England and Wales are likely to seek to take advantage of the fact that the limitation period in Scotland is two years longer than it is in England and Wales. But the risk exists that over time the difference in the limitation regimes may encourage the bringing of actions which have no substantial connection to Scotland. While the introduction of a jurisdictional threshold may help to guard against this (see chapter 8), we think that the added safeguard of a shorter limitation period has much to recommend it. More generally, however, we take the view that to reduce the length of the limitation period would strike a fairer balance between the two interests with which the law of defamation is principally concerned, protection of reputation and freedom of expression. To reduce the length of the limitation period would also, we think, be consistent with the thinking underlying introduction of a single publication rule, namely preventing the threat of defamation proceedings from subsisting over a protracted period.

7.19 We therefore recommend that:

38. The length of the limitation period in actions for defamation should be one year.

(Draft Bill, section 32(2))

Should the cause of action accrue on publication?

7.20 Sixteen respondents offered comments on this question.[8] The vast majority (13 of 16) agreed without qualification that the cause of action should accrue on the date of original publication of a statement, with the limitation period starting to run on that date. Clarity about the date on which time starts to run in defamation actions was cited as a key reason in support of this change. Furthermore, the Libel Reform Campaign was critical of the current rule under which limitation starts to run only when publication of a statement comes to the

[7] The Law Commission for England and Wales in its *Report on Limitation of Actions* (Law Com No 270, 2001) recommended that the limitation period in respect of defamation actions should be extended from one year to three years, without any judicial discretion to dis-apply the limitation period. This was on the view that it would reduce the risk of forum shopping to Scotland and because the one-year period was proving to be too short to allow claimants to prepare their claims. However, we note the comments of Hale LJ (as she then was) in *Steedman v BBC* [2001] EWCA 1534 at [32] where she said: 'The Commission do not appear to have attached any weight to the consideration that a major, if not the major, objective of a defamation action is the vindication of the claimant's reputation, an objective which in most cases can only be attained by swift remedial action.'

[8] See again paragraphs 10.14 and 10.19 of the Discussion Paper, and question 42.

attention of the pursuer: "It allows a pursuer enormous leeway to start the limitation period at a time that suits them."

7.21 One response expressed opposition without giving reasons. Two others expressed reservations. Robert Templeton was not opposed in principle to such a change but thought it would require new provision (separate from section 19A of the 1973 Act) in order to allow a discretion to override the limitation period in defamation actions. The Faculty of Advocates did not oppose a change of this kind but questioned its likely impact:

> "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."

7.22 We noted in the Discussion Paper that, as Scots law currently stands, it would, in theory at least, be possible for a cause of action to accrue on a date which fell, say, nineteen years and eleven months after the date of publication of an article, if it was only at that point that the fact of publication came to the attention of the pursuer.[9] The pursuer would by then have only one month to raise proceedings, since under section 7 of the 1973 Act the obligation to make reparation would be extinguished twenty years after it became enforceable. Nevertheless, the fact remains that there would be a possibility of proceedings being brought after the passage of a very significant period of time since publication. This may be an extreme example, but an example it remains.

7.23 In line with the views of the majority of respondents, section 32(3) and (6)(b)(iv) of the draft Bill provide for the limitation period to run from the date of first publication.[10] For the limitation period to commence at this point appears to us to be consistent with the proposed single publication rule. It also seems to us to represent a fair balance between protection of reputation and freedom of expression since, as we have already mentioned, it is reasonable to suppose that in general a publication which passes the serious harm threshold would come to the notice of a pursuer without significant delay.

7.24 We therefore recommend that:

39. The limitation period should commence on the date of first publication of the statement complained of.

(Draft Bill, section 32(3) and 32(6)(b)(iv))

Should the long-stop prescription be reduced to less than twenty years?

7.25 The twenty year long-stop prescription under section 7 of the 1973 Act applies to obligations to make reparation for defamation. In order to preserve the balance of the

[9] See paragraph 10.14 of the Discussion Paper. There is no provision for constructive knowledge in section 18A of the 1973 Act.
[10] For the meaning of "publish", see sections 1(4) and 34(a) of the draft Bill.

scheme of prescription and limitation as a whole, it seemed to us appropriate to ask whether consultees had views on the length of the applicable long-stop prescriptive period.[11]

7.26 Fourteen respondents commented on this question. Ten, including Aviva, NUJ, Roddy Dunlop and the Faculty of Advocates, took the view that the twenty year period should be reduced. A recurring theme was that any significant delay in raising a claim was likely to call into question whether there had in fact been damage to a pursuer's reputation such as to merit bringing a claim. By definition, for the long stop to become relevant, there would need to have been significant delay in a statement first coming to the pursuer's attention. The Faculty of Advocates suggested that, of all the possible routes identified to clarify the issues around limitation in defamation actions, a reduction in the length of the long-stop period might be the most effective option. Only one respondent suggested how long the long-stop period should be: Roddy Dunlop suggested a period of five years.

7.27 Three respondents were opposed to a reduction in length of the long-stop period. The Law Society of Scotland highlighted the point that a period of twenty years was consistent with the long-stop period applicable to most other obligations in Scots law. It was also close to the duration of the long-stop period in a number of other jurisdictions. Gavin Sutter suggested that little would be gained by reducing the period. He took the view that it would be more constructive instead to retain the 20-year long stop but have a limitation period only one year in length, running from the date of first publication of the material which was the subject of a defamation action. Graeme Henderson also expressed opposition, but did not elaborate on his reasoning. Ursula Smartt suggested that the long-stop prescription should no longer apply to defamation at all.

7.28 It is clear from the responses that there is an appetite for a reduction in the length of the long-stop period applicable to obligations to make reparation for defamation. A genuine claim is likely to be brought promptly. Assuming a threshold of serious harm is introduced (as we recommend), it may be arguable that, if there is significant delay in raising an action, that test cannot be satisfied.

7.29 There are, however, cogent reasons for retaining the twenty year prescriptive period for obligations arising from defamation. The principal one is consistency with the long-stop regime applicable to other kinds of obligations. In our Report on *Prescription*[12] we reviewed the position in relation to obligations generally and recommended that the long-stop prescriptive period under sections 7 and 8 of the 1973 Act should not be reduced. With the exception of obligations under Part 1 of the Consumer Protection Act 1987 (where the long-stop period is ten years), which derives from a European Directive,[13] the only long-stop provisions in the 1973 Act are of twenty years.

7.30 In our Report on *Prescription* we recommended a change to the starting date of the long-stop prescription under section 7, namely that for obligations to which it applies the long-stop period should start to run from the date of the defender's last act or omission,

[11] See paragraphs 10.14 and 10.19 of the Discussion Paper and question 43.
[12] Scot Law Com No 247 (2017).
[13] Directive 85/374/EEC - the Product Liability Directive.

rather than (as it does now) the date on which loss flowed from that act or omission. So far as defamation is concerned, as set out in the Discussion Paper (paragraph 10.3) the position appears to be that the date on which an obligation becomes enforceable is the date of publication of the statement in question: that is the date on which the long-stop prescriptive period will begin to run.[14]

7.31 There are good arguments against having a proliferation of prescriptive periods. It cannot be conducive to clarity and accessibility of the law. Introduction of a shorter long-stop period for defamation would inevitably contribute towards such a proliferation.

7.32 It also seems to us to be relevant that the long-stop period is rarely likely to be of significance in defamation cases; it is likely that the limitation period (extended by section 19A of the 1973 Act where appropriate) will be determinative. The long-stop prescription is likely to be of relevance only if there is a practical issue about whether the obligation to pay damages in respect of defamation has been extinguished by prescription. That is likely to matter only if, for instance, there is an issue about set-off between the publisher of the defamatory statement and the person defamed, on the basis that the limitation period has expired but the long-stop prescriptive period has not. It seems unlikely that that situation, if it ever arises, will arise at all often.

7.33 For these reasons we have come to the view that the arguments against altering the long-stop period applicable to obligations arising from defamation outweigh those in favour of doing so. We therefore make no recommendation on this matter.

[14] That would be the equivalent of the date of the defender's last act or omission.

Chapter 8 Jurisdiction and jury trials

Introduction

8.1 In this chapter we consider issues relating to access to the Scottish courts to bring proceedings in defamation. We consider, too, whether there should continue to be an automatic right to trial by jury in defamation actions unless the parties agree otherwise.

Jurisdiction

8.2 In the Discussion Paper[1] we noted that section 9 of the 2013 Act creates for England and Wales a new threshold test for establishing jurisdiction in defamation actions brought against persons who are not domiciled in the United Kingdom, elsewhere in the European Union or in a state party to the Lugano Convention.[2] Where the defendant is domiciled in the European Union, the EU jurisdiction regime contained in the Brussels Regulation as amended[3] will continue to apply.[4] Similarly, in the case of defendants domiciled in a state party to the European Free Trade Association, the Lugano Convention regime will continue to regulate questions of jurisdiction. In other cases section 9 provides that a court in England and Wales does not have jurisdiction against defendants not domiciled in the United Kingdom unless it is satisfied that, of all the places in the world in which the statement has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement. The aim of the provision is to address the issue of 'libel tourism', an expression coined to describe the practice of raising defamation cases in the courts of England and Wales despite there being no more than a tenuous link to that jurisdiction.

8.3 Although libel tourism had been one of the main themes of the campaign for libel reform in England and Wales, we observed in the Discussion Paper that there is no firm evidence to suggest that any such problem has yet arisen in Scotland.[5] We noted, however, that there is the potential for libel tourism to occur here if the jurisdictional rules in this country come to be seen as being more liberal than those applying in England and Wales. We therefore asked for consultees' views on whether it would be desirable to introduce a rule creating a new threshold test for establishing jurisdiction in defamation actions in Scotland equivalent to section 9 of the 2013 Act.

8.4 Most respondents supported the introduction in Scotland of a test based on section 9 of the 2013 Act. Amongst this group of consultees, Roddy Dunlop acknowledged that there have been very few instances of 'libel tourism' in this country over the past 15 years.

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[1] See paragraph 11.2 of the Discussion Paper.
[2] The Lugano Convention is defined in section 9 as the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters between the European Community and the Republic of Ireland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30 October 2007.
[3] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[4] Subject, of course, to the outcome of the Brexit negotiations.
[5] See paragraph 11.4 of the Discussion Paper.

Nonetheless he thought that in order to deal with the potential for this problem to arise in future there would be no objection to a section 9-type threshold being introduced here. The Libel Reform Campaign viewed it as particularly important for there to be parity in relation to this matter across the United Kingdom. Otherwise there was a danger of forum shoppers moving to Edinburgh from London. The recent case of *Ahuja*[6] shows, the Campaign submitted, that the problem of libel tourism persists.[7] Aviva and BLM also referred to the potential dangers of forum shopping.

8.5 The Senators of the College of Justice provided a more nuanced response, but tended to support the introduction of a threshold test. They highlighted that Scotland was not a jurisdiction in which libel tourism had presented itself as an issue, but made the point that this did not warrant dismissal of the idea of a threshold test relating to jurisdiction. The Senators counselled against mere numbers of readers or incidences of publication being regarded as determinative of whether the courts of a particular country should enjoy jurisdiction. Such comparisons would always favour jurisdiction being in the larger country even though the pursuer might have a substantial reputation to protect in the smaller one; this would often be the position as between England and Wales on the one hand and Scotland on the other. In most cases an action ought to be allowed to be brought in each of the separate UK jurisdictions. There might be exceptions to this where, for instance, the defamatory material was published only in hard copy in a local newspaper. Unless it could be shown that there was no or disproportionately small reputational damage in Scotland relative to any of the other UK jurisdictions, the Scottish courts should have jurisdiction alongside the courts of England and Wales and of Northern Ireland. There was also the existing doctrine of *forum non conveniens*; this should not be lost sight of. The essence of this doctrine is that, although a given court has jurisdiction to hear a case, the interests of justice would be better served if it was heard by a different court, which has concurrent jurisdiction and is considered to provide the most appropriate forum in the whole circumstances of the case.

8.6 On the other hand, Gavin Sutter considered that the phenomenon of libel tourism had been exaggerated; there was no reliable evidence that it had actually brought about a chilling effect on freedom of expression in England and Wales or further afield. Even before section 9 was introduced, the English courts were reluctant to exercise jurisdiction in circumstances where the claimant had no real reputation to protect in that country. Mr Sutter thought that section 9 made little difference in practical terms; judges would take account of the same factors as previously in determining whether there was a sufficient connection with England and Wales to establish jurisdiction.

8.7 The Faculty of Advocates similarly did not believe there to be any convincing evidence of libel tourism in Scotland. If anything, the opposite was the case. The factors which had led to London becoming the global centre of litigation did not apply here. In this connection, the Faculty mentioned the growing reputation of Dublin as a forum for defamation litigation; the reasons for this might include the relatively high level of damages awarded in the courts of the Republic of Ireland. In the circumstances, the Faculty did not see any basis for further restricting the already limited numbers of defamation cases in

[6] See paragraph 11.3 of the Discussion Paper.
[7] *Ahuja v Politiksa Novine I Magazini DOO* [2015] EWHC 3380 (QB) at paragraph 31.

Scotland. The risks to the development of Scots law in this area were already immediate and real. Campbell Deane expressed a similar view. He thought that concerns about libel tourists flocking to Scotland were fanciful. On the contrary, defamation litigation in Scotland was at an all-time low. Alignment with section 9 would only serve to exacerbate that situation.

8.8 The Law Society of Scotland agreed that Scotland was not a jurisdiction that had had to contend with libel tourism. They did not think that new rules on jurisdiction were required. Graeme Henderson put forward a similar line of argument. He thought that the introduction of an equivalent of section 9 in Scotland would simply add unnecessary complexity to the current framework.

8.9 We consider that there is little room for doubting that libel tourism has not yet affected the Scottish courts to any significant degree. On one view this might be thought to undermine the justification for the introduction of a jurisdictional threshold such as is contained in section 9 of the 2013 Act. At the same time, we see no merit in the view that the policy of Scots law should be shaped with the aim in mind of regenerating defamation litigation in this country. This is particularly so if the regeneration is to come from attracting litigants with questionable links to this jurisdiction. In this connection it has to be borne in mind that if Scotland were to be left with a weaker jurisdictional threshold (or one that was perceived to be weaker) than applied in the other constituent parts of the United Kingdom (emulation of section 9 is now proposed for Northern Ireland[8]) the resultant disparity would create the potential for libel tourists to seek to invoke the jurisdiction of the Scottish courts; there would then be a risk of a chilling effect on freedom of expression in this country. On balance, we think that the right course to steer is to recognise the advantages of creating a level playing field throughout the United Kingdom by adopting the approach taken in section 9 of the 2013 Act. The effect of this will be to restrict the jurisdiction of the Scottish courts to hear and determine defamation proceedings brought against persons who are not domiciled in the UK, another Member State or a state which is a contracting party to the Lugano Convention. A court in Scotland will have jurisdiction to determine such proceedings only if satisfied that, of all the places where the statement complained of has been published, Scotland is clearly the most appropriate place to bring proceedings. In our view this would represent a valuable reform, albeit that its practical effect may be modest. We agree with the suggestion made during consultation on the Discussion Paper that the defence of *forum non conveniens* should be expressly preserved; it may continue to have a useful part to play. The draft Bill provides for its preservation.

8.10 We therefore recommend that:

[8] See paragraphs 2.111-2.115 of the Northern Irish Report.

40. A court in Scotland should not have jurisdiction to hear and determine defamation proceedings against a person who is not domiciled in the UK, another Member State or a state which is a contracting party to the Lugano Convention, unless satisfied that Scotland is clearly the most appropriate place to bring the proceedings. This should not affect the availability of the defence of *forum non conveniens*, where appropriate.

(Draft Bill, section 19)

Jury trials

8.11 The effect of sections 9 and 11 of the Court of Session Act 1988 is that any action raised in that court for "libel or defamation"[9] must be tried by a jury unless the parties agree otherwise or the court is satisfied that "special cause" exists for withholding a jury trial.[10] Such actions have long been one of the "enumerated causes" considered appropriate for jury trial.[11] In the Discussion Paper we pointed out that the effect of section 11 of the 2013 Act was to abolish the existing statutory presumption in favour of jury trial in libel and slander actions in England and Wales.[12] The court may still order jury trial as a matter of discretion.

8.12 In the Discussion Paper[13] we noted that the prevailing view amongst specialist practitioners in England and Wales is that the occasions on which the court will exercise its discretionary power to order trial by jury are likely to be "extremely rare"[14] and confined to cases in which the defendant is a public authority or where the position of the claimant gives rise to a risk of involuntary bias on the part of the trial judge.[15] Factors militating against trial by jury are seen as including: the advantages of a reasoned judgment; proportionality; and the promotion of effective case management. We suggested that one option for any modification of the existing rules in Scotland would be to confer a broad discretionary power on the court to decide on what form of inquiry is appropriate in the particular circumstances of the case; on that approach there would no longer be a presumption in favour of jury trial or a need to show special cause for withholding jury trial. We asked consultees for their views on whether the existing rules on jury trial should be modified and, if so, in what respects.

8.13 Almost all of those who responded to this question favoured modification, to varying degrees, of the existing rules whereby actions for defamation are categorised as enumerated causes considered to be appropriate for trial by jury unless special cause can be shown as to why that form of inquiry should be withheld.

8.14 Eric Clive said that he would be happy for defamation cases to be handled by judges. Roddy Dunlop queried whether defamation actions should continue to be enumerated

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[9] It is unclear why the statute uses both terms since they are synonymous in Scots law.
[10] Jury trial was abolished in the Sheriff Court by section 11 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980. There is now the possibility for it to be reinstated in certain classes of action – see sections 41 and 63 of the Courts Reform (Scotland) Act 2014. Jury trials are now permitted in relation to personal injury actions in the all-Scotland sheriff court known as the Sheriff Personal Injury Court – see Chapter 36B of the Ordinary Cause Rules (ie Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, SI 1993/1956).
[11] The others are actions of damages for personal injuries, damages claims based on delinquency or quasi-delinquency and actions for reduction on the ground of incapacity, essential error or force and fear.
[12] See paragraph 11.9 of the Discussion Paper.
[13] See paragraph 11.11 of the Discussion Paper.
[14] *Duncan and Neill on Defamation* (4th edn, 2015), paragraph 32.42.
[15] *Yeo v Times Newspapers Ltd* [2015] 1 WLR 971.

causes. The increasing complexity of the law meant that such cases were often unsuitable for juries. Gavin Sutter, the Libel Reform Campaign, Aviva and BLM all pointed to the advantages of proactive and early judicial case management, particularly with regard to the early determination of meaning; this was very difficult to achieve where a case was to be tried by a jury. However, none of these respondents suggested expressly that the possibility of jury trials in defamation cases should be excluded completely. On the other hand, BBC Scotland favoured the abolition of jury trials as an option in defamation cases. It highlighted the increasing technicality of the law in this area. NUJ took the same stance.

8.15 By contrast, two respondents expressed support for jury trials in defamation actions. The Law Society of Scotland took the view that, following the reintroduction of jury trials for personal injury actions in the Sheriff Court, there was an opportunity for reflection on the role of juries in civil litigation in Scotland. The Society believed that there were a number of benefits to jury trials in the context of defamation actions, not least in regard to the assessment of damages for loss of reputation.

8.16 The Senators of the College of Justice said that they saw the Civil Courts Review as having endorsed jury trial as a means of inquiry in actions for damages. They agreed with the view of Justice Steven Rares of the Federal Court of Australia, as quoted in paragraph 11.12 of the Discussion Paper, that the issues going to the heart of a defamation action were best determined by a jury representing a cross section of ordinary citizens. The Senators accordingly considered that there should be no change made to the current position.

8.17 Some other respondents suggested a middle ground. Google supported the removal of the presumption in favour of trial by jury, but with its replacement by a discretionary power for the courts to order trial by jury in exceptional cases. SNS thought that it would be unwise to rule out jury trial completely. The Faculty of Advocates agreed with the suggestion in the Discussion Paper that the presumption should be replaced by a discretionary power to order the type of inquiry best suited to the particular circumstances of a case.

8.18 We consider that defamation actions should no longer be enumerated causes and that instead the courts should be given a discretionary power to order the form of factual inquiry best suited to the particular circumstances of the case; in appropriate cases this could be trial by jury, but it could also be a proof or perhaps more commonly a proof before answer. This approach would allow the courts greater scope to exercise flexible and proactive case management powers, as has become the established practice in England and Wales. It has been recognised in England and Wales for some time that defamation litigation lends itself particularly well to the early determination of the type of legally complex issues that habitually arise in such actions, such as the determination of meaning and the application of the new threshold tests of serious harm and in relation to jurisdiction. The current Scots system of pleading and the presumption in favour of jury trial militate against the efficient handling of defamation actions. These are all considerations that point towards the current presumption being modified so that the courts are given the power to decide on the type of hearing and ultimately the type of factual inquiry that works best for each particular case.

8.19 We therefore recommend that:

41. The presumption in favour of jury trials in defamation actions should be replaced by a discretionary power to allow the court to appoint the form of inquiry, including jury trial, best suited to the circumstances of the case.

(Draft Bill, section 20)

Chapter 9 Verbal injury and malicious publication

Introduction

9.1 In this chapter we discuss and make recommendations about reform of the Scots law of verbal injury.

9.2 Verbal injury is a common-law civil wrong analogous to, though distinct from, defamation.[1] It covers statements which, although not defamatory (in the sense of making people think less of a person's moral credentials or their business or professional standing), are likely to be damaging.

9.3 As noted in the Discussion Paper,[2] the question as to which of the possible categories of verbal injury an imputation most probably falls into is not always easily answered. Also, the scope of verbal injury – and the precise categories into which it can be divided – is a source of considerable uncertainty. Overall, there is no doubt that the present law is confused and unclear.

Main categories of verbal injury recognised in Scots law

9.4 Despite this state of confusion, it is possible to discern the main categories of verbal injury which have been recognised in Scots law. These are:

- Slander of title;
- Slander of property;
- Falsehood about the pursuer causing business loss;
- Verbal injury to feelings by exposure to public hatred, contempt or ridicule;
- Slander on a third party.[3]

9.5 The Discussion Paper, at paragraphs 13.10 to 13.25, gave a more detailed outline of what we understand constitutes each of these categories of verbal injury in Scots law. Paragraphs 13.22 and 13.23 of the Discussion Paper advanced our provisional view that *convicium*, whilst originally developed by the institutional writers as a form of wrong separate from verbal injury, should, in its more modern incarnation, be regarded as verbal injury by exposure to public hatred, contempt or ridicule, simply known by a different name. To the extent that *convicium* is to be recognised as a free-standing wrong in Scots law, this is likely to be in relation to truthful disclosures. However, as discussed below, it is highly unlikely that any case would be brought under this head today.

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[1] For discussion of the distinction between verbal injury and defamation see *Sheriff v Wilson* (1855) 17 D 528 at 530 per Lord Justice-Clerk Hope; *Steele v Scottish Daily Record* 1970 SLT 53 at 60 per Lord Wheatley. See also, K McK Norrie, "*Actions for Verbal Injury"*, (2003) 7 Edin LR 390.

[2] At paragraphs 13.1 and 13.2.

[3] For detailed discussion of each of these categories see K McK Norrie, *Defamation and related actions in Scots law* (1995), Chapter 4.

9.6 The three prerequisites of an actionable verbal injury in any of the categories described above are that:

- there is a false imputation made in respect of the pursuer or, as appropriate, a third party;
- it was made with malicious intent to injure; and
- there is actual injury to the pursuer consequent on the imputation.

9.7 Also, one of the main distinguishing factors between verbal injury and defamation is that the pursuer in a verbal injury action does not enjoy the benefit of any of the presumptions that exist in defamation, such as the presumptions of falsity and of malice. Accordingly, the onus of proof is on the pursuer to establish each of the prerequisites described above.

A possible way forward

9.8 After a detailed discussion of how verbal injury interacts with defamation, paragraphs 13.35 to 13.40 of the Discussion Paper outlined a possible way forward in terms of reform of the current forms of verbal injury recognised in Scots law.

9.9 Whilst not forming any concluded view on the future of the law of verbal injury and how it might be modified or clarified, broadly speaking, our preliminary views in the Discussion Paper were that –

- little would be lost by abolishing verbal injury to feelings by exposure to public hatred, contempt or ridicule as a category;
- whilst there has not been any successful action in Scotland involving slander on a third party, it is possible to envisage circumstances in which this would be the only available cause of action, even if, in practice, such cases are likely to be rare;
- there may be advantage in retaining the business-related categories of verbal injury (ie slander of title, slander of property and falsehood about the pursuer causing loss) and redrawing them in statute in some shape or form.

Responses to Discussion Paper consultation

9.10 Our intention in the Discussion Paper was to assess the extent to which the various categories of verbal injury may continue to be of practical utility by addressing gaps in the law (not filled by defamation law) which would otherwise be left open. Against that background we asked consultees for their views on the extent to which each of the categories of verbal injury continue to be important in practice and whether they should be retained.[4]

9.11 Sixteen respondents offered comments in response to this question. Among four of those there was a sentiment that clarification of the nature of verbal injury was not a

[4] See question 52 of the Discussion Paper.

worthwhile exercise. Paul Bernal and Ursula Smartt tended to the view that the wrong of defamation should be reformulated so as to ensure that it accommodated any matters currently falling within verbal injury but not defamation. BLM and Aviva suggested verbal injury was not important in practice as a form of wrong and should not be retained.

9.12 Roddy Dunlop did not come down firmly on one side or the other but commented that he had dealt only with one case falling within verbal injury to feelings, and none in any of the economic categories or slander on a third party. BBC Scotland and SNS similarly did not express strong views either way as to retention or non-retention, but indicated that they had found verbal injury to be of little importance in practice. They suggested that if it was to be retained as a separate wrong, clarity as to its nature would be of help. The Libel Reform Campaign commented: "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."

9.13 On the other hand, eight respondents (in other words, half of the total number) supported the continued existence of verbal injury as a separate form of wrong. For seven of those, this support extended only to the forms of verbal injury affecting economic interests (or in the case of one respondent, Graeme Henderson, economic verbal injury plus slander on a third party). They considered that a case for retention and clarification could not be made out in relation to verbal injury to feelings. This line was taken, among others, by the Faculty of Advocates, Elspeth Reid, Eric Clive and Stephen Bogle. Dr Bogle referred to a tendency for actions in defamation to be raised in circumstances where an action under the head of one of the forms of verbal injury relating to economic interests would have been more appropriate. By contrast, the Law Society of Scotland supported retention and clarification of each of the forms of verbal injury mentioned in the Discussion Paper. They considered that, in light of the tendency of social media to increase the potential for exposure to abuse, the wrong of exposure to public hatred, contempt or ridicule had a role to play in providing a civil remedy.

9.14 We also asked consultees for views on whether and to what extent there would be an advantage in expressing any of the categories of verbal injury in statutory form, assuming they are to be retained.[5]

9.15 Fifteen respondents offered comments on this question. A reasonably narrow majority of those – 10 in total - took the view that if at least some forms of verbal injury are to be retained, there would be advantage in placing them on a statutory footing, in the interests of clarity as to what the various categories entail. These included the Law Society of Scotland, the Senators of the College of Justice, BBC Scotland and NUJ.

9.16 On the other hand, four respondents opposed the expression of the categories of verbal injury in statutory form. Among these, Roddy Dunlop remarked "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 said he saw no merit in codifying this area of law.

[5] See question 53 of the Discussion Paper.

9.17 Eric Clive did not express a firm view one way or the other, but commented that he did not consider the placing of verbal injury on the statute book to be of particular importance.

Consideration

9.18 Case law in relation to verbal injury is scarce and some consultation responses indicated that this area of the law is perceived as obscure and little used. However, as Elspeth Reid noted in her response, "infrequency of litigation is not necessarily an argument for abolishing verbal injury in all contexts".

Verbal injuries relating to economic interests

9.19 Taking into account the consultation responses summarised above we think, on balance, that there is merit in retaining the principles underlying those categories of verbal injury that relate to economic interests (ie falsehood about the pursuer causing business loss, slander of title and slander of property) and expressing them in statutory form.

9.20 This is on the basis that we think that these three forms of verbal injury fill gaps that would be left open if they were removed and defamation was left as the only actionable form of wrong. For example, aspersions as to the title of a person or entity to engage in a particular transaction may suggest certain inefficiencies in their approach to business life. But we doubt that it would be defamatory of the person or entity in relation to the conduct of their business. As regards aspersions against property, there is probably no cause of action in defamation if it is contended that a person *owns or distributes* property that is defective in some way, rather than *manufactures* it. Slander of property seems to fill that gap. Finally, there have been cases in which claims for falsehood about the pursuer causing business loss have been brought as a result of a false contention, for example, that a particular entity was about to go out of business.[6] This allegation would not necessarily be expected to make people think less of the professional or business standing of the entity which was the subject of it. However, it is clear that it would be likely to cause loss to it.

9.21 In addition, it is perhaps significant that, so far as we are aware, there was no pressure in England and Wales prior to the Defamation Act 2013, or in Northern Ireland, at the time of the examination of defamation law there, that their broad equivalents to verbal injuries, "malicious falsehoods", should be abolished.

9.22 We also tend to agree with the narrow majority of respondents who think that equivalents of these forms of verbal injury relating to economic interests should be expressed in statutory form. This would promote the accessibility and transparency of the law. In consequence, we are of the view that the existing common-law rules providing for these forms of verbal injury should be abolished and replaced with reformulated statutory wrongs. We consider that this approach is desirable in the interests of legal certainty and clarity, especially given the substantial uncertainty over the scope and categorisation of verbal injuries in Scots common law. We also think it desirable to take the opportunity to "re-

[6] See, for example, *Craig v Inveresk Paper Merchants Ltd* 1970 SLT (Notes) 50, where the verbal injury was a contention that an entity was about to go out of business. This case would have been successful, but for the fact that the pursuer sued the wrong defenders.

brand" verbal injury as a class of wrong as well as the three forms of economic-related delicts that are to be retained so that they reflect more clearly the types of conduct they seek to address.

9.23 We therefore recommend that:

42. The principles underlying the three categories of verbal injury which relate to economic interests (ie falsehood about the pursuer causing business loss, slander of title and slander of property) should be retained.

43. The common law rules relating to these categories of verbal injury should be abolished and instead expressed in statutory form.

(Draft Bill, sections 21, 22, 23 and 27)

44. Verbal injury should be renamed by a term which reflects more accurately the type of conduct it seeks to address (ie malicious publication).

(Draft Bill, Part 2)

45. The three categories of verbal injury relating to economic interests should be renamed, to reflect more clearly the types of conduct they seek to address (ie statements causing harm to business interests, statements causing doubt as to title to property and statements criticising assets).

(Draft Bill, sections 21, 22 and 23)

Approach of the draft Bill

9.24 Sections 21 to 23 of the draft Bill, in providing for the three statutory wrongs described above, each set out the detail of the requirements which must be satisfied in order to allow proceedings to be brought successfully.

9.25 In short, a person (who may be a natural or non-natural person) may bring proceedings where the defender has made a false and malicious statement about the matter covered by the particular form of wrong, with that statement having been published to a person other than the pursuer. The draft provisions explicitly make clear that the pursuer (labelled "B" in the provisions) can *only* bring proceedings against the defender "A" (ie the person who has actually made and published the statement complained of) and not any other person (eg an internet intermediary). This is made explicit in answer to a point of clarification raised by Google in their response to the consultation on the draft Bill. The statement must have caused, or be likely to cause, financial loss to the pursuer.

9.26 In response to the consultation on the draft Bill, Google also called for a threshold of "serious financial loss" to be included in a similar way to the "serious harm" threshold in section 1 of the draft Bill on the basis that it would very likely help discourage unmeritorious claims. However, we are not persuaded by this on the basis that the context is different from

defamation where the pursuer has the benefit of a number of favourable presumptions. In actions under sections 21 to 23, the pursuer has to prove falsity, malice and show that loss has been caused or is likely to be caused. We think that, on balance, these hurdles for the pursuer provide sufficient protection for freedom of expression and would, in themselves, deter unmeritorious or "vanity" claims.

9.27 Subsection (2) of each of the sections elaborates as to what is meant by 'malicious' in each context. It sets out two matters which the pursuer must show. The first is that the imputation conveyed by the statement complained of was presented as being a statement of fact, rather than opinion, and was sufficiently credible so as to mislead a reasonable person. The second matter reflects an either/or situation. One option is for the pursuer to show that the defender knew that the imputation was false, or that he or she were indifferent as to whether it was true. Alternatively, the pursuer must show that the defender's publication of the statement was motivated by a malicious intention either to cause harm to business, to delay or jeopardise a property transaction or to cause financial loss through disparaging assets. The question as to whether there is a malicious intention will turn on whether the defender was motivated predominantly by the aim of causing detriment to the pursuer, rather than by a wish to further his or her own interests.

Verbal injuries relating to individuals and feelings

9.28 We now move on to consider the remaining categories of verbal injury currently recognised in Scots law, which could broadly be described as relating to individuals and feelings. These categories are:

(a) Exposure to public hatred, contempt or ridicule, that is, the making of a false statement with the intention of causing injury to the person who is the subject of it, and resulting in actual loss, whether in the form of pecuniary damage, or injury to feelings, or both, as a result of a significant degree of social exclusion.

(b) *Convicium*, that is, the making of a false – or a true – statement resulting in intentional harm to the person who is the subject of it, by bringing that person into public hatred, ridicule or contempt, or by making public information of a sensitive and embarrassing nature about that person.

(c) Slander on a third party, that is, causing deliberate damage to the pecuniary position of the pursuer accompanied, depending on the circumstances, by injury to feelings, by means of a defamatory attack on a third party,

9.29 In our considered view the sensible course is to abolish these three forms of verbal injury to individuals. We consider that they are each shrouded in obscurity and are no longer of practical utility. We believe that the clarity and internal coherence of the law will be promoted by their abolition. In their response to the consultation on the draft Bill, the Faculty of Advocates commented that a few of their members had experience of actions of malicious falsehood on behalf of natural pursuers, either as a stand-alone ground of action or as an adjunct to an action for defamation. On the basis that we are removing an existing common-law remedy for individuals, albeit in a small category of cases, they called for a clear explanation of the basis for our approach. The paragraphs that follow explain our reasoning for abolishing these forms of common law verbal injury.

9.30 As set out in the Discussion Paper,[7] we think that verbal injury as a result of exposure to public hatred, contempt or ridicule has been superseded by other areas of legal protection, partly in relation to privacy and confidentiality, and partly in relation to harassment and the delict of intentional infliction of mental harm. As a result, it has largely fallen into desuetude and we see no reason to preserve it. A similar fate appears to have befallen *convicium.* Even assuming that this has survived in some way in the modern law, it is difficult to make a case that it provides a credible and workable framework for redress in this context. There has been no case law for over a century, and such discussion of *convicium* as was espoused by the institutional writers took place against the background of a very different cultural and social understanding of the importance of freedom of expression than exists today. To the extent that *convicium* is still alive in Scots law, it seems most likely to be concerned with disclosures of a truthful but sensitive nature, perhaps in relation to such matters as illnesses suffered or long-past misdemeanours. Given that breach of privacy is increasingly recognised as a free-standing delict,[8] such cases can be dealt with most appropriately under that head.

9.31 As regards slander on a third party, this also appears to be of limited relevance in the modern age. In responding to the Discussion Paper, Elspeth Reid commented on this wrong that: "The authorities as to the ambit of this delict were never clear…but the absolute absence of case law for over a century speaks to it having lapsed into desuetude". In so far as the essence of this wrong might be of continued relevance, we envisage that it could be accommodated under the heading of falsehood about the pursuer causing business loss (or statements causing harm to business interests, as the draft Bill re-names that wrong[9]).

9.32 We therefore recommend that:

46. The common-law rules providing for verbal injury relating to individuals should be abolished.

(Draft Bill, section 27)

Other matters

Limit on requirement to show financial loss

9.33 In creating new statutory wrongs in sections 21 to 23 of the draft Bill, we are of the view that an equivalent provision to section 3 of the Defamation Act 1952[10] is needed so that a pursuer in proceedings under Part 2 of the draft Bill does not need to demonstrate actual financial loss if the statement complained of is more likely than not to cause such loss[11]. In their responses to the consultation on the draft Bill, the Libel Reform Campaign, NUJ and SNS called for section 24 of the draft Bill to be amended to establish a requirement for evidence to be provided by the pursuer to demonstrate financial loss in proceedings under Part 2 of the draft Bill. We are not persuaded that a case has been made out for this;

[7] See paragraph 13.35.
[8] *Lord Advocate v Scotsman Publications* 1989 SC (HL) 22; *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; *PJS v Newsgroup Newspapers Ltd* [2016] UKSC 26.
[9] See section 21 of the draft Bill.
[10] As applied to Scotland by section 14 of that Act.
[11] See section 24 of the draft Bill.

section 24 reflects the law as it has stood for some time throughout the United Kingdom. We consider that the provision is important because it covers cases in which it may not be possible for the pursuer to prove actual financial loss, but it is clear that such loss will probably arise.

9.34 We therefore recommend that:

47. There should be no requirement on the pursuer in proceedings under Part 2 of the draft Bill to show financial loss if the statement complained of is more likely than not to cause such loss.

(Draft Bill, section 24)

Single meaning rule

9.35 We are also of the view that the "single meaning rule" that is applicable in actions of defamation should not apply in relation to proceedings brought under Part 2 of the draft Bill.[12] We are in agreement with the view expressed in the *Ajinomoto Sweeteners* case that examination by the court of multiple meanings allows the damaging effect of the words to be put into perspective and malice and damage to be gauged more realistically.

9.36 We therefore recommend that:

48. The "single meaning rule" should not apply in relation to proceedings brought under Part 2 of the draft Bill.

(Draft Bill, section 25)

Single publication rule

9.37 On the other hand, we see no reason why the "single publication rule" should not apply to proceedings brought under Part 2 of the draft Bill and so the amendments made to section 18A of the Prescription and Limitation (Scotland) Act 1973 by section 32 of the draft Bill have been extended to capture those proceedings. Chapter 7 of this Report discusses those amendments in more detail. The potential advantages of a single publication rule in relation to defamation proceedings, as regards eliminating a perpetual threat of liability, would apply equally to proceedings under Part 2.

Damages for anxiety and distress

9.38 In responding to the Discussion Paper Elspeth Reid raised the related question of whether anxiety and distress should be compensated where this flows from economic damage to business interests. This is a matter separate from exposure to public hatred, contempt or ridicule; there is no reason why the pursuer should be shunned or ostracised, but he or she may suffer anxiety as a result of economic damage to his or her business interests. This has been recognised, tentatively, as a possible head of claim in the English

[12] See discussion of this matter in the case of *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2010] EWCA Civ 609, in particular the discussion by Sedley LJ at paragraphs 27-35. We are not aware of any Scottish authority on the point.

courts.[13] In an indirect way it has also been so recognised in the Scottish courts, although in a different context[14]. We are persuaded by this and therefore recommend that:

49. Anxiety and distress should be capable of being taken into account by the court in determining the appropriate amount of general damages, in so far as such anxiety and distress flows from economic damage to business interests caused by the relevant statement.

(Draft Bill, section 26)

[13] *Khodaparast v Shad* [2001] 1 WLR 618 (CA).
[14] *Martin v Bell Ingram* 1986 SC 208. In this case an award was made for "worry and inconvenience" arising from the provision of a negligent home survey.

Chapter 10 Defamation of the deceased

Introduction

10.1 As we explained in the Discussion Paper, defamatory statements made about a person after his or her death are not actionable in Scots law; no one, not even a close relative, has the right to sue in respect of such statements.[1] We noted that whilst most European jurisdictions (apart from England and Wales) make some provision to allow defamation claims to be brought on behalf of persons who have died, this was not common in other parts of the World.[2] This chapter summarises the outcome of our consultation and sets out our conclusions on the possibility of enabling defamation actions to be brought on behalf of people who have died, in respect of statements made about them after their death.

European case law

10.2 The case law of the European Court of Human Rights in this area is still developing. As a starting point, it is worthwhile noting the recent case of *Genner v Austria.*[3] There the European Court of Human Rights held that there had been no violation of the applicant's Article 10 rights where he had been convicted and fined under the Austrian criminal code for an outspoken personal attack on the character of a recently deceased politician. The Court alluded to the line in its earlier decision in *Putistin v Ukraine*[4] where it approached matters from the point of view of the Article 8 ECHR rights of persons closely connected to the deceased, but did not develop this line of argument.[5] However, it included alongside this reasoning an apparent focus on the reputation of the deceased politician herself, referring to the statement of the applicant as being "likely to cause significant damage to the late Minister's reputation".[6] As has been pointed out in commentary on the *Genner* ruling, it is perhaps regrettable that the European Court did not take the opportunity to develop further the line about those closely connected to the deceased, clarifying such points as whether presumed harm was enough to justify an interference with Article 10 ECHR, or whether it was necessary to prove that actual and direct harm had been suffered. It may be said instead to have left unanswered the question as to whose reputation is protected by the

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[1] Discussion Paper, paragraphs 12.1 and 12.2. See also *Broom v Ritchie* (1904) 6 F 942; E C Reid, *Personality, Confidentiality and Privacy in Scots law* (2010), pp 159-161; Gloag and Henderson, *The Law of Scotland* (14th edn, 2017), para 29.25.

[2] Discussion Paper, paragraphs 12.12-12.15; Christian von Bar, *The Common European Law of Torts – Volume 2* (2000), at paragraph 116; under section 189 of the German Civil Code violation of the memory of the dead amounts to a criminal offence. The Australian Uniform Defamation Laws provide in section 110 that there is no cause of action for defamation of or against deceased persons.

[3] *Genner v Austria* (Application no. 55495/08, 12 January 2016).

[4] Application no. 16882/03, 21 November 2013. The *Putistin* case was brought by the son of a participant in the so-called death match between Dynamo Kyiv and a German military football team in 1942. The applicant claimed that his late father's reputation had been damaged by a newspaper article implying that he was a collaborator with the Gestapo.

[5] See paragraphs 35 and 41.

[6] See paragraph 44.

ECHR – the deceased's or those closely connected to him or her? Only time, and case law, will tell how the European jurisprudence in this area develops.[7]

10.3 We are aware that there has been at least one Scottish case in which the relatives of a person who has been convicted of murder, and is now deceased, have been permitted to proceed with an appeal against the conviction after the death.[8] In our view this is fundamentally different from any attempt by relatives of a deceased person to bring an action for defamation in respect of a statement made after his or her death. The effect of any such opportunity may very well be to prevent the coming to light, in any shape or form, of information in which the public have a real and genuine interest. By contrast, where it is a criminal conviction that is at issue, information about this will usually be in the public domain already.

Should there be provision for an action of defamation to be brought on behalf of someone who has died?

10.4 The vast majority of respondents[9] who answered question 47 of the Discussion Paper – whether there should be provision to enable an action for defamation to be brought on behalf of someone who has died, in respect of statements made after their death - opposed any such provision. The main theme of the opposition was that, as had been apparent at the time of the Scottish Government's consultation on introduction of provision in relation to defamation of the deceased,[10] such justification as existed was extremely limited. This could not be said to provide a solid basis for the introduction of such provision. Indeed, the general consensus of opinion was that there was far greater reason not to introduce such a provision than to introduce it. In particular, consultees thought that account should be taken of the serious risk of discouraging investigative journalism and historical research, such as had led to the reporting, after his death, of sexual abuse perpetrated by the late Jimmy Savile.

10.5 Campbell Deane raised arguments against introduction of provision for defamation actions on behalf of people who have died additional to those advanced at the time of the Scottish Government's consultation. He suggested that, because it would open in Scotland an avenue that was not available in England and Wales, it could encourage libel tourism in Scotland to take advantage of the provision. This would be a possibility where material was published on a UK basis, downloadable in Scotland. There was also a question as to how the necessary threshold of serious harm to reputation could be established where it was the reputation of a deceased person that was at stake.

10.6 By contrast, the Law Society of Scotland was keen to see consideration of the issue of defamation of the deceased as part of the current project, potentially along with consideration of the accessibility of defamation law to people lacking capacity. Active support for statutory provision to enable actions for defamation to be brought on behalf of

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[7] Valeska David, "Insulting a politician right after her death: Does the ECHR protect the reputation of the deceased?" 8 February 2016 - https://strasbourgobservers.com/2016/02/08/insulting-a-politician-right-after-her-death-does-the-echr-protect-the-reputation-of-the-deceased/.

[8] *Gormley v HMA* (Appeal Court, High Court of Justiciary, unreported, 17/11/99); section 303A(4) of the Criminal Procedure (Scotland) Act 1995.

[9] 16 out of 18.

[10] "Death of a Good Name: Defamation and the Deceased – A Consultation Paper: http://www.gov.scot/Publications/2011/01/11092246/0

people who have died was also expressed by Margaret and James Watson. As mentioned in the Discussion Paper, they were the authors of a long-running petition to the Scottish Parliament on the subject, following comments published about their daughter after she had been murdered.[11] The petition called for the Scottish Parliament to take steps to prevent defamation of murder victims and, in particular, to stop convicted murderers or members of their families from profiting from their crimes by selling accounts of their crimes for publication.

10.7 Whilst we are very conscious of the pain and distress that is liable to be caused to families and relatives of deceased persons by insensitive and cruel statements made after the death of a loved one, we do not consider that there is sufficient justification for extending the law of defamation in this area. We agree with the majority of respondents that there would be a serious risk that legitimate investigative journalism and research would be stifled and that the wider public interest would thereby be damaged. Moreover, we consider that reform of the law in a way that attempted to protect the reputation of deceased persons would run counter to the basic principle that defamation law is intended to provide a means of vindication for the reputation of the person bringing the proceedings rather than the rights and interests of other persons, however close their bonds of affection with the deceased may have been. Defamation law is designed to protect the feelings of the defamed person; this cannot be easily reconciled with the idea of introducing a cause of action for a person who is no longer alive. In addition, there would inevitably be difficult questions as to who would be entitled to sue and for how long a right to sue would continue after the death. It would also be undesirable, we consider, to set Scots law apart from the law of England and Wales on this sensitive issue; we are mindful in this connection of the risk of libel tourism to which Campbell Deane drew attention. Accordingly, while we are acutely aware of the sensitivities involved for those affected by the issues, we do not make any recommendation for provision to enable actions in defamation to be brought on behalf of people who have died in respect of comments made after their death.

[11] See paragraph 12.3 of the Discussion Paper.

Chapter 11 List of recommendations

1. It should be competent to bring defamation proceedings in respect of a statement only where the statement has been communicated to a person other than its subject, with that person having seen or heard it and understood its gist.

(Paragraph 2.8; Draft Bill, section 1(2)(a) and (4))

2. It should be competent to bring defamation proceedings in respect of a statement only where the publication of the statement has caused, or is likely to cause, serious harm to the reputation of the person who is the subject of the statement.

(Paragraph 2.14; Draft Bill, section 1(2)(b) and (4))

3. Bodies which exist for the primary purpose of making a profit should, in principle, continue to be permitted to bring proceedings in defamation.

(Paragraph 2.20)

4. A non-natural person whose primary purpose is to trade for profit should be permitted to bring defamation proceedings only where it can demonstrate that the statement complained of has caused or is likely to cause it serious financial loss.

(Paragraph 2.25; Draft Bill, section 1(3))

5. Persons which are classed as public authorities for the purposes of the Bill should not be permitted to bring proceedings for defamation.

(Paragraph 2.29; Draft Bill, section 2(1))

6. A person should be classed as a public authority if the person's functions include functions of a public nature.

(Paragraph 2.29; Draft Bill, section 2(2))

7. A person should not fall into the category of a public authority if it is a non-natural person which has as its primary purpose trading for profit or is a charity or has a charitable purpose and is not owned or controlled by a public authority and only carries out functions of a public nature from time to time.

(Paragraph 2.29; Draft Bill, section 2(3)-(4))

8. There should be a power for Scottish Ministers to make regulations specifying persons or descriptions of persons who are not to be treated as a public authority, where this result is not achieved already by section 2. Such regulations should require public consultation before they are made and be subject to the affirmative resolution procedure.

(Paragraph 2.29; Draft Bill, section 2(6)-(8))

9. A statutory defence of truth should be introduced. The defences of *veritas* at common law and justification under the Defamation Act 1952 should be abolished.

(Paragraph 3.13; Draft Bill, sections 5, 8(1)(b) and 33(1))

10. A statutory defence of honest opinion should be introduced. The defences of fair comment at common law and under the Defamation Act 1952 should be abolished.

(Paragraph 3.22; Draft Bill, sections 7, 8(1)(d) and 33(1))

11. It should not be a requirement of the defence of honest opinion that the opinion expressed relates to a matter of public interest.

(Paragraph 3.28)

12. The statutory defence of honest opinion should be available in relation to a statement of opinion including a statement drawing an inference of fact which:

(a) indicates either in general or specific terms the evidence on which it is based; and

(b) is such that an honest person could have held the opinion conveyed by the statement on the basis of any part of that evidence.

(Paragraph 3.62; Draft Bill, section 7(2), (3) and (4))

13. The statutory defence of honest opinion should fail if it is shown that the person who made the statement did not genuinely hold the opinion conveyed by the statement.

(Paragraph 3.62; Draft Bill, section 7(5))

14. Where the statement complained of was published by one person but made by another, the previous recommendation should be inapplicable and the statutory defence of honest opinion should fail if it is shown that the person who published the statement knew or ought to have known that the author of the statement did not genuinely hold the opinion conveyed by the statement.

(Paragraph 3.62; Draft Bill, section 7(6))

15. A statutory defence of publication in the public interest should be introduced. The *Reynolds* defence should be abolished.

(Paragraph 3.75; Draft Bill, sections 6 and 8(1)(c))

16. The statutory defence of publication in the public interest should extend to statements of fact and to statements of opinion.

(Paragraph 3.79; Draft Bill, section 6(5))

17. The statutory defence of publication in the public interest should make specific provision for reportage. In particular, it should be provided that in determining whether it was reasonable for a defender to believe that publication was in the public interest,

(a) allowance must be made for editorial judgment, where appropriate; and

(b) no account should be taken of any failure by a defender to take steps to verify the truth of the imputation conveyed by a statement if the statement was or formed part of an accurate and impartial account of a dispute to which the pursuer was a party.

(Paragraph 3.85; Draft Bill, section 6(3) and (4))

18. Any review of responsibility and defences for publication by internet intermediaries should be carried out on a UK-wide basis.

(Paragraph 4.7)

19. As part of any UK-wide review of liability and defences of internet intermediaries, consideration should be given to (a) whether there is scope to clarify the operation of existing provisions, rather than creating new provisions and (b) if so, whether this would be most appropriately achieved by means other than legislation.

(Paragraph 4.25)

20. Generally, defamation proceedings should not be capable of being brought against a person, unless the person is the author, editor or publisher of the statement in respect of which the proceedings are to be brought or is an employee or agent of such a person and is responsible for the content of the statement or the decision to publish it.

(Paragraph 4.33; Draft Bill, section 3)

21. A regulation-making power should be created to allow for exceptions to the general rule so that specified categories of person may be treated as publishers of a statement for the purpose of defamation proceedings despite not being the author, editor or publisher of the statement or an employee or agent of such a person. A draft of such regulations should be the subject of consultation before they are made. The regulations should be subject to the affirmative resolution procedure.

(Paragraph 4.33; Draft Bill, section 4(1), (3) and (4))

22. Any such regulations may also provide for a defence that the person treated as a publisher did not know and could not reasonably be expected to have known that the material disseminated contained a defamatory statement.

(Paragraph 4.33; Draft Bill, section 4(2))

23. There should be no change to Scots law in relation to absolute privilege for statements made in the course of parliamentary proceedings.

(Paragraph 5.9)

24. Section 14 of the Defamation Act 1996 should be repealed and re-enacted in a new Defamation Act so as to reflect in Scots law the change effected by section 7(1) of the 2013 Act for England and Wales in relation to absolute privilege for contemporaneous reports of court proceedings anywhere in the world and of any international court or tribunal established by the Security Council or by an international agreement.

(Paragraph 5.9; Draft Bill, section 9)

25. The law on privileges should be extended by allowing qualified privilege to cover communications issued by 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 5.16; Draft Bill, section 11 and schedule)

26. The privileges of the Defamation Act 1996 should be restated for Scotland in a new statute.

(Paragraph 5.22; Draft Bill, sections 9 and 11 and schedule)

27. There should be no reform of Scots law in relation to qualified privilege for publication (through broadcasting or otherwise) of Parliamentary papers or extracts thereof, for the time being.

(Paragraph 5.32)

28. Consideration of any future reform relating to this area should be carried out on a UK-wide basis.

(Paragraph 5.32)

29. The scope of section 6 of the 2013 Act should not be expanded but its current terms should be restated in a new Act for Scotland.

(Paragraph 5.44; Draft Bill, section 10)

30. There should be no change to the law governing the granting of interdict and *interim* interdict in defamation actions or in proceedings under Part 2 of the Bill.

(Paragraph 6.6)

31. The offer of amends procedure should be incorporated in a new Defamation Act.

(Paragraph 6.11; Draft Bill, sections 13 to 17)

32. There should be a statutory provision to the effect that an offer of amends is deemed to have been rejected if not accepted within a reasonable period.

(Paragraph 6.17; Draft Bill, section 13(3)(c))

33. In defamation proceedings and in Part 2 proceedings the court should have power to order that the defender must publish a summary of its judgment.

(Paragraph 6.44; Draft Bill, section 28)

34. In defamation proceedings and in Part 2 proceedings the court should have statutory power to allow a settlement statement to be read out in open court.

(Paragraph 6.51; Draft Bill, section 29)

35. In defamation proceedings and in Part 2 proceedings the court should have statutory power, at any stage in the proceedings, (a) to order the operator of a website to remove a defamatory statement or (b) to order the author, editor or publisher of such a statement to stop distributing, selling or exhibiting material containing it.

(Paragraph 6.61; Draft Bill, section 30)

36. Where a person publishes a statement to the public and subsequently publishes the same or substantially the same statement, any right of action in respect of the subsequent publication should be treated as having accrued on the date of the first publication.

(Paragraph 7.8; Draft Bill, section 32(3))

37. The previous recommendation should not apply where the manner of the subsequent publication is materially different from that of the first publication, having regard to the level of prominence that the statement is given; the extent of subsequent publication; and any other matter which a court considers relevant.

(Paragraph 7.14; Draft Bill, section 32(3))

38. The length of the limitation period in actions for defamation should be one year.

(Paragraph 7.19; Draft Bill, section 32(2))

39. The limitation period should commence on the date of first publication of the statement complained of.

(Paragraph 7.24; Draft Bill, section 32(3) and 32(6)(b)(iv))

40. A court in Scotland should not have jurisdiction to hear and determine defamation proceedings against a person who is not domiciled in the UK, another Member State or a state which is a contracting party to the Lugano Convention, unless satisfied that Scotland is clearly the most appropriate place to bring the proceedings. This should not affect the availability of the defence of *forum non conveniens*, where appropriate.

(Paragraph 8.10; Draft Bill, section 19)

41. The presumption in favour of jury trials in defamation actions should be replaced by a discretionary power to allow the court to appoint the form of inquiry, including jury trial, best suited to the circumstances of the case.

(Paragraph 8.19; Draft Bill, section 20)

42. The principles underlying the three categories of verbal injury which relate to economic interests (ie falsehood about the pursuer causing business loss, slander of title and slander of property) should be retained.

(Paragraph 9.23)

43. The common law rules relating to these categories of verbal injury should be abolished and instead expressed in statutory form.

(Paragraph 9.23; Draft Bill, sections 21, 22, 23 and 27)

44. Verbal injury should be renamed by a term which reflects more accurately the type of conduct it seeks to address (ie malicious publication).

(Paragraph 9.23; Draft Bill, Part 2)

45. The three categories of verbal injury relating to economic interests should be renamed, to reflect more clearly the types of conduct they seek to address (ie statements causing harm to business interests, statements causing doubt as to title to property and statements criticising assets).

(Paragraph 9.23; Draft Bill, sections 21, 22 and 23)

46. The common-law rules providing for verbal injury relating to individuals should be abolished.

(Paragraph 9.32; Draft Bill, section 27)

47. There should be no requirement on the pursuer in proceedings under Part 2 of the draft Bill to show financial loss if the statement complained of is more likely than not to cause such loss.

(Paragraph 9.34; Draft Bill, section 24)

48. The "single meaning rule" should not apply in relation to proceedings brought under Part 2 of the draft Bill.

(Paragraph 9.36; Draft Bill, section 25)

49. Anxiety and distress should be capable of being taken into account by the court in determining the appropriate amount of general damages, in so far as such anxiety and distress flows from economic damage to business interests caused by the relevant statement.

(Paragraph 9.38; Draft Bill, section 26)

Appendix A

Defamation and Malicious Publication (Scotland) Bill

[DRAFT]

CONTENTS

Defamation and Malicious Publication (Scotland) Bill

DRAFT

An Act of the Scottish Parliament to amend the law of defamation; replace the common law delicts of verbal injury with delicts of malicious publication; and for connected purposes.

INTRODUCTORY NOTE

Part 1 of the draft Bill (Defamation – sections 1 to 20) covers amendments to the law of defamation and makes provision in relation to actionability of defamatory statements and restrictions on bringing proceedings, defences, absolute and qualified privilege, offers to make amends, jurisdiction and the removal of the presumption that defamation proceedings are to be tried by jury. Part 2 (Malicious publication – sections 21 to 27) makes provision to replace common law verbal injuries with three new statutory delicts relating to malicious publication. Part 3 (General – sections 28 to 38) makes provision as to remedies and limitation of defamation actions and actions under Part 2 as well as miscellaneous provisions dealing with matters such as consequential modification, interpretation, regulations and commencement.

PART 1
DEFAMATION

Actionability and restrictions on bringing proceedings

1 Actionability of defamatory statements

(1) This section applies to a defamatory statement made by a person (A) about another person (B).

(2) A right to bring defamation proceedings in respect of the statement accrues only if—

(a) A has published the statement to a person other than B, and

(b) the publication of the statement has caused (or is likely to cause) serious harm to the reputation of B.

(3) For the purposes of subsection (2)(b), where B is a non-natural person which has as its primary purpose trading for profit, harm to B's reputation is not "serious harm" unless it has caused (or is likely to cause) B serious financial loss.

(4) For the purposes of this Act, unless the context otherwise requires—

(a) a reference to publishing a statement is a reference to communicating the statement by any means to a person in a manner that the person can access and understand, and

(b) a statement is published when the recipient has seen or heard it.

(5) Nothing in this section affects a right to bring proceedings which accrued before the commencement of this section.

NOTE

Background

Section 1 restricts the circumstances in which proceedings can competently be brought in respect of a statement that is alleged by the person bringing the proceedings to be defamatory. The word 'defamatory' is to be read in accordance with the classic test laid down in *Sim v Stretch*[1] – "Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" This is an accepted part of Scots common law. The test does not displace the common law position that proceedings can only be brought in respect of a defamatory statement if the statement is false and made with malice. A statement that is false and defamatory will be presumed to have been made with malice.[2] In defamation proceedings the burden of proving the truth of a defamatory statement lies on the defender.

The use of the word 'proceedings' is intended to reflect the fact that, in terms of court procedure, while measures taken in respect of alleged defamation are likely to come in the form of the raising of a court action (by summons or initial writ) in the vast majority of cases, this will not necessarily always be so. They may also take the form of a different type of procedure by way of a petition presented to the Court of Session, for example, where all that is sought is an interdict against publication and not damages.

When may proceedings competently be brought?

Subsection (1) sets out the basis of the operation of the section – it applies where one person makes a defamatory statement about another person. At common law, a defamatory statement is one which would be expected to make the average member of the public think less of the subject of the statement. Applying the definition of "person" in the Interpretation and Legislative Reform (Scotland) Act 2010 to the draft Bill, that subject may be a natural person or an entity, including a corporate body, an unincorporated association, or a partnership.

Subsection (2) identifies the circumstances in which proceedings in relation to defamation can competently be brought. First, the statement complained about must have been published to a person other than the one who is the subject of the statement. This marks an important change in the position under current Scots law; as things stand, proceedings for defamation can be brought even if the statement complained of is conveyed only to the person about whom it is made. Second, the publication of the statement must have caused, or be likely to cause, serious harm to the reputation of the subject of the statement; only then will the court allow the proceedings to go ahead. Subsection (3) further limits the circumstances in which proceedings for defamation may competently be brought where the party seeking to do so is a non-natural person whose primary purpose is to trade for profit. In this scenario, for the purpose of subsection (2)(b), the harm to the entity is not "serious harm" unless it has caused, or is likely to cause, serious financial loss. Subsection (4) sets out what is meant by "publishing" and related terms for the purposes of the draft Bill. Reading this in conjunction with section 34(a), these definitions apply throughout the whole of the draft Bill, unless the context in which the words are used dictates otherwise.

Subsection (5) is a savings provision which makes clear that the changes brought about by section 1 do not affect a right to bring proceedings which accrued before the section comes into force.

[1] [1936] 2 All ER 1237.
[2] *Morrison v Ritchie* (1902) SC 4 F 645.

2 Prohibition on public authorities bringing proceedings

(1) A public authority may not bring defamation proceedings.

(2) For the purpose of subsection (1), a person is a "public authority" if the person's functions include functions of a public nature.

(3) But, where the person—

(a) is a non-natural person which—

(i) has as its primary purpose trading for profit, or

(ii) is a charity or has purposes consisting only of one or more charitable purposes, and

(b) is not owned or controlled by a public authority,

it is not a public authority by reason only of its carrying out functions of a public nature from time to time.

(4) For the purposes of subsection (3)(b), a non-natural person is owned or controlled by a public authority if the authority—

(a) holds (directly or indirectly) the majority of the shares or voting rights in it,

(b) has the right (directly or indirectly) to appoint or remove a majority of the board of directors of it, or

(c) has the right to exercise, or actually exercises, significant influence or control over it.

(5) For the avoidance of doubt, nothing in this section prevents an individual from bringing defamation proceedings in a personal capacity (as distinct from the individual acting in the capacity of an office-holder).

(6) The Scottish Ministers may by regulations make provision specifying persons or descriptions of persons who are not to be treated as a public authority for the purpose of subsection (1).

(7) Regulations under subsection (6) are subject to the affirmative procedure.

(8) Before laying a draft of a Scottish statutory instrument containing regulations under subsection (6), the Scottish Ministers must consult such persons as they consider appropriate.

(9) In this section—

(a) a reference to a charity is a reference to a non-natural person—

(i) registered in the Scottish Charity Register, or

(ii) managed or controlled wholly or mainly outwith Scotland and which is registered in a register equivalent to the Scottish Charity Register for the purposes of the country in which it operates,

(b) "charitable purposes" is to be construed in accordance with section 7(2) of the Charities and Trustee Investment (Scotland) Act 2005.

NOTE

Section 2 places on a statutory footing the principle laid down by the case of *Derbyshire County Council v Times Newspapers Ltd*[3] that a public authority has no right at common law to bring proceedings for defamation. Although a principle of English common law, it is thought to hold good also in Scots common law.

Subsection (1) sets out the basic principle laid down in *Derbyshire.*

Subsection (2) sets out what is meant by a public authority, namely a person whose functions include functions of a public nature. This should, however, be read in conjunction with subsection (3).

Subsection (3) sets out a default position which excludes from the category of public authorities both bodies set up to trade for profit and charitable organisations where either exercises public functions from time to time, provided (in both cases) that they are not owned or controlled by a public authority. Typical examples may include companies and charitable organisations contracted by Government or local authorities to discharge functions on their behalf at certain times. Use of the words 'from time to time' is intended to reflect the fact that such entities may operate on a contractual basis, discharging public functions sporadically. It seeks to ensure that they will not be deemed to fall into the category of public authorities by reason only of such periodic discharging of public functions. The provision does not preclude the possibility of them being found to be public authorities, but that finding may not be made solely on the basis of their carrying out functions of a public nature from time to time. The reference to their not being under the ownership or control of a public authority is designed to distinguish bodies covered by the exception from corporate vehicles set up by central or local government.

Subsection (4) elaborates as to what is meant by a non-natural person being under the ownership or control of a public authority. This includes situations where a public authority holds the majority of shares in it or has the right to appoint or remove a majority of the board of directors.

Subsection (5) puts beyond doubt that an individual who discharges public functions in the capacity of an office-holder is not prevented from bringing defamation proceedings in his or her personal capacity. Such proceedings may, for example, relate to the individual's professional/occupational position and reputation. This option will be available insofar as the matter concerned relates to the position of the individual, rather than the public functions.

Subsections (6) to (8) provide Scottish Ministers with the power to make regulations to specify persons or descriptions of persons who are not to be treated as public authorities for the purposes of subsection (1). The regulations are to be the subject of consultation by the Scottish Ministers, and are to be subject to the affirmative procedure of the Scottish Parliament.

Subsection (9) provides a definition of the terms 'charity' and 'charitable purposes'.

3 No proceedings against secondary publishers

(1) Except as may be provided for under section 4, a right to bring defamation proceedings in respect of a statement does not accrue against a person unless the person is—

(a) the author, editor or publisher of the statement, or

(b) both—

(i) an employee or agent of such a person, and

[3] [1993] AC 534.

(ii) responsible for the statement's content or the decision to publish it.

(2) In this section, subject to subsections (3) and (4)—

"author" means the person from whom the statement originated, but does not include a person who did not intend the statement to be published,

"editor" means a person with editorial or equivalent responsibility for the content of the statement or the decision to publish it,

"publisher" means a commercial publisher (that is to say, a person whose business is issuing material to the public or to a section of the public) who issues material containing the statement in the course of that business.

(3) Despite subsection (2), a person is not to be considered the author, editor or publisher of a statement if the person's involvement with the statement is only—

(a) printing, producing, distributing or selling printed material containing the statement,

(b) processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part 1 of the Copyright, Designs and Patents Act 1988) containing the statement,

(c) processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded,

(d) operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form,

(e) broadcasting a live programme containing the statement in circumstances in which the person has no effective control over the maker of the statement,

(f) operating or providing access to a communications system by means of which another person over whom the person has no effective control transmits the statement or makes it available,

(g) moderating the statement (for example, by removing obscene language or correcting typographical errors without altering the substance of the statement).

(4) Where a person does not fall within any of paragraphs (a) to (g) of subsection (3), the court may have regard to those paragraphs by way of analogy in determining whether a person is the author, editor or publisher of a statement.

(5) The Scottish Ministers may by regulations modify subsection (3) to add, amend or remove activities or methods of disseminating or processing material.

(6) Regulations under subsection (5) are subject to the affirmative procedure.

(7) Before laying a draft of a Scottish statutory instrument containing regulations under subsection (5), the Scottish Ministers must consult such persons as they consider appropriate.

NOTE

Subsection (1) lays down the general principle that, except as may be provided for under section 4, no defamation proceedings may be brought against a person unless that person is the author, editor or publisher of the statement which is complained about or is an employee or agent of that person and is responsible for the content of the statement or the decision to publish it.

Subsection (2) sets out definitions of the terms "author", "editor" and "publisher", subject to subsections (3) and (4).

Subsection (3) sets out a list of functions that are not to be taken to place a person in the category of an author, editor, or publisher. These include moderating and processing the material in relation to which proceedings are brought, making copies, and operating equipment. "Moderating" may involve performing functions offline, such as in relation to letters to the editor in hard copy newspapers and magazines, as well as online functions.

Subsection (4) provides for the use of the examples in subsection (3) by analogy, where appropriate, to determine whether a person is the author, editor, or publisher of a statement.

Subsection (5) allows for regulations to be made to add, alter or remove activities or methods of disseminating or processing material from the list in subsection (3). In terms of subsections (6) and (7), any such regulations are to be the subject of consultation by the Scottish Ministers, and are to be subject to the affirmative procedure of the Scottish Parliament.

4 Power to specify persons to be treated as publishers

(1) The Scottish Ministers may by regulations specify categories of persons who are to be treated as publishers of a statement for the purpose of defamation proceedings despite not being—

(a) the author, editor or publisher of the statement as defined in section 3, or

(b) an employee or agent of such a person.

(2) Regulations under subsection (1) may also provide for a defence to defamation proceedings for a person who—

(a) is treated as a publisher under such regulations,

(b) did not know and could not reasonably be expected to have known that the material which the person disseminated contained a defamatory statement, and

(c) satisfies any further conditions specified by the regulations.

(3) Regulations under subsection (1) are subject to the affirmative procedure.

(4) Before laying a draft of a Scottish statutory instrument containing regulations under subsection (1), the Scottish Ministers must consult such persons as they consider appropriate.

NOTE

Section 4 effectively qualifies section 3, discussed above.

Subsection (1) gives the Scottish Ministers power to make regulations specifying categories of persons who are to be treated as publishers of a statement, for the purposes of the bringing of defamation proceedings, despite not being persons who would be classed as authors, editors or publishers by virtue of section 3. In other words, the provision is concerned with people who neither fall within the definition of author, editor, or publisher, based upon subsections (2) and (3) of section 3, nor are an employee or agent of such a person. This is designed to cater, in particular, for a scenario in which a new category of intermediary emerges and is actively facilitating the causing of harm.

Subsection (2) enables the Scottish Ministers to make provision in regulations under subsection (1) for a defence to defamation proceedings for persons who are treated as publishers under those regulations, who

did not know, and could not reasonably be expected to have known, that the material which they disseminated contained a defamatory statement and who satisfy any further conditions specified by the regulations.

Subsections (3) and (4) provide that regulations under subsection (1) are to be the subject of consultation by the Scottish Ministers and are to be subject to the affirmative procedure of the Scottish Parliament.

Defences

5 Defence of truth

(1) It is a defence to defamation proceedings for the defender to show that the imputation conveyed by the statement complained of is true or substantially true.

(2) Where defamation proceedings are brought in respect of a statement conveying two or more distinct imputations, the defence under subsection (1) does not fail if—

(a) not all of the imputations are shown to be true or substantially true, but

(b) having regard to the imputations that have been shown to be true or substantially true, publication of the remaining imputations has not caused serious harm to the reputation of the pursuer.

NOTE

Section 5 replaces the common law defence of *veritas* (truth) with a statutory equivalent, known simply as the defence of truth.

Subsection (1) sets out the basis on which the defence operates. It applies where the defender can show that the imputation conveyed by the statement complained of is true or substantially true. By 'imputation' is meant a slur impinging in some way on a person's reputation.

Subsection (2) deals with a case where defamation proceedings are brought in relation to a statement which conveys two or more distinct imputations. It makes clear that the defence does not fail if not all of the imputations are shown to be true or substantially true. Rather, the defence can still be relied upon if the defender can show that, having regard to the imputations that are shown to be true or substantially true, the publication of the remaining imputations has not caused serious harm to the reputation of the pursuer. This gives statutory effect to the rule laid down for England and Wales in *Polly Peck (Holdings) plc v Trelford*,[4] and thought also to apply in Scotland.

6 Defence of publication on a matter of public interest

(1) It is a defence to defamation proceedings for the defender to show that—

(a) the statement complained of was, or formed part of, a statement on a matter of public interest, and

(b) the defender reasonably believed that publishing the statement complained of was in the public interest.

[4] [1986] QB 1000.

(2) Subject to subsections (3) and (4), in determining whether the defender has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the pursuer was a party, the court must in determining whether it was reasonable for the defender to believe that publishing the statement was in the public interest disregard any omission of the defender to take steps to verify the truth of the imputation conveyed by it.

(4) In determining whether it was reasonable for the defender to believe that publishing the statement was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

NOTE

Section 6 creates a defence on the basis that the statement in relation to which proceedings were brought related to a matter of public interest. It is based on the common law defence established in England and Wales by the leading case of *Reynolds v Times Newspapers Ltd*[5] (and generally accepted in Scotland), and is intended to reflect the principles developed in that case and subsequent case law. It may therefore be regarded simply as a statutory incarnation of the common law position, albeit with a change of focus. The test to be applied is now reasonableness of the belief that publication of the statement complained of was in the public interest, rather than the responsibility of the journalism behind the statement.

Subsection (1) sets out the components of the defence. The defender must show that the statement complained of was or formed part of a statement on a matter of public interest. The defender must also have reasonably believed that it was in the public interest for the statement to be published.

Subsection (2) provides that, subject to subsections (3) and (4), the court must have regard to all the circumstances of the case in determining whether the defender has shown the matters mentioned in subsection (1).

Subsection (3) provides for one consideration that is *not* to be taken into account, namely any failure by the defender to verify the truth of an imputation conveyed by a statement which forms part of an accurate and neutral report of a dispute to which the pursuer was a party. In effect, this places on a statutory footing the common law defence of reportage. It is intended to reflect the fact that reportage has been recognised by the Supreme Court as a special form of *Reynolds* privilege, namely in the case of *Flood v Times Newspapers Ltd*.[6] In cases other than those involving reportage, the general position will be that steps should be taken by the defender to verify the truth of the imputation complained of. The draft Bill does not, however, lay down an express requirement of verification. It will, therefore, accommodate any situation in which the public interest in publication is so strong and urgent as to justify publication without steps towards verification.

Subsection (4) provides that, in determining whether it was reasonable for the defender to believe that publishing the statement was in the public interest, the court must make such allowance for editorial judgment as it considers appropriate. This is not intended to be limited to the judgement of editors in a media context.

[5] [2001] 2 AC 127.
[6] [2012] 2 AC 273.

Subsection (5) makes clear that the defence can be relied upon regardless of whether the statement which has been complained about is one of fact or opinion.

7 Defence of honest opinion

(1) Subject to subsections (5) and (6), it is a defence to defamation proceedings for the defender to show that the conditions in subsections (2) to (4) are met.

(2) The first condition is that the statement complained of was a statement of opinion.

(3) The second condition is that the statement indicated, either in general or specific terms, the evidence on which it was based.

(4) The third condition is that an honest person could have held the opinion conveyed by the statement on the basis of any part of that evidence.

(5) The defence fails if the pursuer shows that the defender did not genuinely hold the opinion conveyed by the statement.

(6) Where the statement complained of was published by the defender but made by another person ("the author")—

(a) subsection (5) does not apply, but

(b) the defence fails if the pursuer shows that the defender knew, or ought to have known, that the author did not genuinely hold the opinion conveyed by the statement.

(7) For the purpose of subsection (2), a "statement of opinion" includes a statement which draws an inference of fact.

(8) For the purpose of subsections (3) and (4), "evidence" means—

(a) any fact which existed at the time the statement was published,

(b) anything asserted to be a fact in a privileged statement made available before, or on the same occasion as, the statement complained of, or

(c) anything that the defender reasonably believed to be a fact at the time the statement was published.

(9) For the purpose of subsection (8)(b), a statement is a "privileged statement" if the person responsible for its publication would have one or more of the following defences if defamation proceedings were to be brought in respect of it—

(a) the defence of publication on a matter of public interest under section 6,

(b) the defence of absolute privilege under section 9, or

(c) the defence of qualified privilege under section 10 or 11.

NOTE

Section 7 replaces the common law defence of fair comment with a statutory equivalent, known as honest opinion.

Subsection (1) sets out the parameters of the defence – subject to limited qualifications, discussed below, it applies only if the defender shows that the conditions set out in subsections (2) to (4) are met.

Subsection (2) lays down the first condition, namely that the statement complained of was one of opinion (as opposed to one of fact).

Subsection (3) sets out the second condition, namely that the statement must have indicated, either in general or specific terms, the evidence on which it was based.

Subsection (4) sets out the third condition, namely that an honest person could have held the opinion conveyed by the statement on the basis of any part of that evidence. This requirement will be judged with reference to whether the view expressed can be said, objectively, to be sufficiently linked to the evidence underpinning it.

Subsection (5) provides that the defence fails if the pursuer shows that the defender did not genuinely hold the opinion conveyed by the statement.

Subsection (6) caters for the situation where the defender published the statement complained of but is not the author of the statement. This may apply, for example, where proceedings are brought against the editor of a newspaper, rather than the journalist who wrote the article containing the statement in question. In this scenario, the defence fails if the pursuer shows that the defender knew, or ought to have known, that the author did not genuinely hold the opinion conveyed by the statement.

Subsection (7) provides, for the purposes of subsection (2), that a "statement of opinion" includes a statement which draws an inference of fact. An example of an inference of fact would be a contention that because a person has been charged with a criminal offence, he or she must be guilty of it.

Subsection (8) provides, for the purposes of subsections (3) and (4), that "evidence" may take three possible forms. It may take the form of any fact which existed at the time the statement was published, anything presented as a fact in a privileged statement, made available before, or on the same occasion as, the statement complained of, or anything that the defender reasonably believed to be a fact at the time the statement was published. Subsection (9) defines what a "privileged statement" is for the purposes of subsection (8)(b).

8 Abolition of common law defences and transitional provision

(1) Any rules of law providing for—

(a) the defence of innocent dissemination,

(b) the defence of veritas,

(c) the defence known as the Reynolds defence,

(d) the defence of fair comment,

cease to have effect.

(2) Nothing in sections 5 to 7 or subsection (1) of this section has effect in relation to defamation proceedings if the right to bring the proceedings accrued before the commencement of the section or subsection in question.

NOTE

Section 8(1) provides for the abolition of a number of common law defences, for which statutory equivalents are introduced, in some form, by the Bill (see sections 5 to 7). These are the defences of innocent dissemination, *veritas* (i.e. truth), the Reynolds defence (which, as noted above, includes reportage) and the defence of fair comment. Subsection (2) is a transitional provision to make clear that nothing in sections 5 to 7 (i.e. the new statutory defences) or subsection (1) (i.e. the abolition of common

law defences) has effect in relation to defamation proceedings if the right to bring the proceedings accrued before the commencement of the provision in question.

Absolute privilege

NOTE

Sections 9 to 12, along with the schedule of the Bill, make provision in relation to absolute and qualified privilege. The overall effect is to provide for a consolidation of the provisions relating to privilege in Scots defamation law. The relevant existing provisions of the Defamation Act 1996 ("the 1996 Act") relating to privilege are repealed and re-enacted, as are the relevant provisions of the Defamation Act 2013 ("the 2013 Act"), in so far as they apply to Scotland (see also section 33 in relation to repeals).

Background as to the operation of privilege

The effect of privilege is to exclude or at least restrict the bringing of proceedings in relation to defamation. Where a statement is subject to absolute privilege, no proceedings in defamation can be brought in relation to it, even if there is evidence of malice. Examples of statements falling under this category include those made in the course of proceedings in Parliament and by certain persons involved in court proceedings, including judges, lawyers and witnesses. Where a statement is subject to qualified privilege, no proceedings can be brought unless the pursuer can prove that it was made with malice. This applies, for example, to reports of certain types of meetings, including meetings of local authority committees and general meetings of companies. It applies, also, when a journalist or blogger produces a summary of material which has been published by or on the authority of Parliament. In effect, qualified privilege is privilege which is ousted by proof of malice.

The approach of the draft Bill

Sections 9 to 11 and the schedule of the draft Bill re-enact sections 14, 15 and schedule 1 of the 1996 Act, along with sections 6 and 7(9) of the 2013 Act, insofar as they apply to Scotland.

The provisions of the 1996 Act are subject to certain adjustments in their re-enactment in the draft Bill. This reflects equivalent adjustments made to those provisions, insofar as they apply to England and Wales, by section 7 of the 2013 Act. A common theme among the adjustments is in the expansion of the geographical reach of the provisions. Several of the provisions now confer privilege on material produced by particular types of bodies located anywhere in the world, rather than in a more restricted locus as was previously the case. By way of example, section 9 of the draft Bill, in re-enacting section 14 of the 1996 Act, expands its application such that the provision now covers the contemporaneous publication of reports by courts anywhere in the world. Section 14 of the 1996 Act applied only to publication by certain courts, in the United Kingdom or Europe.

9 Contemporaneous reports of court proceedings

(1) The contemporaneous publication of a statement which is a fair and accurate report of proceedings in public before a court to which this section applies is absolutely privileged.

(2) Where the publication of a report of proceedings is required to be postponed—

(a) by an order of the court, or

(b) as a consequence of a statutory provision,

it is to be treated as being contemporaneously published if it is published as soon as practicable after that is permitted.

(3) This section applies to—

(a) any court in the United Kingdom,

(b) any court established under the law of a country or territory outside the United Kingdom,

(c) any international court or tribunal established by the Security Council of the United Nations or by an international agreement.

(4) For the purposes of subsection (3)(a) and (b), "court" includes any tribunal or body exercising the judicial power of the State.

NOTE

Section 9 of the draft Bill re-enacts section 14 of the 1996 Act.

Subsection (1) provides that the contemporaneous publication of a statement which is a fair and accurate report of proceedings in public before a court (defined in subsections (3) and (4)) is absolutely privileged. Subsection (2) provides that where publication of a report of proceedings is required to be postponed (either by an order of the court or as a consequence of a statutory provision) it is to be treated as contemporaneously published if it is published as soon as practicable after that is permitted. Non-contemporaneous reports of court proceedings are only subject to qualified privilege (see paragraphs 3 and 4 of the schedule).

Qualified privilege

10 Peer-reviewed statement in scientific or academic journal etc.

(1) The publication of a statement in a scientific or academic journal is privileged if the following conditions are met.

(2) The first condition is that the statement relates to a scientific or academic matter.

(3) The second condition is that before the statement was published an independent review of the statement's scientific or academic merit was carried out by—

(a) the editor of the journal, and

(b) one or more persons with expertise in the scientific or academic matter concerned.

(4) Where the publication of a statement in a scientific or academic journal is privileged by virtue of subsection (1), the publication in the same journal of any assessment of the statement's scientific or academic merit is also privileged if—

(a) the assessment was written by one or more of the persons who carried out the independent review of the statement, and

(b) the assessment was written in the course of that review.

(5) Where the publication of a statement or assessment is privileged by virtue of this section, the publication of a fair and accurate copy of, extract from or summary of the statement or assessment is also privileged.

(6) The publication of a statement is not privileged by virtue of this section if it is shown to have been made with malice.

(7) Nothing in this section is to be construed as—

(a) protecting the publication of matter the publication of which is prohibited by law, or

(b) limiting any privilege subsisting apart from this section.

(8) The reference in subsection (3)(a) to "the editor of the journal" is to be read, in the case of a journal with more than one editor, as a reference to the editor or editors who were responsible for deciding to publish the statement concerned.

NOTE

Section 10 of the draft Bill re-enacts section 6 of the 2013 Act, conferring qualified privilege on the publication of material in a scientific or academic journal, provided that certain conditions are met. One of the key conditions is that the material must have been subject to peer review. In short, this means that it has been subject to scrutiny by the editor who took the decision to publish the material in the journal concerned, and by one or more persons with expertise in the topic covered by the material. However, if the publication is shown to have been made with malice, privilege will not apply.

11 Other statements protected by qualified privilege

(1) Other than as provided in this section, the publication of any statement mentioned in the schedule (however described) is privileged.

(2) The publication of a statement is not privileged by virtue of this section if it is shown to have been made with malice.

(3) Subsection (4) applies to defamation proceedings brought in respect of the publication of a statement mentioned in Part 2 of the schedule.

(4) If the pursuer shows that the defender—

(a) was requested by the pursuer to publish, in a suitable manner, a reasonable statement by way of explanation or contradiction, and

(b) refused or neglected to do so,

the publication of the statement is not privileged by virtue of this section.

(5) For the purpose of subsection (4)(a), "in a suitable manner" means—

(a) in the same manner as the statement complained of, or

(b) in a manner that is adequate and reasonable in the circumstances.

(6) This section does not apply to the publication of matter which is not of public interest and the publication of which is not for the public benefit.

(7) Nothing in this section is to be construed as—

(a) protecting the publication of matter the publication of which is prohibited by law, or

(b) limiting any privilege subsisting apart from this section.

NOTE

Section 11 and the schedule of the draft Bill re-enact section 15 and schedule 1 of the 1996 Act. They make provision for other types of statements protected by qualified privilege. For example, paragraph 16

of the schedule re-enacts paragraph 14A of schedule 1 of the 1996 Act, as inserted by the 2013 Act, conferring qualified privilege upon a report of a scientific or academic conference held anywhere in the world, or an extract, summary etc. of such a report.

Part 2 of the schedule deals with statements which attract qualified privilege only if the defender, having been requested by the pursuer to publish a reasonable letter or statement by way of explanation or contradiction of the statement which is the subject of the proceedings, has not done so or has not done so in a suitable manner. By contrast, the statements described in Part 1 enjoy qualified privilege without the need to react to a request to provide an opportunity for explanation or contradiction.

12 Privilege: transitional provision

Nothing in sections 9 to 11 (or the schedule) has effect in relation to defamation proceedings if the right to bring the proceedings accrued before the commencement of the section in question.

NOTE

Section 12 of the draft Bill is a transitional provision to make clear that nothing in the changes to the application of privilege brought about by sections 9 to 11 (or the schedule) of the Bill will have effect in relation to defamation proceedings if the right to bring the proceedings accrued before the relevant provision comes into force.

Offers to make amends

NOTE

Subject to a limited number of departures of approach, sections 13 to 17 of the draft Bill replace sections 2 to 4 of the Defamation Act 1996 insofar as they apply to Scotland, relating to offers to make amends. Section 18 makes transitional provision in relation to those sections of the draft Bill.

In essence, the offer of amends procedure provides a route by which a person against whom proceedings for defamation are brought may seek to make amends as an alternative to defending the proceedings. The offer may relate to the statement in general (i.e. an "unqualified offer"), or only to a specific defamatory meaning conveyed by the statement (i.e. a "qualified offer"). In making an offer of amends, be it qualified or unqualified, the offeror is conceding, as appropriate, that the statement in general or the specific meaning to which the offer relates is defamatory.

13 Offers to make amends

(1) An offer to make amends is an offer made by a person (A) who has published a statement which another person (B) alleges is defamatory to make amends to B by—

(a) making a suitable correction of—

(i) the statement generally, or

(ii) a specific defamatory meaning conveyed by the statement,

(b) giving a sufficient apology,

(c) publishing the correction and apology in a manner that is reasonable and practicable in the circumstances,

(d) paying to B such compensation and expenses as may be agreed or determined to be payable (if any), and

(e) taking such other steps (if any) as A may propose.

(2) The offer must—

(a) be made before A lodges defences in any defamation proceedings brought by B in relation to the statement,

(b) be in writing,

(c) state that it is an offer to make amends under this section, and

(d) if made in relation to a specific defamatory meaning only, state that it is a qualified offer and set out the meaning in relation to which it is made.

(3) An offer made under this section—

(a) may be withdrawn before it is accepted,

(b) may be renewed (such renewal being treated as a new offer),

(c) is deemed to have been rejected if not accepted within a reasonable period.

NOTE

Section 13(1) sets out the components of a valid offer to make amends. It must comprise a suitable correction, either of the statement in general or, in the case of a qualified offer, of a specific defamatory meaning conveyed by the statement. There must also be a sufficient apology, with both this and the correction being published in a manner that is reasonable and appropriate in all the circumstances. The person receiving the offer may, for example, wish no more than a privately communicated retraction, without an apology being made known more widely. The offer must include, too, details of the compensation and expenses which are to be paid by the offeror, assuming expenses and compensation are to be paid, and insofar as the parties have succeeded in agreeing on the sums payable. If they have not so agreed, the level of compensation and expenses will be determined by the court (see section 14(5) and (7)). The offer may also include an undertaking to take such other steps as the offeror may propose to take; this might, for example, include a payment to charity.

Subsection (2) deals with the requisites of making a valid offer to make amends. Paragraph (a) makes clear that the opportunity to make an offer of amends is lost in the event that the offeror has lodged defences in relation to defamation proceedings brought by the party to whom the offer is made. The offer must also be made in writing, and state expressly that it is an offer or, as appropriate, a qualified offer under this section. If it is a qualified offer in relation to a specific defamatory meaning, it must set out the meaning in relation to which it is made.

Subsection (3) makes provision in relation to withdrawal and deemed rejection of offers. An offer of amends may be withdrawn before it is accepted. If it is withdrawn, or in appropriate cases, even if it has not been withdrawn, it may subsequently be renewed (with such renewal being treated as a new offer). Provision is also made, in paragraph (c), for an offer to be deemed to have been rejected, by force of law, if not accepted within a reasonable period. In the event of dispute as to whether deemed rejection has taken place, it will be for the court to determine what is a reasonable period in the circumstances of any given case.

14 Acceptance and enforcement of offer to make amends

(1) This section applies where a person (B) accepts an offer to make amends made under section 13.

(2) B may not bring or continue defamation proceedings against the person who made the offer (A) in respect of—

(a) in the case of a qualified offer, the specific defamatory meaning set out in the offer, or

(b) in any other case, the statement,

but may enforce the offer in accordance with this section.

(3) If A and B agree on the steps to be taken in fulfilment of the offer, B may apply to the court for an order requiring A to take the agreed steps.

(4) If A and B do not agree on the steps to be taken by way of correction, apology and publication, A may take such steps as A considers appropriate, and may in particular—

(a) make the correction and apology in open court in terms approved by the court, and

(b) give an undertaking to the court as to the manner in which A will publish the correction and apology.

(5) If A and B do not agree on the amount to be paid by way of compensation, the court must determine the appropriate amount on the same principles as damages in defamation proceedings.

(6) In determining the appropriate amount to be paid under subsection (5), the court must take account of—

(a) any steps taken in fulfilment of the offer, and

(b) so far as not agreed between A and B—

(i) the suitability of the correction,

(ii) the sufficiency of the apology, and

(iii) whether the manner of the publication of the correction and apology was reasonable in the circumstances.

(7) If A and B do not agree on the amount to be paid by way of expenses, the court must determine the appropriate amount on the same principles as expenses awarded in court proceedings.

(8) Proceedings under this section are to be heard and determined without a jury.

(9) In this section, a "qualified offer" is an offer to make amends made under section 13 that is made only in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys.

NOTE

Section 14 makes provision for enforcement in the situation where an offer to make amends has been accepted.

Subsection (1) sets out the parameters of the section. It applies only where an offer to make amends made under section 13 has been accepted by the person to whom it is made.

Subsection (2) makes clear that a person who has accepted an offer to make amends may not bring or continue defamation proceedings against the person who made the offer. In the case of a qualified offer, the bar on bringing or continuing proceedings will apply only in relation to the specific defamatory meaning set out in the offer. It will not apply to any other meanings that could be drawn from the

statement. In the case of any other offer, the bar on bringing or continuing proceedings is in respect of the statement complained of as a whole.

Subsection (3) empowers the person who has accepted the offer to apply to the court for an order requiring the person who made the offer to take the steps agreed between the parties in fulfilment of the offer. It is not, however, compulsory that an order be obtained. The person accepting the offer may rely simply on the fact that agreement has been reached.

Subsection (4) deals with the situation where the offer of amends is accepted in principle but the parties cannot reach agreement as to the steps to be taken by way of correction, apology, and publication. A possible example may be lack of consensus as to where exactly in a newspaper the correction and apology should appear. In that event, it is open to the person making the offer to take such steps as he or she considers appropriate towards its implementation. In particular, he or she may make the correction and apology in open court, in such terms as are approved by the court and give an undertaking to the court as to the manner in which the correction and apology will be published subsequently. In effect, the offeror is, in this situation, asking the court to fill gaps left in the offer of amends process by lack of consensus between the parties.

Subsections (5) and (6) provide for the scenario where the offeror and offeree do not agree on the amount to be paid by way of compensation, as part of the offer of amends. As mentioned above, it then falls to the court to determine the amount of compensation payable. This is to be done, in terms of subsection (5), by applying the same principles as apply in determining the level of damages payable in defamation proceedings. Subsection (6) sets out practical factors to be taken into account in determining the amount of compensation payable. These include any steps taken to fulfil the offer and, so far as these matters have not been agreed, the suitability of the correction, sufficiency of the apology and whether the manner of the publication of the correction and apology was reasonable in the circumstances.

Subsection (7) requires the court to determine the amount of expenses payable, in the event that the offeror and offeree do not reach agreement, on the same principles as expenses are awarded in court proceedings.

Subsection (8) makes clear that there is to be no jury involvement in proceedings relating to offers to make amends.

Subsection (9) provides a definition of "qualified offer" for the purposes of the section. It is an offer to make amends, made under section 13, relating only to a specific defamatory meaning which the person making the offer accepts that the statement conveys.

15 Offer to make amends: multiple persons responsible for statement

(1) This section applies where a person (B)—

(a) has a right to bring defamation proceedings against more than one person in respect of an allegedly defamatory statement, and

(b) has accepted an offer to make amends under section 13 made by one of the persons (A) in respect of the statement.

(2) B's acceptance of the offer made by A does not affect any right to bring defamation proceedings that B has against another person in respect of the statement.

(3) Section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 ("the 1940 Act") (right of one joint wrongdoer as respects another to recover contribution towards damages) applies in relation to compensation paid under an offer to make amends as it applies in relation to damages in an action to which that section applies.

(4) Where a person other than A is liable in respect of the same damage (whether jointly or otherwise), A is not required to pay by virtue of any contribution under section 3(2) of the 1940 Act an amount greater than the amount of compensation payable under the offer made by A.

NOTE

Section 15 of the draft Bill provides for what happens when there is an offer to make amends and there are multiple persons responsible for the allegedly defamatory statement.

Subsection (1) sets out the parameters of the section. It provides that section 15 applies where a person has a right to bring defamation proceedings against more than one person in respect of an allegedly defamatory statement and that person has accepted an offer of amends under section 13 made by one of those persons.

Subsection (2) provides that the acceptance of an offer of amends made by one of the people responsible for the statement does not affect the right of the person accepting the offer to bring defamation proceedings against another person.

Subsections (3) and (4) make provision as to the level of compensation payable by the person making the offer to make amends in a situation where several people are jointly responsible for the statement. Section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 is applied in relation to compensation paid under an offer to make amends as it applies in relation to damages in an action to which that section applies. The effect of this is that a person ("A") who has paid compensation under an offer of amends is entitled to recover from any other person against whom defamation proceedings could have been taken in respect of the statement, and who might also have been held liable to pay damages, such contribution, if any, as the court may deem just. In terms of subsection (4), where a person other than A is liable in respect of the same damage (whether jointly or otherwise), A is not required to pay by virtue of any contribution under section 3(2) of the 1940 Act an amount greater than the amount of compensation payable under the offer made by A.

16 Rejection of unqualified offer to make amends

(1) This section—

(a) applies where a person (B) rejects or is deemed to have rejected an offer to make amends made under section 13, but

(b) does not apply to the rejection or deemed rejection of a qualified offer (see section 17).

(2) It is a defence to defamation proceedings brought by B against the person who made the offer (A) that B rejected the offer (or is deemed to have rejected it).

(3) The defence is not available if (at the time of making the statement complained of) A knew or had reason to believe that the statement—

(a) referred to B or was likely to be understood as referring to B, and

(b) was both false and defamatory of B,

but it is to be presumed, unless the contrary is shown, that A did not know and had no reason to believe that this was the case.

(4) Where A relies on the defence under this section, A may not rely on any other defence.

(5) The offer may be relied on in mitigation of damages whether or not it was relied on as a defence.

(6) In this section, a "qualified offer" is an offer to make amends made under section 13 that is made only in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys.

NOTE

Section 16 applies where an offer of amends has been made covering the whole of a statement which is alleged to be defamatory, and that offer has been rejected. It may have been rejected expressly or deemed to have been rejected as a result of the passage of time.

Subsection (1) sets out the parameters of the section. It applies where a person has rejected an offer to make amends relating to the whole of a statement which is alleged to be defamatory, or is deemed to have done so. It does not, however, apply to the rejection or deemed rejection of a qualified offer (which is dealt with in section 17).

Subsections (2) to (4) deal with the effect of the making of an offer which is rejected, from the point of view of the offeror. In general, the offeror can rely on the fact of rejection of the offer as a defence to any defamation proceedings which subsequently go ahead. This applies whether the rejection is actual or deemed. Such a course does, however, exclude the opportunity to rely on any other defence (see subsection (4)). Also, the rejection does not operate as a defence if the person making the offer knew or had cause to believe that the statement referred, or was likely to be understood as referring, to the recipient of the offer and that it was both false and defamatory of him or her. The key consideration is the state of knowledge *at the time* the statement which is alleged to be defamatory was made (see subsection (3)). It is, however, presumed that the person making the offer did not know of these matters, meaning that the burden falls on the recipient of the offer to prove otherwise. In terms of subsection (5), the fact that the offer has been made and rejected, or deemed to have been rejected, may be relied upon in mitigation of the level of damages payable, regardless of whether it has been relied upon as a defence.

Subsection (6) provides a definition of "qualified offer" for the purposes of the section. It is an offer to make amends made under section 13 relating only to a specific defamatory meaning which the person making the offer accepts that the statement which is the subject of the proceedings conveys.

17 Rejection of qualified offer to make amends

(1) This section applies where a person (B) rejects or is deemed to have rejected a qualified offer.

(2) In so far as relating to the specific defamatory meaning set out in the offer, it is a defence to defamation proceedings brought by B against the person who made the qualified offer (A) that B rejected the offer (or is deemed to have rejected it).

(3) The defence is not available if (at the time of making the statement complained of) A knew or had reason to believe that the meaning that A accepts the statement conveys—

(a) referred to B or was likely to be understood as referring to B, and

(b) was both false and defamatory of B,

but it is to be presumed, unless the contrary is shown, that A did not know and had no reason to believe that this was the case.

(4) Where A relies on the defence under this section, A may not rely on any other defence in respect of the accepted meaning.

(5) The qualified offer may be relied on in mitigation of damages whether or not it was relied on as a defence.

(6) In this section, a "qualified offer" is an offer to make amends made under section 13 that is made only in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys.

NOTE

Section 17 makes provision equivalent to that of section 16, but in relation to a situation where an offer is made only in relation to one particular defamatory meaning conveyed by a statement. In other words, it relates to rejection of qualified offers to make amends rather than unqualified ones.

18 Offers to make amends: transitional provision

Nothing in sections 13 to 17 has effect in relation to defamation proceedings if the right to bring the proceedings accrued before the commencement of the section in question.

NOTE

Section 18 is a transitional provision to make clear that nothing in sections 13 to 17 (i.e. the offers to make amends provisions) has effect in relation to defamation proceedings if the right to bring the proceedings accrued before the relevant provision comes into force.

Jurisdiction

19 Actions against a person not domiciled in the UK or a Member State etc.

(1) This section applies to defamation proceedings brought in Scotland against a person who is not domiciled—

(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.

(2) A court does not have jurisdiction to hear and determine proceedings to which this section applies unless the court is satisfied that, of all the places where the statement complained of has been published, Scotland is clearly the most appropriate place to bring proceedings in respect of the statement.

(3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of.

(4) Nothing in this section limits the availability of, or otherwise affects, any plea of forum non conveniens in respect of proceedings to which this section applies.

(5) For the purposes of this section—

(a) a person is domiciled in the United Kingdom or another Member State if the person is domiciled there for the purposes of the Brussels Regulation,

(b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention.

(6) In this section—

"the Brussels Regulation" means Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), as amended from time to time and as applied by virtue of the Agreement made on 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ No L 299, 16.11.2005, p62; OJ No L79, 21.3.2013, p4),

"the Lugano Convention" means the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30 October 2007.

(7) Nothing in subsections (1) to (6) has effect in relation to defamation proceedings begun before the commencement of this section.

NOTE

Section 19 lays down a jurisdictional threshold limiting the circumstances in which an action for defamation may competently be brought in a court in Scotland.

Subsections (1) and (2) set out the precise limitation of the jurisdiction of the Scottish courts. Subsection (1) provides that the section applies where defamation proceedings are brought in a Scottish court 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. Subsection (2) makes clear that a court in Scotland has jurisdiction to hear and determine such proceedings only if satisfied that, of all the places in which the statement complained about has been published, Scotland is clearly the most appropriate one in which to bring proceedings. The result is that where a statement has been published in Scotland and in other jurisdictions, the court will have to look at the overall global picture.

Subsection (3) provides that references in subsection (2) to publication of the statement complained of are to be taken to include publication of any statement conveying the same, or substantially the same, imputation as the particular statement complained of. This is intended to prevent attempts to circumvent the effect of the section by drawing distinctions between different incarnations of the statement appearing in different jurisdictions, in circumstances where no meaningful distinctions exist.

Subsection (4) makes clear that the provision does not affect the opportunity of a defender to take a plea of forum non conveniens. The essence of such a plea is that, although a given court has jurisdiction to determine proceedings, the interests of all the parties involved would be better served if they were determined by a different court, which has concurrent jurisdiction.

Subsection (5), read together with subsection (6), sets out the circumstances in which a person will be taken to be domiciled in a given state.

Subsection (7) is a transitional provision to make clear that nothing in subsections (1) to (6) has effect in relation to defamation proceedings that have begun before section 19 comes into force.

Removal of presumption that proceedings are to be tried by jury

20 Removal of presumption that proceedings are to be tried by jury

(1) In section 11 of the Court of Session Act 1988 (jury actions), paragraph (b) is repealed.

(2) Subsection (1) does not have effect in relation to defamation proceedings begun before the commencement of this section.

NOTE

Section 20 removes the presumption that proceedings in defamation are to be tried by jury.

Subsection (1) provides for the repeal of paragraph (b) of section 11 of the Court of Session Act 1988. The effect of this is not to prevent a defamation action being dealt with by means of a trial by jury. Rather, it gives the courts a power to order the form of factual inquiry which they consider to be most appropriate to the circumstances of any given case. As an alternative to a trial by jury there may be a proof or (more usually) a proof before answer. Given the operation of section 63 of the Courts Reform (Scotland) Act 2014, the removal of a presumption of trial by jury would apply also to defamation actions in the sheriff court, if an order were to be made under section 41(1) of the 2014 Act to allow defamation trials by jury in the sheriff court.

Subsection (2) is a transitional provision that makes clear that the removal of the presumption by subsection (1) does not have effect in relation to defamation proceedings that have begun before section 20 comes into force.

PART 2

MALICIOUS PUBLICATION

NOTE

Sections 21 to 27 make provision for statutory equivalents of certain categories of the form of wrong known at common law as verbal injury. In summary, whilst equivalents of the forms of verbal injury relating to economic interests are placed on a statutory footing as actionable types of malicious publication, those categories relating to injury to a natural person's feelings are abolished outright.

Background: what amounts to verbal injury relating to economic interests at common law?

It may be helpful to begin with an explanation of the categories of verbal injury for which a statutory equivalent is to be provided. In the context of a business or profession, verbal injury centres on the making of statements which, though not defamatory, in the sense of being likely to make people think less of the pursuer's business or professional position or ability, would nonetheless be expected to cause harm, predominantly of a financial nature. Sections 21 to 23 of the draft Bill provide respectively for three forms of wrong relating to economic interests – statements causing injury to business interests, statements causing doubt as to title to property, and statements criticising assets. Given that the common law equivalents of these are abolished by section 27 of the draft Bill (see further the explanation below), the effect of this provision is to provide for the re-incarnation of these forms of wrong on a statutory footing under the new description of "malicious publication".

To provide an outline, first of all, as to how the three forms of wrong may arise in practice, causing doubt as to title to property concerns the making of a false and malicious statement about the pursuer's title to

land or other property.[7] This may be designed to jeopardise or at least delay a transaction involving the land or other property in question. Criticising assets involves making a false and malicious statement criticising or denigrating the quality, condition, use or treatment of assets owned, possessed, or controlled by the pursuer. This is intended to cover anything with value to the pursuer's business and may include items manufactured or leased as part of a business. It also covers incorporeal assets (i.e. assets with no physical existence, such as different types of rights, for example intellectual property rights) as well as corporeal assets (i.e. physical assets). It may be motivated by a malicious intention to cause financial loss to the pursuer. The third category - causing injury to business interests - is designed to sweep up forms of wrong that do not fall under either of the other two categories. In essence, it involves making a false and malicious statement about the pursuer's business or business activities. An example may be a false claim that the pursuer is about to go out of business, thereby causing loss of orders. This may be motivated by a malicious intention to cause harm to the business or business activities of the pursuer. Further explanation as to the meaning intended by the reference to 'malicious intention' in this context is provided below in the explanation of sections 21 to 23.

Actionable types of malicious publication

21 Statements causing harm to business interests

(1) A person (B) may bring proceedings under this section against another person (A) where—

(a) A has—

(i) made a false and malicious statement about B's business or business activities, and

(ii) published the statement to a person other than B, and

(b) the statement has caused (or is likely to cause) financial loss to B.

(2) For the purposes of subsection (1)(a)(i), a statement is malicious only if B shows—

(a) that the imputation conveyed by the statement complained of was presented as being a statement of fact (rather than a statement of opinion) and was sufficiently credible so as to mislead a reasonable person, and

(b) either—

(i) that A knew that the imputation was false or was indifferent as to the truth of the imputation, or

(ii) that A's publication of the statement was motivated by a malicious intention to cause harm to B's business or business activities.

22 Statements causing doubt as to title to property

(1) A person (B) may bring proceedings under this section against another person (A) where—

(a) A has—

(i) made a false and malicious statement about B's title to land or other property, and

(ii) published the statement to a person other than B, and

[7] The term "land" is used, alongside 'property', to import the wide definition of the term 'land' in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.

(b) the statement has caused (or is likely to cause) financial loss to B.

(2) For the purposes of subsection (1)(a)(i), a statement is malicious only if B shows—

(a) that the imputation conveyed by the statement complained of was presented as being a statement of fact (rather than a statement of opinion) and was sufficiently credible so as to mislead a reasonable person, and

(b) either—

(i) that A knew that the imputation was false or was indifferent as to the truth of the imputation, or

(ii) that A's publication of the statement was motivated by a malicious intention to delay or jeopardise a transaction involving the land or other property of B.

23 Statements criticising assets

(1) A person (B) may bring proceedings under this section against another person (A) where—

(a) A has—

(i) made a false and malicious statement criticising or denigrating the quality, condition, use or treatment of assets owned, possessed or controlled by B, and

(ii) published the statement to a person other than B, and

(b) the statement has caused (or is likely to cause) financial loss to B.

(2) For the purposes of subsection (1)(a)(i), a statement is malicious only if B shows—

(a) that the false imputation conveyed by the statement complained of was presented as being a statement of fact (rather than a statement of opinion) and was sufficiently credible so as to mislead a reasonable person, and

(b) either—

(i) that A knew that the imputation was false or was indifferent as to the truth of the imputation, or

(ii) that A's publication of the statement was motivated by a malicious intention to cause B financial loss.

NOTE

Each of sections 21 to 23, in providing for the three new actionable types of malicious publication, sets out the detail of the requirements which must be satisfied in order to allow proceedings to be brought successfully. In short, one party may bring proceedings against the other party where the defender has made a false and malicious statement about the matter covered by the particular form of wrong, with that statement having been published to a person other than the pursuer. The statement must have caused, or be likely to cause, financial loss to the pursuer. Subsection (2) of each of the sections elaborates as to what is meant by 'malicious' in each context. It sets out two matters which the pursuer must show. The first is that the imputation conveyed by the statement complained of was presented as being a statement of fact, rather than opinion, and was sufficiently credible so as to mislead a reasonable person. The second matter reflects an either/or situation. One option is for the pursuer to show that the defender knew that the imputation was false, or that he or she was indifferent as to whether it was true. Alternatively, the pursuer

must show that the defender's publication of the statement was motivated by a malicious intention to cause harm to business, to delay or jeopardise a land or property transaction or to cause financial loss through disparaging assets. The question of whether there is a malicious intention will turn on whether the defender was motivated predominantly by the aim of causing detriment to the pursuer, rather than by a wish to further his or her own economic interests.

General provision

24 Limit on requirement to show financial loss

A pursuer in proceedings under this Part does not need to show financial loss if the statement complained of is more likely than not to cause such loss.

NOTE

Section 24 provides that a pursuer in proceedings under Part 2 does not need to show actual financial loss if the statement complained of is more likely than not to cause financial loss. (Section 34(c) makes clear that by proceedings under Part 2 is meant proceedings in respect of the forms of wrong set out in sections 21, 22 and 23 of the draft Bill). This replaces an equivalent provision in section 3 of the Defamation Act 1952, which is repealed in terms by section 33(1)(a) of the draft Bill.

25 Statements conveying two or more meanings

(1) This section applies where proceedings are brought under this Part in respect of a statement that is capable of conveying two or more distinct meanings.

(2) It is not necessary for the purposes of deciding whether harm has occurred for the court to determine—

(a) which of the meanings is conveyed by the statement in the circumstances, or

(b) that one meaning should be preferred to the exclusion of the other or others.

(3) But nothing in this section prevents the court from excluding or disregarding possible meanings where it considers it appropriate to do so.

NOTE

The effect of section 25 is to exclude the application of the single meaning rule from proceedings brought under Part 2. The effect of that rule, in relation to defamation proceedings, is to provide a mechanism by which the judge or jury at a proof or trial is to determine which of the meanings that may be attributed to a statement is the true meaning to be attributed to the statement in all the circumstances of a case. It is that meaning, and that meaning only, which will be considered from the point of view of determining whether the statement has been defamatory of the pursuer as a matter of fact.

Section 25 provides that, where proceedings are brought under Part 2 in respect of a statement that is capable of conveying two or more distinct meanings, it will not be necessary, in deciding whether harm has occurred, for the court to determine either which of the meanings is conveyed by the statement in the circumstances or that one meaning should be preferred to the exclusion of all others. Subsection (3) clarifies that nothing in section 25 prevents the court from excluding or disregarding possible meanings where it considers it appropriate to do so.

26 Damages for anxiety and distress

(1) In determining the appropriate amount of damages to award in proceedings under this Part, the court may take into account any distress and anxiety caused to the pursuer by the statement complained of.

(2) This section does not limit any other basis of claim for damages or remedy that may be available to a pursuer in proceedings under this Part.

NOTE

Section 26 makes clear that, in determining the appropriate amount of damages to award in proceedings under Part 2, the court may take into account any distress and anxiety caused to the pursuer by the statement complained of. This is a subsidiary head of recovery; it can only be factored in, as part of the general head of damages, where there has been economic loss. Also, it does not affect any other basis of claim that may be available to a pursuer in proceedings under this Part.

Abolition of common law verbal injuries

27 Abolition of common law verbal injuries

(1) Any rules of law providing for a right to bring proceedings for a verbal injury cease to have effect.

(2) Subsection (1) does not affect any right to bring proceedings for a verbal injury which accrued before the commencement of that subsection.

NOTE

Section 27(1) provides for all rules of law governing the right to bring proceedings in respect of the forms of verbal injury which exist at present in Scots common law to cease to have effect. This includes rules governing *convicium*, which involves the disclosure of a false, or true, statement with the intention of causing harm to the person who is its subject. The harm may involve bringing that person into public hatred, ridicule or contempt (in other words, some form of abhorrence among members of the public who see or hear the statement) or making public information of a sensitive or embarrassing nature about that person. Reading this section in conjunction with sections 21 to 23, as described above, providing for statutory equivalents of forms of verbal injury relating to economic interests, the result is that all forms of verbal injury relating solely to injury to a natural person's feelings are abolished outright in terms of the draft Bill. The same is true of slander on a third party, relating to claims for loss, at least partly of a financial nature, arising from a defamatory attack on a third party. On the other hand, the principles underlying verbal injuries relating to economic interests are retained, with the wrongs being re-cast and placed on a statutory footing.

Subsection (2) is a savings provision which makes clear that the ceasing to have effect of rules relating to common law verbal injuries in terms of subsection (1) does not affect any right to bring proceedings which arises before subsection (1) comes into force.

PART 3

GENERAL

Remedies

28 Power of court to order a summary of its judgment to be published

(1) A court may, in finding for the pursuer in defamation proceedings or proceedings under Part 2, order the defender to publish a summary of the judgment.

(2) It is for the parties to agree—

(a) the wording of the summary, and

(b) the time, manner, form and place of its publication.

(3) But, if the parties cannot agree—

(a) the wording of the summary, the court must determine it,

(b) a matter in subsection (2)(b), the court may give such directions as it considers appropriate.

NOTE

Section 28 empowers the court to order the defender in defamation proceedings or proceedings under Part 2 for a malicious publication to publish a summary of the court's judgment.

Subsection (1) sets out the parameters of the power. It is exercisable only where the court has found in favour of the pursuer in defamation proceedings or proceedings under Part 2.

Subsection (2) makes clear that it is for the parties to agree (a) the wording of the summary and (b) the time, manner, form and place of its publication. Where, however, the parties cannot reach agreement on the wording of the summary, the court must determine it (see subsection (3)(a)). Where the parties cannot agree on a matter (or matters) identified in subsection (2)(b), the court may give such directions as it considers appropriate (see subsection (3)(b)). This may include, for example, substituting its own wording for that put forward by the parties.

29 Making a statement in open court

(1) In defamation proceedings or proceedings under Part 2, where the parties have reached an agreement in settlement of the proceedings, the court may allow a statement to be made in open court.

(2) The wording of the statement—

(a) may be agreed between the parties, or

(b) in the absence of agreement, may be determined by the pursuer.

(3) The statement may not be made unless the court has approved its wording.

NOTE

Section 29 allows a statement to be made in open court at the point where settlement is reached in defamation proceedings or proceedings under Part 2 for a malicious publication. This may be either a bilateral statement, as agreed between the parties to the proceedings, or a unilateral statement made only by the pursuer. As Scots law currently stands there is not thought to be anything to prevent the reading out

of a statement of this nature, commonly known as a settlement statement, although this is not done in practice in Scotland, unlike in England and Wales. The provision is intended to clarify the existence of this remedy as an option, potentially also encouraging its use.

Subsection (1) sets out the basic power for the court to allow a statement to be made in open court.

Subsection (2) makes clear that it is for the parties to agree the wording of the statement and all other aspects of its terms. Failing such agreement, the wording may be determined by the pursuer. In terms of subsection (3) the court must, however, give its approval to the wording of a statement before it may be read out in open court. It cannot substitute new terms to replace any with which it does not agree. Its only power is to reject those terms. The parties may then propose alternative wording.

30 Power of court to require removal of a statement etc.

(1) In defamation proceedings or proceedings under Part 2, a court may order—

(a) the operator of a website on which the statement complained of is posted to remove the statement, or

(b) any person who was not the author, editor or publisher of the statement to stop distributing, selling or exhibiting material containing the statement.

(2) This section does not limit the other powers available to the court in respect of the statement or any person who is publishing it.

(3) In this section, "author", "editor" and "publisher" are to be construed in accordance with section 3.

NOTE

Section 30 is intended to provide for the fact that it may not always be possible for the author of material which is the subject of defamation proceedings or proceedings under Part 2 for a malicious publication to prevent further distribution of the material or orchestrate its removal from a website.

Subsection (1) empowers the court to order the removal of material which is the subject of defamation or Part 2 proceedings from any website on which it appears, as well as to order a person who was not the author, editor, or publisher of the material to stop distributing, selling, or exhibiting material containing the statement. The exercise of the power is not confined to circumstances in which the final outcome of the proceedings has already been determined by the court. Accordingly, the court would be entitled in an appropriate case to grant an order for removal or cessation of distribution on an interim basis, before the final outcome of the proceedings is known.

Subsection (2) makes clear that the power to make such an order does not constrain the court's exercise of other powers that are available to it. This may include the granting of an interdict or interim interdict.

Subsection (3) makes clear that the terms "author", "editor" and "publisher" are to attract the same definition, for the purposes of section 30, as they attract in section 3.

31 Remedies: transitional provision

Nothing in sections 28 to 30 has effect in relation to defamation proceedings begun before the commencement of the section in question.

NOTE

Section 31 is a transitional provision which makes clear that nothing in sections 28 to 30 (i.e. the provisions on remedies) has effect in relation to defamation proceedings that have begun before the relevant section comes into force.

Limitation

32 Limitation of actions

(1) Section 18A of the Prescription and Limitation (Scotland) Act 1973 (limitation of defamation and other actions) is amended as follows.

(2) In subsection (1)—

(a) after "defamation" insert "or under section 21, 22 or 23 of the 2017 Act (actionable types of malicious publication)",

(b) for "3 years" substitute "one year".

(3) After subsection (1), insert—

"(1A) Where—

(a) a person publishes a statement to the public or to a section of the public ("the first publication"), and

(b) the person subsequently publishes (whether or not to the public) the same statement or a statement that is substantially the same ("the subsequent publication"),

any right of action against the person for defamation or under section 21, 22 or 23 of the 2017 Act in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

(1B) Subsection (1A) does not apply where the court determines that the manner of the subsequent publication is materially different from the manner of the first publication.

(1C) In determining whether the manner of the subsequent publication is materially different from the manner of the first publication, the court may have regard to—

(a) the level of prominence that the statement is given,

(b) the extent of the subsequent publication, and

(c) any other matter that the court considers relevant.".

(4) In subsection (2), after "defamed" insert "or harmed by a malicious publication in a manner described in section 21, 22 or 23 of the 2017 Act".

(5) After subsection (3), insert—

"(3A) This section continues to have effect in relation to a statement which was published before the day on which section 32 of the 2017 Act comes into force as if it had not been amended by section 32 of the 2017 Act.

(3B) In determining whether subsection (1A) applies, no account is to be taken of a statement which was published before the day on which section 32 of the 2017 Act comes into force.".

(6) In subsection (4)—

(a) for paragraph (a) substitute—

"(aa) "2017 Act" means the Defamation and Malicious Publication (Scotland) Act 2017,",

(b) in paragraph (b)—

(i) after "construed" insert "(subject to subsection (1A))",

(ii) for "publication or communication" substitute "statement",

(iii) after "defamation" insert "or, as the case may be, under section 21, 22 or 23 of the 2017 Act",

(iv) for "first came to the notice of the pursuer." substitute "was published, and",

(c) after paragraph (b), insert—

"(c) "statement" has the meaning given in section 34 of the 2017 Act (interpretation).".

NOTE

Section 32 provides for three things: (1) it brings forward the date on which a right of action accrues in relation to defamation and conduct falling within Part 2 for a malicious publication; (2) it reduces the period, starting from the accrual of the right of action, within which an action must be brought; and (3) it prevents a new right of action arising, and with that a new limitation period, where there is a republication of the same or substantially the same material, by the same publisher. Instead of multiple different limitation periods, there is, in cases involving republication, a single limitation period, running from the date on which the statement complained of was first published to the public or a section of the public. This means that it will have been made available to the public in general, or at least a cross-section of the public, and without restriction according to membership of, for example, a particular club, profession or similar. It is only within the one-year period that any action based on republication of the same or substantially the same material can be brought.

Subsection (1) sets out the operation of the provision. It amends section 18A of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act").

Subsection (2) provides for reduction of the limitation period for the bringing of defamation actions and actions under Part 2 from 3 years to 1 year. The result is that any action for defamation must be brought within 1 year of the date on which the right to bring an action accrues. See further the explanation below of new subsections (1A) - (1C) for what is meant by accrual of a right of action in this context, reflecting amendment to section 18A. The 1 year period applies also to proceedings under Part 2.

Subsection (3) inserts new subsections (1A) – (1C) into section 18A of the 1973 Act. Inserted subsection (1A) imposes a restriction, in certain circumstances, on the bringing of actions in respect of republication of material that has been published previously. It is intended to address a potential risk of perpetual liability for defamation, owing in particular to the increasing prevalence of online publication. As matters currently stand, each accessing of an article, image etc. by a new reader/viewer/listener would trigger a new cause of action and, therefore, a new limitation period. The effect of subsection (1A) is that, where material has been published to the public or a section of the public, any right of action based on republication of the same (or substantially the same) material by the same publisher is taken to have

accrued on the date on which the statement was first seen or heard and understood by the public or a section of the public. (The member of the public on whom the start of the limitation period is based must be a person other than the subject of the statement – in other words, a third party). As a result, there will, in general, be a single limitation period of 1 year, during which any actions in respect of the republication can competently be brought. The court will, though, retain its discretion, in terms of section 19A of the 1973 Act, to allow an action to be brought notwithstanding that it would ordinarily be excluded by limitation in terms of section 18A. This exercise of discretion could extend to disregarding the 1 year limitation period which will ordinarily be applicable to republication of a statement which is the same or substantially the same as that published previously.

Inserted subsection (1B) makes clear that the restriction outlined above does not apply if the court determines that the manner of the subsequent publication is materially different to that of the original publication.

Inserted subsection (1C) provides guidance as to how the question of whether there is a material difference in publication should be determined. Two specific factors are identified which may be taken into account, as appropriate: the level of prominence of the statement the republication of which is complained of, and the extent of the republication. These matters are to be judged relative to the prominence and extent of publication when first published to the public. So, for example, the court may look at whether it has been transferred from a relatively obscure position on a website to somewhere more obvious and easier to access. This may speak of a material difference in the level of both publication and prominence. Beyond this, the court may take account of any other circumstances it considers relevant to the particular case.

Subsection (5) provides for the insertion of new subsections (3A) and (3B) into section 18A of the 1973 Act. Inserted subsection (3A) makes clear that the alteration to the dates on which rights of action accrue has no effect in relation to a statement published before the coming into force of this section of the draft Bill. Inserted subsection (3B) provides refinement as to how the application, or otherwise, of subsection (3A) is to be determined.

Subsection (6) provides for amendments to section 18A(4) of the 1973 Act, giving effect to the changes introduced by subsections (2) and (3) as described above. Most substantively, it alters the date on which the right of action accrues in relation to defamation actions and actions under Part 2. In terms of the amendment made by subsection (6)(b)(iv), this will happen when the statement is published for the first time. Reading this provision together with section 32(3), the effect will be that the accrual from first publication will apply in all cases, regardless of whether the statement is communicated to the public at large or to one individual, or any level of communication in between. It will be necessary only that the statement should be seen or heard by at least one person who understands its gist.

Miscellaneous

33 Consequential modifications

(1) The Defamation Act 1952 is amended as follows—

(a) sections 3, 5, 6 and paragraph (b) of section 14 are repealed,

(b) in section 14 (application of Act to Scotland), in paragraph (d)—

(i) after "pursuer;" insert "and",

(ii) the words from "for", where it second occurs, to the end are repealed.

(2) The Rehabilitation of Offenders Act 1974 is amended as follows—

(a) in section 8(6) (defamation actions: reports of court proceedings), after "1996" insert ", section 9 of the Defamation and Malicious Publication (Scotland) Act 2017",

(b) in section 8(8) (defamation actions)—

(i) after paragraph (b), the word "and" is repealed,

(ii) for paragraph (c) substitute—

"(c) for references to a defence under section 2 of the Defamation Act 2013 there is substituted a reference to a defence under section 5 of the Defamation and Malicious Publication (Scotland) Act 2017, and

(d) for the reference to a defence under section 3 of the Defamation Act 2013 there is substituted a reference to a defence under section 7 of the Defamation and Malicious Publication (Scotland) Act 2017.".

(3) The Defamation Act 1996 is amended as follows—

(a) sections 1 to 4, 14, 15, 17(2) and schedule 1 are repealed,

(b) in section 18(2) (provisions extending to Scotland)—

(i) the words "section 1 (responsibility for publication)," are repealed,

(ii) the words "sections 2 to 4 (offer to make amends), except section 3(8)," are repealed,

(iii) the words "section 14 and 15 and Schedule 1 (statutory privilege)" are repealed.

(4) The Defamation Act 2013 is amended as follows—

(a) sections 6, 7(9), 15 and 16(5) are repealed,

(b) in section 17 (short title, extent and commencement)—

(i) in subsection (2), the words "Subject to subsection (3)," are repealed,

(ii) subsections (3) and (5) are repealed,

(iii) in subsection (4), for "subsections (5) and" substitute "subsection".

NOTE

Section 33 makes amendments to other enactments in consequence of provisions made in the draft Bill.

Subsection (1) provides for the repeal of a number of provisions of the Defamation Act 1952, to reflect the placing on a statutory footing of the common law defences of *veritas* and fair comment, along with such equivalents of verbal injury as are to be provided for.

Subsection (2) makes consequential amendments to section 8 of the Rehabilitation of Offenders Act 1974. This reflects the new statutory defences of truth and honest opinion. Section 8 of the 1974 Act applies to actions for defamation brought by rehabilitated persons based on statements made about offences which are the subject of a spent conviction, with the statements having been published after the conviction has become spent.

Subsections (3) and (4) provide for repeal of the provisions relating to privilege which are re-enacted by sections 9 to 11 and the schedule of the draft Bill, together with other minor consequential repeals.

34 Interpretation

In this Act, unless the context otherwise requires—

(a) "publish" (and cognate expressions), in relation to a statement, are to be construed in accordance with section 1(4),

(b) "statement" means words, pictures, visual images, gestures or any other method of signifying meaning,

(c) a reference to proceedings brought under Part 2 is a reference to proceedings brought under section 21, 22 or 23,

(d) in relation to proceedings generally, a reference to—

(i) a pursuer includes a petitioner,

(ii) a defender includes a respondent, and

(iii) defences includes answers.

35 Regulations

(1) Any power conferred by this Act on the Scottish Ministers to make regulations includes the power to make—

(a) such incidental, supplementary, consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate, and

(b) different provision for different purposes.

(2) This section does not apply to regulations made under section 36 or 37.

36 Ancillary provision

(1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act.

(2) Regulations under this section may—

(a) modify any enactment (including this Act),

(b) make different provision for different purposes.

(3) Regulations under this section which contain provision adding to, replacing or omitting any part of the text of an Act are subject to the affirmative procedure.

(4) Otherwise, regulations under this section are subject to the negative procedure.

37 Commencement

(1) This section and sections 34 to 36 and 38 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

(3) Regulations under this section may—

(a) include transitional, transitory or saving provision,

(b) make different provision for different purposes.

(4) Regulations under this section bringing section 32 into force may amend section 18A of the Prescription and Limitation (Scotland) Act 1973 so that, instead of referring to the day on which section 32 comes into force, it specifies the date on which section 32 actually comes into force.

38 Short title

The short title of this Act is the Defamation and Malicious Publication (Scotland) Act 2017.

SCHEDULE

(introduced by section 11)

STATEMENTS HAVING QUALIFIED PRIVILEGE

PART 1

STATEMENTS HAVING QUALIFIED PRIVILEGE WITHOUT BEING SUBJECT TO EXPLANATION OR CONTRADICTION

Reports of legislative proceedings

1 A fair and accurate report of proceedings in public of a legislature anywhere in the world.

Legislature and government documents

2 A fair and accurate copy of or extract from matter published by or on the authority of a legislature or government anywhere in the world.

Reports of court and inquiry proceedings

3 A fair and accurate report of proceedings in public before a court anywhere in the world (see also section 9).

4 A fair and accurate report of proceedings in public of a person appointed to hold a public inquiry by a legislature or government anywhere in the world.

Court notices, advertisements etc.

5 A notice or advertisement published by or on the authority of a court, or of a judge or officer of a court, anywhere in the world.

Public registers and documents

6 A fair and accurate copy of or extract from any register or other document required by law to be open to public inspection.

International organisations and conferences

7 A fair and accurate report of proceedings in public anywhere in the world of an international organisation or an international conference.

8 A fair and accurate copy of or extract from matter published anywhere in the world by an international organisation or an international conference.

PART 2

STATEMENTS HAVING QUALIFIED PRIVILEGE SUBJECT TO EXPLANATION OR CONTRADICTION

Notices etc. issued by legislatures, governments, certain authorities, international organisations etc.

9 (1) A fair and accurate copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of—

(a) a legislature or government anywhere in the world,

(b) an authority anywhere in the world performing governmental functions,

(c) an international organisation or international conference.

(2) In this paragraph, "governmental functions" includes police functions.

Documents released by courts, judges and court officers

10 A fair and accurate copy of, extract from or summary of a document made available by a court anywhere in the world, or by a judge or officer of such a court.

Reports of proceedings of local government, committees, commissions, inquiries, tribunals etc.

11 (1) A fair and accurate report of proceedings at any public meeting or sitting in the United Kingdom of—

(a) a local authority, local authority committee or, in the case of a local authority which is operating executive arrangements, the executive of that authority or a committee of that executive,

(b) a justice or justices of the peace acting otherwise than as a court exercising judicial authority,

(c) a commission, tribunal, committee or person appointed for the purposes of any inquiry by any statutory provision, by Her Majesty or by a Minister of the Crown, a member of the Scottish Government, the Welsh Ministers or the Counsel General to the Welsh Government or a Northern Ireland Department,

(d) a person appointed by a local authority to hold a local inquiry in pursuance of any statutory provision,

(e) any other tribunal, board, committee or body constituted by or under, and exercising functions under, any statutory provision.

(2) In the case of a local authority which is operating executive arrangements, a fair and accurate record of any decision made by any member of the executive where that record is required to be made and available for public inspection by virtue of section 22 of the Local Government Act 2000 (access to information etc.) or of any provision in regulations made under that section.

(3) In sub-paragraphs (1)(a) and (2)—

"executive" and "executive arrangements" have the same meaning as in Part 2 of the Local Government Act 2000,

"local authority" means—

(a) in relation to Scotland, a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 or an authority or body to which the Public Bodies (Admission to Meetings) Act 1960 applies,

(b) in relation to England and Wales, a principal council within the meaning of the Local Government Act 1972, any body falling within any paragraph of section 100J(1) of that Act or an authority or body to which the Public Bodies (Admission to Meetings) Act 1960 applies,

(c) in relation to Northern Ireland, any authority or body to which sections 23 to 27 of the Local Government Act (Northern Ireland) 1972 apply, and

"local authority committee" means any committee of a local authority or of local authorities, and includes—

(d) any committee or sub-committee in relation to which sections 50A to 50D of the Local Government (Scotland) Act 1973 apply by virtue of section 50E of that Act, and

(e) any committee or sub-committee in relation to which sections 100A to 100D of the Local Government Act 1972 apply by virtue of section 100E of that Act (whether or not also by virtue of section 100J of that Act).

(4) A fair and accurate report of any corresponding proceedings in any of the Channel Islands or the Isle of Man or in another member State.

Reports of press conferences on matters of public interest

12 A fair and accurate report of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest.

Reports of public meetings on matters of public interest

13 (1) A fair and accurate report of proceedings at any public meeting held anywhere in the world.

(2) In this paragraph, a "public meeting" means a meeting which is held—

(a) lawfully and in good faith,

(b) for a lawful purpose, and

(c) for the furtherance or discussion of a matter of public interest,

whether admission to the meeting is general or restricted.

Listed companies: reports of meetings and certain other documents

14 (1) A fair and accurate report of proceedings at a general meeting of a listed company.

(2) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company—

(a) by or with the authority of the board of directors of the company,

(b) by the auditors of the company, or

(c) by any member of the company in pursuance of a right conferred by any statutory provision.

(3) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company which relates to the appointment, resignation, retirement or dismissal of directors of the company or its auditors.

(4) In this paragraph, "listed company" has the same meaning as in Part 12 of the Corporation Tax Act 2009 (see section 1005 of that Act).

Findings or decisions of certain associations

15 (1) A fair and accurate report of any finding or decision of any of the following descriptions of association, formed anywhere in the world, or of any committee or governing body of such an association.

(2) The descriptions of association are—

(a) an association—

(i) formed for the purpose of promoting or encouraging the exercise of or interest in any art, science, religion or learning, and

(ii) empowered by its constitution to exercise control over or adjudicate on matters of interest or concern to the association, or the actions or conduct of any person subject to such control or adjudication,

(b) an association—

(i) formed for the purpose of promoting or safeguarding the interests of any trade, business, industry or profession, or of the persons carrying on or engaged in any trade, business, industry or profession, and

(ii) empowered by its constitution to exercise control over or to adjudicate on matters connected with that trade, business, industry or profession, or the actions or conduct of those persons,

(c) an association—

(i) formed for the purpose of promoting or safeguarding the interests of a game, sport or pastime to the playing or exercise of which members of the public are invited or admitted, and

(ii) empowered by its constitution to exercise control over or adjudicate on persons connected with or taking part in the game, sport or pastime,

(d) an association—

(i) formed for the purpose of promoting charitable purposes or other purposes beneficial to the community, and

(ii) empowered by its constitution to exercise control over or to adjudicate on matters of interest or concern to the association, or the actions or conduct of any person subject to such control or adjudication.

Reports of scientific and academic conferences and associated documents

16 A fair and accurate—

(a) report of proceedings of a scientific or academic conference held anywhere in the world, or

(b) copy of, extract from or summary of matter published by such a conference.

Reports and summaries etc. by Scottish Ministers' designees

17 (1) A fair and accurate report or summary of, copy of or extract from, any adjudication, report, statement or notice issued by a body, officer or other person designated for the purposes of this paragraph by regulations made by the Scottish Ministers.

(2) Regulations under this paragraph are subject to the negative procedure.

PART 3

SUPPLEMENTARY PROVISION

Interpretation

18 In this Schedule—

"court" includes—

(a) any tribunal or body established under the law of any country or territory exercising the judicial power of the State,

(b) any international tribunal established by the Security Council of the United Nations or by an international agreement,

(c) any international tribunal deciding matters in dispute between States,

"international conference" means a conference attended by representatives of two or more governments,

"international organisation" means an organisation of which two or more governments are members, and includes any committee or other subordinate body of such an organisation,

"legislature" includes a local legislature, and

"member State" includes any European dependent territory of a member State.

Appendix B

List of respondents to the Discussion Paper on Defamation

Individuals

Christian Angelsen

Dr Paul Bernal, Lecturer in Information Technology, Intellectual Policy and Media Law, University of East Anglia Law School

Francis Berry

Dr Stephen Bogle, Lecturer in Private Law, University of Glasgow School of Law

Advocate John Campbell, South Africa

Professor Eric Clive, University of Edinburgh, Edinburgh Law School (initial response and supplementary comments)

Campbell Deane, Solicitor, Bannatyne, Kirkwood, France & Co

Professor Eric Descheemaeker

Roddy Dunlop QC

Sameen Farouk

Dr David Goldberg

Professor George Gretton, University of Edinburgh, Edinburgh Law School

Graeme M Henderson, Advocate

Dr Brooke Magnanti

Professor Elspeth Reid, University of Edinburgh, Edinburgh Law School

Sibyl (Member of the public, Australia)

Dr Simon Singh, Science writer

Ursula Smartt, Lecturer in Media Law, University of Surrey

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

Judiciary

Senators of the College of Justice

Sheriffs' Association (nil response)

Appendix C

List of respondents to the consultation on the draft Defamation and Malicious Publications (Scotland) Bill

Individuals

Adrian Van de Heever

Alastair Galloway

Alastair Macrae

Alistair Bonnington

Alwyn Lewis

Anne Clarke

Campbell Deane

Carl MacDougall

Caroline Richmond

Carolyn Warburton

Christopher Wortley

Clare Rice

Conrad Hughes

David McDowall

David Nicol

David Pollock

Denis Lesley

Douglas Lipton

Dr Benjamin Rusholme

Dr David Dinsdale

Dr Glyn Walsh

Dr Lorna Gillies

Dr Mangesh Thorat

Dr Peter Wilmshurst

Dr Rob Van Nues

Dr Simon Singh

Dr Tina Diggory

Eileen Findlay

Elizabeth Marriott

Frances Touch

Gabriella Braun

Gavin Sutter

Geoffrey Lake

Glen Forde

Glyn Shaw

Greville Corbett

James Arnold-Baker

James Cook

James P Ward

Jamie Shutler

Jean Rafferty

Jeff Alderson

Jennifer Williams

Jeremy Tuite

Jim Stuart

John Hanger

John Mortimer

John Ward

Juri and Lynette Gabriel

Katrina Brown

Kay Townsend

Kevin Senior

Linda Strachan

Liz Albert

Louise Kelly

Mark Poulter

Mark Sinton

Mark Whittet

Matthew Broadhurst

Michael Newman

Nick Lanyon

Patrick Shaw

Paul Seed

Peter Ford

Peter Heine

Peter Lown

Peter Riches

Philip Hirst

Philip Kelman

Professor Anette Schrag

Professor Keith Stenning

Racheal Sharples

Randall Bell

Ranjit Singh

Rev Joan Craig

Richard Gatti

Richard Middleton

Robert Dawson Scott

Roger Bishop Jones

Scott Jamieson

Stephen Hands

Susan Francis

Teresa Preece

Tom Marshall

Tony Barron

Tracy Worcester

Una Flett

William Blair

William Egner

Campaign/discussion groups

Edinburgh Skeptics

Glasgow Skeptics

Global Witness

Libel Reform Campaign

Open Rights Group

Insurance interest

Aviva

Media and media-related organisations

BBC Scotland

Google

News Scotland

Ofcom

TripAdvisor

Representative bodies (media)

National Union of Journalists ("NUJ")

The Publishers Association

Scottish Newspaper Society ("SNS")

Society of Authors

Legal bodies

Faculty of Advocates

Law Society of Scotland

Judiciary

Senators of the College of Justice

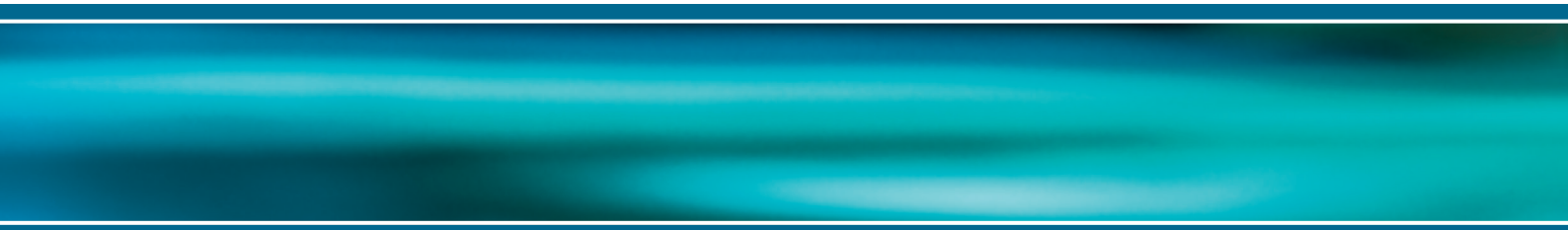
Writers and journalists

Chris Brookmyre, Writer

Lesley Riddoch, Journalist

Sara Sheridan, Writer

Susie Maguire, Writer



Produced for the Scottish Law Commission by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA

This publication is available on our website at http://www.scotlawcom.gov.uk

ISBN: 978-0-9935529-8-4

PPDAS335466 (12/17)