FACULTY OF ADVOCATES

RESPONSE

by

FACULTY OF ADVOCATES

to

SCOTTISH LAW COMMISSION

on

DISCUSSION PAPER ON DEFAMATION

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1. **Are there any other aspects of defamation law which you think should be included as part of the current project? Please give reasons in support of any affirmative response.**
(Paragraph 1.21)

Comments on Question 1

The current consultation exercise offers a wide-ranging consideration of the law relative to defamation. It is not suggested there are any other aspects that ought to be considered at this stage.

2. **We would welcome information from consultees on the likely economic impact of any reforms, or lack thereof, to the law of defamation resulting from this Discussion Paper.**
(Paragraph 1.25)

Comments on Question 2

The Faculty of Advocates shares the view of the Scottish Government that the legal sector in Scotland should be assisted in contributing to the economic

growth of the nation. It is therefore a shared objective that Scotland be a strong forum for litigation, including in the area of defamation. The current low volume of cases accordingly undermines not only the development of the law but diminishes the prospect of Scotland being taken seriously as a centre of excellence in matters relating to defamation.

It is accordingly our hope that any reforms will specifically consider how that critical current issue can be addressed. In a sense, the Scottish problem is exactly the reverse of that which recent reform in England addressed; in England there was a concern that there were too many cases whilst in Scotland there is uniform acceptance that there are far too few.

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

Comments on Question 3

No.

On balance, we are not sufficiently persuaded by this proposal without further consideration at the Report stage.

This proposal would represent a significant change to the long-established principle of Scots Law that the essence of defamation is injury to self-esteem which is actionable in its own right. The First Division in *Mackay v M'Cankie*[1] made plain that the law in Scotland was different from that in England and in our view that position should not be readily departed from without a more compelling basis for reform.

Whilst it may be correct for the Discussion Paper to note that there are no recorded cases in recent times, that is not to say that the issue does not arise in practice. After all, most defamation cases in Scotland resolve without proof or trial and are not reported. Albeit in small numbers, we have experience of cases in which a remedy has been successfully sought arising from, for example, private correspondence. We acknowledge that such cases are rare but the fact that they still exist requires us to consider what the original justification for the existing law was, and whether it has any useful application in the modern era.

We share the view (Discussion Paper at para 3.4) that in fact the principle may have direct applicability in an online age, most notably in the context of emails. The ease and frequency of direct, private communication has massively increased

[1] (1883) 10 R 537

in recent years. The law has often struggled to keep pace with that increased electronic communication. In other words, we wonder whether the Mackay principle might be something which (after a long period of relative irrelevance) is now more relevant than it has been. If so, abolishing that means of a pursuer seeking remedy would seem odd.

We note the reference to a possible alternative remedy in the form of the Protection from Harassment Act 1997, but that (as the Paper notes) requires a 'course of conduct' which may not always be present. Equally, s. 127 of the Communications Act 2003 is potentially a higher bar to overcome ('grossly offensive') and in any event is a criminal and not a civil sanction.

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

(Paragraph 3.24)

Comments on Question 4

No.

There is no clear reason in principle why there ought to be any threshold of harm for defamation actions. There is no such threshold in Scotland at present, and it is not suggested that this has created any particular difficulty, or led to a number of *de minimis* claims being raised. In fact, as previously noted, the greatest difficulty facing the development of Scots Law in this area is having too few cases, not too many. The application of s.1(1) of the Defamation Act 2013 has already raised significant issues in England, and such a test would add a layer of complexity, and consequently cost, to any court action. We are firmly of the view that such a provision would be unnecessary and inappropriate for Scottish law.

5. **Assuming that communication to a third party is to become a requisite of defamation in Scots law, are any other modifications required so that a test based on harm to reputation may "fit" with Scots law?**
(Paragraph 3.24)

Comments on Question 5

No.

The traditional approach in Scotland has been whether an offending statement is one that would have a tendency to lower a person in the estimation of others, and it is submitted there is no reason to alter this approach. There is no demonstrated need to introduce a further test based on harm.

6. **Do you agree that, as a matter of principle, bodies which exist for the primary purpose of making a profit should continue to be permitted to bring actions for defamation?**
(Paragraph 3.37)

Comments on Question 6

Yes.

In many cases the only remedy that a commercial enterprise will have is to raise an action for defamation. It is noted that the largest award of damages in Scotland for defamation involved an insurance company and a newspaper. There is no good reason why an insurance company whose business has suffered as a result of a defamatory article should not be entitled to recover.

7. **Should there be statutory provision governing the circumstances in which defamation actions may be brought by parties in so far as the alleged defamation relates to trading activities?**
(Paragraph 3.37)

Comments on Question 7

Yes

There may, as the Discussion Paper notes, be cases where manufacturers sue scientists or scientific journalists for publishing material that calls the efficacy of products into question. There is merit in exploring whether this, in fact, is an issue that produces a 'chilling effect' on legitimate discussion of commercial products. We would, however, wish to examine closely any such proposal in order to ensure that the balance of rights between the parties was adequately addressed in any legislation.

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

Comments on Question 8

No.

There is no clear reason in principle why this defence requires to be placed in statutory form. There is no suggestion of any difficulty in the operation of this defence in Scotland. The law is currently clear and understood by parties, their

legal advisers and the courts. Creating additional scope for confusion and re-interpretation does not seem to us to be justified.

9. **Do you agree that the defence of fair comment should no longer require the comment to be on a matter of public interest?**
(Paragraph 5.11)

Comments on Question 9

No.

The concept of public interest has expanded significantly, and it is submitted that, in consequence, there is no significant restriction in most cases where showing public interest is a requirement.

Nevertheless, there remains a need to balance the right to freedom of expression with the right to protect a private reputation. Without the requirement of public interest, it becomes much more difficult for a party subject to comment on a purely private matter to prevent, or seek damages in respect of, that comment.

The Discussion Paper draws on the Joint Committee support for this abolition. That is worth analysing. That Committee notes

'69. We support the Government's proposal to place the defence of honest opinion on a statutory footing, subject to the following amendments:

a) The term "public interest" should be dropped from the defence as an unnecessary complication. The law's protection of the right to personal privacy (which is another aspect of Article 8 of the ECHR) and confidentiality are now well established and can be used to prevent people from expressing opinions on matters that ought not to enter the public domain. In this respect, the public interest test no longer serves a useful purpose.

It also creates the potential for confusion with the identically worded, but narrower, public interest test under the draft Bill's defence of responsible journalism in the public interest.'

The second aspect of that – the risk of confusion with the public interest provisions in the rest of the legislation, is of course not relevant at this stage as there is no draft bill to analyse.

The principal justification for the abolition appears therefore to be that a separate action would be possible for a breach of privacy. That, however, seems to be a convoluted means of providing what appears to be accepted as a necessary protection for the Article 8 right to reputation. Scotland has nothing approaching

the developed remedy in privacy law which often dovetails with English defamation actions. Furthermore, the justification appears to make no logical sense standing that the critical question for the Court in any such privacy action will be whether there was a 'public interest' in the publication of private matters which justifies the breach of the reasonable expectation of privacy. Given the inevitable overlap between defamation and privacy, it is not at all clear to us why the removal of the 'public interest' aspect of a fair comment defence is justified on the basis of an alternative remedy which itself relies upon consideration of that 'public interest'. The defence of fair comment, with its current requirement that the comment be on a matter of public interest, may apply in a defamation case where there is no question of privacy at all. The fact that protection of privacy involves considerations of public interest is, therefore, no reason to say that public interest should not be part of the defence of fair comment in general. The logical and consistent position seems to us to be the maintenance of the public interest requirement within a fair comment defence, recognising the ability of the courts to expand that necessarily elastic concept to fit the passage of time, the range of matters considered as being in the public interest and the specific facts of any case. The alternative appears to offer too little protection for those about whom defamatory statements have been made who thereafter require to prove a reasonable expectation of privacy and the absence of a dominant public interest in order to succeed in a privacy claim.

10. **Should it be a requirement of the defence of fair comment that the author of the comment honestly believed in the comment or opinion he or she has expressed?**
(Paragraph 5.12)

Comments on Question 10

No.

Honesty of belief in the comment will always be of great assistance to the party relying upon the defence where it applies. It will, presumably, assist greatly with each of the other requirements of the fair comment defence.

The question, however, is not whether an honest person could have held the opinion, but rather whether in any particular case the party relying on the defence did in fact honestly hold that view. We consider that question more problematic and make reference to the case of *Massie v McCaig*[2] as an example of how the difficulties might emerge.

In that case, there was a dispute on the meaning of the statements made. The defender (an elected councillor) contended that he did not defame the pursuer, a

[2] [2013] CSIH 37

position the Inner House rejected. He thereafter succeeded in establishing a defence of fair comment. But had there been a requirement that the defender honestly believed in the meaning ultimately accepted by the Inner House, he could not have succeeded. He openly conceded that he did not hold the view which the Inner House decided was the meaning of his statement. By contrast, the comment would likely have been one which an honest person could have held.

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

11. **Do you agree that the defence of fair comment should be set out in statutory form?**
(Paragraph 5.21)

Comments on Question 11

Yes.

There is a benefit in having a clear statement as to the terms of the defence, however the nature and extent would require to be carefully considered.

12. **Apart from the issues raised in questions 9 and 10 (concerning public interest and honest belief), do you consider that there should be any other substantive changes to the defence of fair comment in Scots law? If so, what changes do you consider should be made to the defence?**
(Paragraph 5.21)

Comments on Question 12

One aspect which might be worthy of further consideration is to resolve the impact of malice in Scots Law. The Lord President (then Lord Justice Clerk) in *Massie* appears to have reaffirmed that the impact of malice is different when considering qualified privilege and, by contrast, fair comment. At paragraph 30 of the judgement, it is put thus

"Interestingly, and distinguishing the defence from that of qualified privilege, malice is not part of the equation ... Presumably, the reasoning is that if something is "fair comment" derived from true fact, the fact that it is maliciously made has no relevance. The comment may be made maliciously and be intended

to lower the pursuer in the estimation of right thinking people. However, as in the case of a successful plea of *veritas*, the statement made, whatever the motive of its maker, ceases to be actionable."

That would plainly run counter to the decision in Joseph v Spiller[3]. That case held that malice (in the sense of intent to injure) would not defeat fair comment but malice (in the sense of dishonesty) would.

Thereafter, however, the Second Division refused leave to appeal to the Supreme Court noting that

"Nothing in its opinion on the nature of fair comment in Scots law is in conflict with the decision in *Joseph v Spiller* or with the additional authorities cited by the pursuer at the hearing on leave to appeal …"

That might be thought to raise the possibility that the Second Division was dealing with malice only in the sense of intent to injure, but the same judgement of the Court continued:

"Although the court was **not persuaded that a subjective "honest belief" in the comment was a requirement of the defence**, that was a relatively minor part of the reasoning which led to the court's ultimate decision to recall the interim order. That reasoning focussed on the terms of section 12(3) of the 1998 Act and on the balance of convenience pending final disposal. Both aspects highlight the interlocutory nature of the decision made."

A subjective honest belief would be required if the law of Scotland was to have been that as set out in *Joseph v Spiller*.

We would make two points about that

1. there is a need to clarify the law in this area

2. the fact that *Joseph v Spiller* may not be the law in Scotland should inform the present process and perhaps offer a basis for being reluctant simply to follow legislation adopted in England to give effect to a case which seems to have been only partially adopted in Scotland.

13. **Should any statutory defence of fair comment make clear that the fact or facts on which it is based must provide a sufficient basis for the comment?** (Paragraph 5.21)

Comments on Question 13

[3] [2010] UKSC 53

Yes.

14. **Should it be made clear in any statutory provision that the fact or facts on which the comment is based must exist before or at the same time as the comment is made?**
(Paragraph 5.21)

Comments on Question 14

Yes.

15. **Should any statutory defence of fair comment be framed so as to make it available where the factual basis for an opinion expressed was true, privileged or reasonably believed to be true?**
(Paragraph 5.21)

Comments on Question 15

We support the first two aspects of that proposal, but not the third.

We have difficulty with what it would mean in practice. In the course of litigation, the definition of 'reasonably believed to be true' will presumably be case specific and raises a range of questions similar to the current 'responsible journalism' test in relation to Reynolds privilege. What efforts would a journalist have to make in order to satisfy that test? What about a home blogger? Would the standard of pre publication investigation be the same for all or not? Would a local paper relying on a national story be entitled to do so? By contrast, the absence of such a provision will certainly provide clarity. The current law requires the facts to be substantially true and that position provides a discipline on those making comment which might be considered to be a useful one as the rights of freedom of expression and reputation are balanced. We are content that the existing law in relation to the factual accuracy underpinning comment is clear and works in practice.

16. **Should there be a statutory defence of publication in the public interest in Scots law?**
(Paragraph 6.15)

Comments on Question 16

To some extent the answer to this question depends on whether there are other public interest defences available, for example, in relation to fair comment.

In principle, we are strongly supportive of the concept of a public interest defence and in practice the Reynolds defence has been a very important part of the Scottish legal landscape, notwithstanding the relative scarcity of reported cases.

In our experience, the Reynolds criteria are extremely useful in providing journalists with a framework within which they can operate.

We do not, with respect, agree with the characterization of Article 10 (para 6.6) as guaranteeing the right of the public to be informed on every matter of public concern. Article 10 gives that right but it is always subject to being balanced against other rights and considerations. That balancing exercise (see for example Lord Steyn in *Re S*[4]) is an important part of this area of the law.

The Discussion Paper notes that the new Section 4 changes the emphasis from responsible journalism to whether the belief in the public interest was reasonable. Given the considerable public disquiet about the conduct of some aspects of the media in recent times, thought might be given to whether that shift is one which is justified. It may, or may not, be that the Reynolds standards are upheld under the new statutory test but if the hope is that they are, we remain unconvinced as to why the shift from emphasis on responsible journalism makes that more likely?

We note with interest some of the difficulties in the operation of the new Section 4, not least the interplay with the question of fair or honest comment. We note that the Discussion Paper takes the view that despite those problems, 'the courts in England and Wales will no doubt address these points.' We do question whether that is an acceptable basis for legislation. Passing provisions in one jurisdiction which are acknowledged as flawed, and in the hope that the Courts in another jurisdiction will later give guidance, is not a proposal which we can support.

Our position is accordingly that either a) an improved statutory provision be considered which deals with the deficiencies of the 2013 Act, and does so in a way consistent with the rest of any statute drafted or b) we rely on the existing common law provisions.

The least attractive option is to accept that because England has passed a defective provision, so too should we.

17. **Do you consider that any statutory defence of publication in the public interest should apply to expressions of opinion, as well as statements of fact?**
(Paragraph 6.15)

[4] [2004] UKHL 47

Comments on Question 17

We hold to the position that the public interest aspect of any opinion is better and more obviously dealt with by maintaining that as an aspect of fair comment. That allows a differentiation between opinion supported by fact on a matter of public interest and opinion based on a much more fluid ' all the circumstances of the case' test.

The difficult interplay of this provision with the honest comment aspects of the 2013 Act seems to us to offer unnecessary complexity.

18. **Do you have a view as to whether any statutory defence of publication in the public interest should include provision as to reportage?**

(Paragraph 6.15)

Comments on Question 18

Yes.

We consider that a useful tool to encourage fair and accurate reporting.

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

Comments on Question 19

Yes.

We consider this to be a complicated area of the law worthy of a separate strand of the current project.

20. **Would the introduction of a defence for website operators along the lines of section 5 of the Defamation Act 2013 address sufficiently the issue of liability of intermediaries for publication of defamatory material originating from a third party?**
(Paragraph 7.39)

Comments on Question 20

No.

We consider that the question should be looked at afresh and in light of the practical difficulties highlighted in the Discussion Paper.

21. **Do you think that the responsibility and defences for those who set hyperlinks, operate search engines or offer aggregation services should be defined in statutory form?**
(Paragraph 7.47)

Comments on Question 21

In principle, yes. We would emphasise, however that all of these more detailed matters require to be examined in greater depth before legislation is drafted. We will be happy to comment on any proposals once that work is complete.

22. **Do you think intermediaries who set hyperlinks should be able to rely on a defence similar to that which is available to those who host material?**
(Paragraph 7.47)

Comments on Question 22
See answers 19 & 21.

23. **Do you think that intermediaries who search the internet according to user criteria should be responsible for the search results?**
(Paragraph 7.47)

Comments on Question 23
See answers 19 & 21.

24. **If so, should they be able to rely on a defence similar to that which is available to intermediaries who provide access to internet communications?**
(Paragraph 7.47)

Comments on Question 24
See answers 19 & 21.

25. **Do you think that intermediaries who provide aggregation services should be able to rely on a defence similar to that which is available to those who retrieve material?**
(Paragraph 7.47)

Comments on Question 25

See answers 19 & 21.

26. **Do you consider that there is a need to reform Scots law in relation to absolute privilege for statements made in the course of judicial proceedings or in parliamentary proceedings?**
(Paragraph 8.9)

Comments on Question 26

No.

27. **Do you agree that absolute privilege, which is currently limited to reports of court proceedings in the UK and of the Court of Justice of the European Union, the European Court of Human Rights and international criminal tribunals, should be extended to include reports of all public proceedings of courts anywhere in the world and of any international court or tribunal established by the Security Council or by an international agreement?**
(Paragraph 8.12)

Comments on Question 27

Yes

28. **Do you agree that the law on privileges should be modernised by extending qualified privilege to cover communications issued by, for example, a legislature or public authority outside the EU or statements made at a press conference or general meeting of a listed company anywhere in the world?**
(Paragraph 8.19)

Yes.

29. **Do you think that it would be of particular benefit to restate the privileges of the Defamation Act 1996 in a new statute? Why?**
(Paragraph 8.19)

Yes, but only if that statute was able to resolve the difficulties set out in paragraph 8.18. The existing position of confusion in some areas defeats the purpose of having a statute. We would welcome the opportunity to consider draft provisions on this matter standing the complexity identified.

30. **Do you think that there is a need to reform Scots law in relation to qualified privilege for publication (through broadcasting or otherwise) of parliamentary papers or extracts thereof?**

(Paragraph 8.23)

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

31. **Given the existing protections of academic and scientific writing and speech, do you think it is necessary to widen the privilege in section 6 of the 2013 Act beyond a peer-reviewed statement in a scientific or academic journal? If so, how?**
(Paragraph 8.27)

We note and welcome the additional protections within the 2013 Act which already apply in Scotland. We consider the examples of emails, newspaper articles and editorial comment which would fall outwith the protection to be examples of publications which benefit sufficiently from the existing protections, whether that be a defence of qualified privilege or fair comment. We are, however, confused by the exclusive reference to 'journal'. We agree that the exclusion of statements in academic books appears illogical. We note that no attempt to define 'journal' exists in the Defamation Act 2013. We note further the issues with definition clearly experienced by the Joint Committee on the draft Defamation Bill (Report October 2011). [5]

That said, it may be that if the threshold test for a publication which is to be granted protection is that of 'independent review' and additionally there is a requirement of editorial review, then such a test was considered more practical in the context of securing publication in a reputable and established journal than in the context of publishing a book (now a relatively simple task for any individual) which the author subsequently claims to be 'academic'. Section 6 and the discussions which led to its drafting make plain that issues of definition and categorisation of publications are extremely difficult. We understand why the preference of legislators was to leave these matters to the Courts, but would respectfully take the view that doing so simply because the issues appear too convoluted to resolve in legislation is not a path which should be followed in Scotland.

We would therefore, in principle, support the extension of any such provision in Scottish legislation to cover a wider range of academic publications but would

[5] See for example at paragraph 49.

flag at the outset of that process the very real challenges in producing a workable, logical and enforceable solution.

32. **Do consultees agree that there is no need to consider reform of the law relating to interdict and interim interdict? Please provide reasons if you disagree.**
(Paragraph 9.8)

Yes

33. **Should the offer of amends procedure be incorporated in a new Defamation Act?**
(Paragraph 9.12)

Yes

34. **Should the offer of amends procedure be amended to provide that the offer must be accepted within a reasonable time or it will be treated as rejected?**
(Paragraph 9.12)

Yes

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

We consider that the offer of amends procedure is an important part of the resolution process and in many cases significantly removes the necessity of litigation. That said, the opportunity to introduce Scottish legislation allows the possibility of providing greater clarity in a number of areas.

First, the major attraction for the publisher in the procedure is the reduction in the damages awarded.[6] That reduction is often a half to a third. Section 3(5) allows that

"If the parties do not agree on the amount to be paid by way of compensation, it shall be determined by the court on the same principles as damages in defamation proceedings.

The court shall take account of any steps taken in fulfillment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was

[6] See for example *Nail v News Group Newspapers Ltd* [2004] EWCA Civ 1708, [2005] 1 All ER 1040

reasonable in the circumstances, **and may reduce or increase the amount of compensation accordingly."**

We are unaware of any case where an offer of amends has led to an increased award in damages and standing that being the principal motivation for any publisher to make such an offer are unclear what purpose that provision serves? It is plainly desirable that the precise reduction in any award of damages be a matter for the court in each specific case, but if the opportunity to draft a clearer clause incentivizing the commercial advantage of the offer of amends to publishers and the public has presented itself, there may be merit in doing so.

Secondly, it will be obvious that any Scottish provision will require to reflect Scottish procedure. Some of the provisions reflect English practice, for example 'open court' statements[7] which have no enabling procedure in the Scottish Rules of Court. That practice is not one currently followed in Scotland, albeit we note the prospect that such a provision might be introduced.

Thirdly, we are aware of potential confusion about the impact of a qualified offer of amends which might usefully be removed in a Scottish provision.

Section 3(2) of the 1996 Act is in the following terms

"3 Accepting an offer to make amends

"(1) If an offer to make amends under section 2 is accepted by the aggrieved party, the following provisions apply.

"(2) **The party accepting the offer may not bring or continue defamation proceedings in respect of the publication concerned against the person making the offer**, but he is entitled to enforce the offer to make amends, as follows."

The wording of that provision leaves open an argument based on statutory construction that acceptance of even a qualified offer of amends ends proceedings.[8] That is not the intention of the provision as we understand it; a qualified offer of amends should still allow proceedings in respect of the publication to proceed in relation to meanings not addressed by the qualified offer.

It might assist in providing clarity if any section were to be appropriately drafted to reflect that position, and indeed for the position of offers and qualified offers of amends to be dealt with in separate sections.

[7] see section 3(4)
[8] See *Warren v The Random House Group Ltd* [2009] Q.B. 600 at paras 41 et seq

36. **Should the courts be given a power to order an unsuccessful defender in defamation proceedings to publish a summary of the relevant judgement?** (Paragraph 9.18)

No.

We are unpersuaded by this provision. Whilst we understand the basis for the proposal, we are instinctively concerned about a Court ordering any media organisation to publish material, and further to make orders in terms of wording, time, manner, form and place of publication. That appears to us to stray too far into an infringement of the Article 10 rights of the media and the editorial discretion of the media. The editorial freedom of the media has long been recognised by the Courts.[9] As Lord Hoffmann put it in *Campbell v MGN Ltd* 'judges are not newspaper editors'[10]. Further, we note that the instruction of corrections and apologies is dealt with by the new Independent Press Standards Organisation (IPSO) which was considered by the UK Parliament to be an appropriate forum. Whilst that does not include a power to force publication of any court judgement, a complaint to IPSO rising from the same publication would be dealt with under those procedures and offer an alternative and non statutory route.

37. **Should the courts be given a specific power to order the removal of defamatory material from a website or the cessation of its distribution?** (Paragraph 9.18)

Yes

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

(Paragraph 9.20)

We are not in principle against that proposal but set out a number of observations which make us cautious about recommending it be adopted.

First, the settlement of actions in Scotland is not currently problematic. We would therefore be providing a remedy to a problem which does not exist.

Secondly, there is no sense from those practising in the area that pursuers have identified the absence of such a procedure as either a barrier to settlement or

[9] *News Verlags GmbH & Co KG v Austria* (2000) 31 EHRR 246, 256, para 39. *In re Guardian News and Media Ltd* [2010] 2 AC 697, at para 63. See also Lord Hope of Craighead in *In re British Broadcasting Corpn* [2010] 1 AC 145 , para 25.
[10] *Campbell v MGN Ltd* [2004] 2 AC 457, 474, para 59.

something which is missing from the process. In contrast to the position in England (where the scale of litigation is vastly greater) there is no expectation that such a statement in court is required or desirable.

Thirdly, given that context, there must be a risk that providing an additional point of disagreement between the parties in fact achieves the opposite effect from that described in England at paragraph 9.19. We do not dispute that given the practice in England many claimants in that jurisdiction might see the value in that process. But that is a considerable distance from justifying the introduction of a new procedure in Scotland where no obvious desire for reform exists.

In our experience, the greater the number of aspects of a claim that require to be agreed, the longer and more expensive the process. The need to agree a form of words and narration for Open Court will inevitably add to the length and expense of the process.

39. **Do you consider that provision should be enacted to prevent republication by the same publisher of the same or substantially the same material from giving rise to a new limitation period?**

(Paragraph 10.20)

No. We are not persuaded that the balance between the interests of parties is at present inappropriate. The current regime has the advantage of a) working in practice and b) being understood. In our experience, the media organisations, as the parties which might be considered most likely to consider the position too favourable to pursuers, in practice manage that risk by removing material from websites when litigation is threatened or commenced. The discussion in Chapter 10 amply demonstrates the difficulties of reform in this area. We remain open to considering specific proposals should they emerge.

40. **Alternatively, if you favour retention of the multiple publication rule, but with modification, should it be modified by: (a) introduction of a defence of non-culpable republication; or (b) reliance on a threshold test; or (c) another defence? (We would be interested to hear suggested options if choosing (c)).**

(Paragraph 10.20)

We have not had time to consider the alternatives in detail but on immediate consideration do not support non-culpable republication, not least because of concerns about practical implementation and cost. Similarly, the threshold test is not one we favour. We consider that such a test, as with the 'serious harm' test, is more likely to create additional delay and expense in litigation. Were the volume of litigation in Scotland that of England, an argument might be made that action

to restrict or exclude claims was more necessary. That is not the position in Scotland. Further, a threshold test removes certainty from the process which is not in the interests of either parties or the public.

41. **Should the limitation period applicable to defamation actions be reduced to less than three years?**
(Paragraph 10.20)

No. We see no reason to make such a change.

42. **Should the limitation period run from the date of original publication, subject to the court's discretionary power to override it under section 19A of the 1973 Act?**
(Paragraph 10.20)

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.

43. **Subject to the outcome of the Commission's project on aspects of the law of prescription, should the long-stop prescriptive period be reduced to less than 20 years, in so far as it applies to defamation actions?**
(Paragraph 10.20)

We consider that of all of the options explored, that may be the most effective.

44. **Would you favour alteration of either or both of the time periods discussed in questions 41 and 43 above even if the multiple publication rule is to be retained?**
(Paragraph 10.20)

We are not persuaded of the need to change the multiple publication rule. We are content with a limitation period of 3 years and see merit in a reduction of the long-stop prescriptive period.

45. **We would welcome views on whether it would be desirable for a rule creating a new threshold test for establishing jurisdiction in defamation actions, equivalent to section 9 of the 2013 Act, to be introduced in Scots law.**
(Paragraph 11.4)

No. The overwhelming experience of practitioners is that there is no evidence for 'libel tourism' in Scotland. If anything, the reverse is true. Moreover, the factors which created London as a global centre of litigation in this area do not exist in Scotland. It will be of interest to the Commission to note that those places with a growing defamation practice include Dublin. The reasons for that include the level of damages awarded in the Irish Courts which far exceed anything awarded in Scotland. There is, in short, no basis for further restricting the already limited number of defamation cases in the Scottish jurisdiction. The risks to the development of Scots law in this area are already immediate and real.

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

We agree that the presumption for jury trial and the question of 'special cause', should be replaced by a broad discretion for the court in relation to the appropriate form of inquiry in the specific facts of each case.

47. **Should consideration be given to the possibility of statutory provision to allow an action for defamation to be brought on behalf of someone who has died, in respect of statements made after their death?**
(Paragraph 12.26)

No.

The potential uncertainty resulting in any such legislation would be unwelcome. We consider that, consistent with the delictual nature of the current law, once a party has died his right to raise action dies with him. We are concerned that to introduce the considered change could have a significant effect on the ability to probe allegations against individuals or have reputations properly examined; for example the post death revelations relating to Jimmy Savile. We are open to giving the matter greater consideration, albeit would direct the Commission to the Faculty of Advocates Response to the previous Scottish Government consultation on 'Defamation and the Deceased' from 2011.

48. **Do you agree that there should be a restriction on the parties who may competently bring an action for defamation on behalf of a person who has died?**
(Paragraph 12.30)

No.

We do not support a change in the law to allow such actions, and accordingly the question does not arise.

49. **If so, should the restriction on the parties be to people falling into the category of "relative" for the purposes of section 14 of the Damages (Scotland) Act 2011?**
(Paragraph 12.30)

Comments on Question 49

Given the response above we do not support any attempt to categorise "relative" for the purposes of the Act. We consider that the very difficulty posed by the query strengthens the argument that change in this area of the law will give rise to confusion and conflict.

50. **Do you consider that there should be a limit as to how long after the death of a person an action for defamation on their behalf may competently be brought? If so, do you have any suggestions as to approximately what that time limit should be?**
(Paragraph 12.32)

Comments on Question 50

Given our response we do not agree with this proposal in principle.
Should there be a decision to allow this proposal we suggest that any time limit should be as short as possible to allow clarity and certainty in the law.

51. **Do you agree that any provision to bring an action for defamation on behalf of a person who has died should not be restricted according to:**
(a) the circumstances in which the death occurred or;
(b) whether the alleged defamer was the perpetrator of the death?
(Paragraph 12.36)

Comments on Question 51

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

52. **Against the background of the discussion in the present chapter, we would be grateful to receive views on the extent to which the following categories of verbal injury continue to be important in practice and whether they should be retained:**

- **Slander of title;**
- **Slander of property;**
- **Falsehood about the pursuer causing business loss;**

- **Verbal injury to feelings caused by exposure to public hatred, contempt or ridicule;**
- **Slander on a third party.**

(Paragraph 13.40)

Comments on Question 52

In general, we do have experience of a few cases involving malicious falsehood and also verbal injury but those cases are not common. The other areas raised do not greatly impact on current defamation actions and practice.

53. **We would also be grateful for views on whether and to what extent there would be advantage in expressing any of the categories of verbal injury in statutory form, assuming they are to be retained.**
(Paragraph 13.40)

Comments on Question 53

We are aware of the different interpretations of the origins and categorisation of verbal injury and would support an attempt to resolve that confusion in statute. We will be happy to comment further on any of the specific proposals in due course.

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.