

List of consultation questions

Question 1

Do you agree with the analysis contained in the Commission's Business and Regulatory Impact Assessment (BRIA)? If not, please explain your reasons for disagreement.

Yes

No

Please explain your answer.

The Faculty supports the introduction of the Bill. Many aspects within the Bill are welcome for the reasons set out in the BRIA. The analysis in the BRIA does not~~-,~~ however, entirely reflect the position of the Faculty. The detailed points of difference are explored later in this response.

One additional general comment we would make is to challenge the approach under 'Rationale for Government Intervention' on page 3. We are confused by the analysis, at page 3, that:-

'The Bill should also reduce the possibility of Scotland becoming, over the course of time, a popular "libel tourism" destination, with attendant court infrastructure and legal and economic costs associated with that.'

The previous paragraph notes that:-

'The Bill would also contribute to the underlying National Outcome 1 – "We live in a Scotland that is the most attractive place for doing business in Europe."

We do not share the apparent view that it would be a negative outcome for Scotland to become a growing centre of litigation. Most countries with strong economic growth and a thriving business culture have a vibrant and robust means of enforcing rights and resolving disputes. Scotland should not be timid or apologetic about becoming a centre of dispute resolution, including litigation. We note the contrasting position of Ireland where the creation of Dublin as a centre for all forms of dispute resolution (including litigation) is actively encouraged.

We acknowledge that the Faculty, as a professional body of legal practitioners, is open to a charge of self-interest. That, however, would be to misunderstand our motivation. Our primary focus is to create a thriving and developing jurisprudence, with access, for those in need of such, to a legal system that commands respect.

We note also that there is no apparent risk of an increase in litigation in Scotland (as made plain in the consultation document in respect of the experience in Scotland post 2013).

The BRIA continues:-

'Moreover, the Bill, and the introduction of a "serious harm" threshold in particular, should help to reduce the number of "vanity" claims brought where little is at stake and where the time, costs and resources involved in a litigation are difficult to justify.'

As outlined later in this response, the Faculty does not support the introduction of that threshold. Given the difficulty in formulating such a test, and likely consequent uncertainty, it could result in the opposite effect - that is to say, of having more contested actions. In relation to the BRIA, we simply note that we do not see the evidence supporting the existence of such 'vanity' claims within any of the material presented to or by the Commission.

Question 2

Do you consider defamation should be defined in statute?

Yes

No

Please explain your answer.

The objective test, as set out in *Sim v Stretch*, is well understood by practitioners. Its parameters have been tested and it remains flexible enough to deal with new matters. While defining “defamation” in statute would perhaps aid accessibility, it would come at the cost of jeopardising the current, well-known test and of hampering flexibility in the development of the common law.

Question 3

Should a statutory threshold test of serious harm like section 1(1) of the Defamation Act 2013 be introduced?

Yes

No

Please explain your answer.

At the time of its creation, the Scottish Parliament was identified as being able to provide ‘Scottish solutions to Scottish problems’. We remain unclear what the problem is which the introduction of this statutory threshold addresses? In England, as we understand it, the desire was to reduce an unmanageable volume of cases and filter those of no merit. That may be an appropriate response to the English legal system, albeit our experience from attending conferences and speaking to practitioners in London is that the introduction of the serious harm test is seen by many as both problematic and regrettable. It could not be suggested that the Scottish courts are currently struggling to deal with either an unwelcome volume of defamation cases or cases of dubious merit. Accordingly, the rationale for the English threshold simply does not exist in Scotland. The introduction of an unnecessary statutory threshold is, in our view, difficult to justify. As practitioners, we do not currently have any difficulty advising on the merits and prospects of potential defamation actions. Legal certainty already exists, without the statutory threshold. Given the issues of statutory interpretation which have already arisen in England (as identified at para 55 of the Consultation document in relation to *Lachaux*) we cannot see the advantage for Scotland in adopting a test which provides greater uncertainty than at present. The argument is made (at para 59 of the Consultation) that not having the same statutory test as in England excludes Scotland from the benefit of English jurisprudence on that discrete aspect. We understand that argument and acknowledge that in many aspects Scots Law utilises the greater number of English cases to develop. Nevertheless, incorporating a problematic aspect of English law simply to have the benefit of access to a potential solution remains unattractive. It may be that further evidence ought to be sought from English practitioners in respect of the operation of this provision in practice, and this may inform and assist the proper consideration of this issue.

Question 4

If a statutory test is adopted, should we define what constitutes 'serious harm'?

Yes

No

Please explain your answer.

The difficulty in doing so is, in our view, a reason not to introduce the statutory provision. The problems of statutory interpretation are already clear in England. It is a test which, if adopted, would benefit from flexibility, depending on the facts of each case. It is difficult, bearing in mind the variety of facts and circumstances that can arise in such cases and the importance of the particular context of any defamatory statement, to create a definition that could offer both clarity and flexibility.

Question 5

Do you have any suggestions about would should constitute 'serious harm'?

See above.

Question 6

Legal persons which have as its primary purpose trading for profit may have a reputation that they wish to protect. Do you agree that such bodies should be able to raise actions in defamation?

Yes

No

Please explain your answer.

The reputation of any business is vital to its success, and therefore to its financial stability. Defamatory statements that impact upon the reputation of a business have the potential to damage, perhaps irreparably, that success and stability. There is no reason in principle why a business should not be able to take action to protect its reputation in the same way as a natural person can.

We note that a right to raise proceedings brings with it the right to secure interim remedies. Given the importance of reputation to businesses, the right to seek interim protection is very often of the utmost importance.

Question 7

Damage to the reputation of such legal persons may not take the form of financial loss. If the Scottish Government were to take forward (and the Scottish Parliament agreed to) the Commission's recommendation that such bodies are allowed to continue to raise proceedings in defamation, do you agree that these types of legal persons should face a threshold test of showing that serious harm to their reputation has caused (or is likely to cause) financial loss?

Yes

No

Please explain your answer.

This is, in our view, even less necessary than for individuals (see above). By its very nature, a claim by a legal person requires to show actual or potential financial loss, in some form. A company has no claim for its pain and suffering. Assuming it can show some actual or potential financial loss, there ought to be no further threshold test. We note the terms of para 70 of the consultation document and the reference to the current law which allows recovery for loss of goodwill. Equally, defamatory statements which impede recruitment, impact on credit or make people reluctant to deal with a business might found an action (see *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 at p547). At para 73, the Consultation document notes 'The Commission point out that it is a radical step to strip such bodies of the rights they currently enjoy, especially as they currently enjoy a similar right in almost all other jurisdictions.' We agree.

Question 8

If legal persons were allowed to continue to raise proceedings in defamation subject to a threshold test, should this be further limited to allow only micro enterprises to continue to raise proceedings?

Yes

No

Please explain your answer.

We see no good reason to impose this distinction. We can see no proper correlation as between the size of a company and the impact of a defamatory statement. Does a grossly defamatory statement widely published on the internet about a large company have less merit than an action brought by a small local business in relation to a defamatory statement published in a restricted but important market for that business? We do not think so.

While the intention to state the Derbyshire principle in statute was widely welcomed, a number of responses questioned the definition of ‘public authority’ used in the Commission’s draft Bill, with some uncertainty about whether a charity or even a doctor could be caught by the definition. Is there anything captured by the definition that is not by the Derbyshire principle?

The Derbyshire principle applies to prevent an interference with free expression when discussing the management of the country (see *Derbyshire* at pg 549).

It applies to local and central government and, depending on the functions being exercised, may also apply to non-elected agencies. The principle has however been held not to apply to, for example, a university or a state school – both of which will receive significant public funding and, at least in the case of the state school, will undertake a public function. Ultimately, the assessment is fact-sensitive, but with the underlying purpose being to facilitate open discussion of the management of the country.

The definition within the draft Bill talks about a “person” being a “public authority” if the person’s functions *include* functions of a public nature (s.2(2)). Whilst there is then further specification of what public functions might mean for non-natural persons, there is no such specification for natural persons.

By reason of the specific mention of “non-natural person” in s.2(3), it would appear however that the definition within s.2(2) is intended to apply to natural persons. Therefore, on the provision as drafted, it would appear that an individual (“A”) may not bring defamation proceedings if A’s functions include functions of a public nature. The question we raised in our response to the Law Commission was whether that would include, for example, a doctor?

This is, as we read it, wider than the principle expressed in *Derbyshire*. In fact, in *Derbyshire* the right of individuals to claim for defamation is maintained, provided the potentially defamatory statement applies to the individual and not the public authority. We therefore see no reason, consistent with *Derbyshire* to include natural persons.

Insofar as the remainder of the definition goes – i.e. the part applying to non-natural persons, it seeks to define the fact-sensitive assessment left open by *Derbyshire*. Our only query in that regard would be whether it reduces the flexibility in the fact-sensitive assessment?

Question 10

Conversely, is there anything not captured by the definition that is caught by the Derbyshire principle?

Not so far as we are aware.

Question 11

Should the Derbyshire principle be recast so that private companies delivering public functions are not able to raise an action in defamation?

Yes

No

Please explain your answer.

Based on the current definition, as we read it, a wholly private company would not become a public authority simply by reason of carrying out functions of a public nature "from time to time" (s.2(3)(b))

The use of "time to time" implies that, if the company undertakes more than that, it will be caught by the principle. That does, it seems to us, attempt to strike the balance covered by the current fact-sensitive assessment. We would only repeat the query as to whether it is better that the statute does not attempt to define so closely a concept that can be so fact-sensitive?

We see some merit in that proposal. We note the original Derbyshire principle arose, in part, from considerations of freedom to criticise a public body in the exercise of its functions (see [1993] A.C. 534 pp. 547E-F, 549B). If those public functions are now to be outsourced there is a reasonable argument that such a political choice should not be at the expense of the freedom of the public or others to criticise those delivering the same public services. Equally, it might be argued by such private companies that the function being performed is less relevant than the fact that such entities are not part of the public authority and so should not be restricted. From the perspective of a private company servicing both private and public contracts, the company would be in the odd position of being able to raise proceedings and seek a remedy in relation to work in the private sector and not in the public. That inconsistency is not attractive. On balance we are therefore against recasting the principle albeit we remain open to persuasion on this point.

Question 12

Public authorities are barred from raising proceedings in defamation under the Derbyshire principle, but are able to fund proceedings brought by an individual in their employment. Do you agree that public authorities should continue to be able to meet the expense of defamation proceedings in this situation?

Yes

No

Please explain your answer.

We agree with the comments of the Commission at paragraph 80 explaining the distinction between the local authority and the individual. We see no reason why an employer should not be able to meet such expenses of an employee if that is their wish or obligation.

Question 13

Do you agree that a new action of unjustified threats is necessary over and above the recommendations made by the Commission in their Report?

Yes

No

Please explain your answer.

We see no need for any such new action. Pre-litigation negotiation often resolves matters in litigation, and the prospect of litigation being raised very often serves the useful purpose of concentrating minds and bringing matters to a swift conclusion. We would consider the removal of the right of an individual to intimate to another party that they were actively contemplating legal action to be an unjustified and unwarranted step. Aside from the very limited and specific situation in relation to IP law, this is a novel legal mechanism, and not one that ought to be developed or expanded into other areas.

Question 14

Do you agree that the definitions of author, editor and publisher in section 3 of the draft Bill contained in the Commission's Report will remove liability for secondary publishers?

Yes

No

Please explain your answer.

This is a significant and wide reaching provision, which merits further consideration. The general position in relation to secondary publishers, as developed by common law and enacted in s.1 of the Defamation Act 1996, was to remove liability for 'innocent publication'. As originally envisaged, this was to apply to publishers of hard copy material, such as booksellers and newsagents. Given the development of technology, and the widespread dissemination of electronic information, 2002 Regulations provided defences for material transmitted by internet intermediaries, and this was further developed in England and Wales by the 2013 Act. Accordingly, by virtue of these provisions, liability for secondary publishers could still attach, but defences were provided. It is recognised that the Commission made no final recommendations on internet intermediary liability, given the UK wide review, and what is proposed is an interim 'solution'. However, it is considered the present draft s.3 of the Bill would significantly expand the existing law, and would mean that there could never be an action against secondary publishers. The draft moves away from 'innocent' dissemination, and it is not clear why such a significant development is proposed, or merited. Contrary to what is suggested, draft s.3 would not provide any of the protection currently afforded by s.1 of the 1996 Act or s.5 or s.10 of the 2013 Act. In particular, in relation to the definition of 'editor' it is considered that the operation of s.(3)(d) would mean that a defamation action could not lie against any person who transmitted or distributed electronic material, even if they did not take reasonable care in relation to the publication, they knew or had reason to believe it contained a defamatory statement or if it was not possible to identify the actual author, editor or publisher.

Question 15

Do you agree that the regulations made by Scottish Ministers under these sections and which will be subject to consultation and parliamentary approval achieve the correct balance between scrutiny and the use of legislative resources?

Yes

No

Please explain your answer.

The affirmative procedure has the benefit of requiring a motion to be put to the lead committee but is not, in our experience, a particularly effective means of ensuring detailed scrutiny. The changes identified as being within the power of Scottish Ministers in paragraph 108 of the Consultation document are in our view important and potentially far-reaching. That importance is evidenced by the debate and discussion around this area both in this consultation and in the development of the 2013 Act. We are not persuaded, therefore, that such changes should not require greater Parliamentary scrutiny before being made. We note that there is a proposal also to have a consultation on such changes. That is welcome but in our view in order to be meaningful should thereafter inform the content of a Bill which can be considered by both the relevant committees and Parliament.

Question 16

Should the defence of honest opinion make allowance for instances where rhetorical devices are used to express an opinion conveyed by the statement that the defender does not genuinely hold? If so, can you provide instances where such a device may have been considered defamatory?

Yes

No

Please explain your answer.

It is considered that a statement made in the context of satire or parody, ought not to fall within the definition of defamation in the first place, eg, *Macleod v Newsquest 2007* SCLR 555
There is accordingly no need for such a provision.

Question 17

Do you agree that the second condition of the recast defence of honest opinion should be capable of taking into account situations where the relevant facts are likely to be known to readers?

Yes

No

Please explain your answer.

On balance, we favour such situations being taken into account. Without this extension the condition might be unduly restrictive. It might exclude the defence in circumstances in which readers are sufficiently well informed of the background facts. It might also lead to the good sense of honest opinions being buried or obscured by a mass of superfluous factual detail.

That said, we also have significant concerns about how this would be achieved. The phrase 'likely to be known to readers' is one which would be problematic. There are potentially difficult questions about which facts were known and to which categories of readers? Equally, the thrust of the current law is that the reader can judge the comment against the stated or apparent facts. Recasting the defence so widely runs the risk of defamatory opinion being protected by the defence even when distant from the original factual basis. For example, social media very often contains long chains of (often defamatory) comment far removed from the original statement of relevant facts. The risk that the reader of such comment has no realistic prospect of judging that comment against the relevant fact is very real.

Accordingly, we would seek further comfort on how such concerns might be met before supporting such a measure.

Question 18

Should it be made clear that an offer of amends is made without admitting that a threshold test has been met?

Yes

No

Please explain your answer.

If, contrary to our submission, a threshold test is imposed then we see no need for this measure. An offer of amends accepts the defamation and offers to make amends. If the view is taken that a threshold test as to what amounts to defamation is not met then presumably no offer of amends will be made. By contrast, an offer is to be made then it would presumably be because it is accepted that the test has been met.

It would presumably also remain open to a defender to make a qualified offer of amends if it were felt, for example, that one meaning met the threshold test but another did not.

Question 19

Should the test of whether a statement complained of is a malicious publication be strengthened, and if so, how?

Yes

No

Please explain your answer.

We are content with the approach adopted by the Commission.

Question 20

Do you agree that the single publication rule is tied to the date of accrual as the date of first publication?

Yes

No

Please explain your answer.

We are not aware of any instance of 'perpetual liability' as outlined in paragraph 145. It is in our view accordingly a conceptual possibility rather than a real problem in practice. We are in full agreement with the criticisms of the single publication rule at paragraphs 147 & 148. Those considerations should, in our view, weigh heavily with the Commission. The effect will be to risk the restriction or removal of rights of individuals and we see no significant or compelling basis for doing so. The concession (para 149 of the consultation: in relation to the scale, or damage of re-publication) that 'the court can take into consideration such facts when deciding whether repeating a defamatory statement should be treated as publication or republication' offers none of the legal certainty the Commission sets out as being a stated objective at paragraph 143. It leaves a litigant unclear whether a case has prospects of success without the expense of raising speculative proceedings. Combining that approach with a limitation period of 1 year further restricts the ability of parties to seek an effective remedy and does not provide a balanced approach.

Question 21

Given the previous recommendation of the Law Commission of England and Wales that 1 year is insufficient time in which to prepare litigation, and given the impact that a shorter period may have on parties' ability to utilise alternative means of resolution, should the current limitation period be retained?

Yes

No

Please explain your answer.

In relation to the 1 year limitation, the argument at paragraph 150 that the court has, as in every case, a discretion to disapply the limitation period is similarly unsatisfactory. It again requires a litigant to raise proceedings in the hope that the Court will allow the action to proceed. The final argument (paragraph 151) justifying the change is that England has introduced a 1 year limitation and there might be cross border litigation. The answer to that is given in paragraph 151 which makes plain that the evidence is that there has been no such increase in defamation cases in Scotland as a result of the change in England to 1 year. There is no evidential basis at all for assuming that will change.

Question 22

If the limitation period is shortened to 1 year, do you agree that the period of limitation should be capable of being extended to reflect the period of time parties engage in alternative methods of dispute resolution?

Yes

No

Please explain your answer.

We agree with the observation that extending, or suspending, the limitation period should encourage parties to explore other methods of resolution before resorting to court action.