

Defamation in Scots law

A consultation

January 2019



Scottish Government
Riaghaltas na h-Alba
gov.scot

“Because it is my name! Because I cannot have another in my life.”

(*The Crucible*, Arthur Miller, 1953)

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Ministerial Foreword

In December 2017 the Scottish Law Commission (“the Commission”) published their Report on Defamation in which they made a number of recommendations to reform Scots law on defamation so as to strike a balance between freedom of expression and protection of reputation.

This consultation seeks views on some of the recommendations made by the Commission. It also seeks views on issues that were not raised as part of the Commission’s reform project.

The protection of freedom of expression is essential for the democratic political process and the development of every human being. As Lord Hailsham said, “I regard freedom of expression as the primary right without which one cannot have a proper functioning democracy.” Yet at the same time it can conflict with other rights, such as reputation.

Reputation is a component of the right to private life, and it forms the basis of the law of defamation. It is an integral and important part of the dignity of the individual, and helps to inform many decisions in a democratic society which are fundamental to its well-being.

I would like to use this opportunity to ensure that any reform to defamation law is fully tested.

We want our law of defamation to be fit for 21st century Scotland, with a clear and accessible framework that balances freedom of expression and protection of reputation.

I welcome the opportunity that this consultation provides to further these vital issues and I look forward to hearing your views.

A handwritten signature in blue ink that reads "Ash Denham". The signature is fluid and cursive.

Ash Denham
Minister for Community Safety

Glossary of terms used in this consultation

Chilling effect The inhibition or discouragement of the legitimate exercise of natural and legal rights by the threat of legal sanction.

Common law A body of law which does not stem from statute but is laid down in judicial decisions. Influences on the Scots common law include authoritative writings of institutional writers and Roman, canon and feudal law and custom.

Date of accrual The date on which the publication first comes to the notice of the person bringing the action. This is the date at which the period of limitation (see below) begins to run.

Internet intermediary A service provider who facilitates the use of the internet. The services they may provide include connecting users to the internet, enabling processing of data and hosting of web-based services, including for user generated comments. They can also assist searches, facilitate the sale of goods or services or enable commercial transactions. Examples are internet service providers, search engines and social media platforms.

Judgment The decision of a court setting out its reasons for the decision.

Liability A term applied to being legally responsible for a situation.

Libel tourism A term used to describe the practice adopted by some litigants of seeking to have their legal case heard in the court thought most likely to provide a favorable judgment.

Limitation A time limit imposed on the commencement of proceedings.

Legal person Any non-human entity that is recognized as having privileges and obligations, for example, the ability to enter into contracts. This includes any organizations including companies, partnerships, local authorities, the Scottish Government, and NGOs.

Patrimonial loss Economic loss or loss of financial support - as distinct from solatium (see below).

Pleadings A formal written statement of a party's claims or responses to another party's claims in a civil action. The parties' pleadings in a case define the issues to be adjudicated in the action.

Solatium A form of compensatory damages given for injury to feelings or reputation, pain and suffering and loss of expectation of life.

Statute/Statutory law Laws passed by the Scottish Parliament and the UK Parliament.

Part One Introduction

1. In May 2014 the Scottish Law Commission (“the Commission”) launched a public consultation exercise seeking ideas and suggestions for law reform projects thought to be suitable for inclusion in their Ninth Programme of Law Reform.¹ A substantial number of responses proposed a review of the law of defamation in Scotland. Attention was drawn to major reform of this area of law in England and Wales, the result of which is the Defamation Act 2013 (“the 2013 Act”).²

2. The Commission published their Discussion Paper in March 2016, and then consulted on a draft Defamation and Malicious Publications (Scotland) Bill.³ In formulating their recommendations the Commission took full account of the views expressed by stakeholders during the course of their reform project. The full list of recommendations can be found in the Commission’s Report on Defamation published in December 2017.⁴

3. Before bringing forward changes to the law of defamation it is vital to explore and understand the different perspectives on the range of issues raised in order to inform our policy decisions. In taking forward consideration of the Commission’s recommendations the Scottish Government’s aim is to ensure that any changes to the law of defamation achieve the right balance between the fundamental values of freedom of expression on the one hand and the protection of reputation on the other, while ensuring access to justice.

Defamation law in Scotland against the background of the 2013 Act

4. The law of defamation in Scotland as it currently stands is mainly based on the common law, with some statutory provisions.⁵ While the common law sets out the main principles, a shortage of modern Scottish case law has resulted in some areas where the law has not developed in line with other systems.⁶ Since the end of

¹The Commission have recently begun work on their Tenth Programme of Law Reform which can be accessed at <https://www.scotlawcom.gov.uk/law-reform/tenth-programme-of-law-reform-consultation/>

²The 2013 Act can be accessed at <http://www.legislation.gov.uk/ukpga/2013/26/contents>

³The Discussion Paper is available at

https://www.scotlawcom.gov.uk/files/5114/5820/6101/Discussion_Paper_on_Defamation_DP_No_16_1.pdf. The draft Bill is available at

https://www.scotlawcom.gov.uk/files/5715/0123/0435/Defamation_and_Malicious_Publications_Scotland_Bill_-_consultation_draft_-_Bill.pdf

⁴The Report is available at

https://www.scotlawcom.gov.uk/files/7315/1316/5353/Report_on_Defamation_Report_No_248.pdf

⁵These are the Defamation Act 1952 available at

<http://www.legislation.gov.uk/ukpga/Geo6and1Eliz2/15-16/66>; the Defamation Act 1996 available at

<http://www.legislation.gov.uk/ukpga/1996/31>; the Electronic Commerce (EC Directive) Regulations

2002 (SI 2002/2013) available at <http://www.legislation.gov.uk/uksi/2002/2013/contents/made>; and

sections 6, 7(9), 15, 16(5) (in so far as it relates to sections 6 and 7(9)) and 17 of the Defamation Act

2013 available at <http://www.legislation.gov.uk/ukpga/2013/26/contents/enacted>

⁶See paragraph 1.12 of the Commission’s Discussion Paper.

the Second World War there have been few reported cases each year in the Court of Session and even fewer in the Sheriff Court. This has given rise to a tendency of Scottish courts and practitioners to follow decisions of the English courts. The decisions of the European Court of Human Rights (ECtHR) on the Article 10 right to freedom of expression and the Article 8 right to private life are other sources of authority for Scottish courts and practitioners.

5. In England and Wales, the 2013 Act restated in statutory form many of the most important common law principles of defamation law, while also making a number of significant substantive changes to the law: the defences of justification, fair comment and *Reynolds* privilege are now restated in statute; there is a new statutory provision on the requirement to show serious harm; an extended defence for website operators; and a new 'single publication' rule.

6. The impetus for the 2013 Act is often traced back to the enactment by various US legislatures of statutes preventing enforcement of foreign, particularly English, libel judgments within their jurisdictions, for example the *Securing the Protection of our Enduring and Established Constitutional Heritage Act 2010* (the SPEECH Act).⁷ The principal concern of the US legislatures was 'libel tourism', which involves foreign defenders being sued in the courts in England and Wales in circumstances where there is only modest publication of the defamatory statement within that jurisdiction. This is seen as having a chilling effect on freedom of expression partly because of the high costs associated with English libel actions that makes defending an action prohibitively expensive for most, and partly because other jurisdictions may provide more extensive defences. Consequently, to prevent publication, an action may be threatened to be initiated in England.

7. The reaction of American legislatures added to the perception that the law of defamation was being exploited by well-placed individuals to constrain criticism in addition to more general concerns about the impact of defamation law on investigative journalism. This helped to energize a campaign to reform English libel laws, prompting two charities - English PEN and Index on Censorship - to assess the impact of English libel law on freedom of expression, both in the UK and internationally. These bodies were joined by other organisations, including Sense About Science, in forming the 'Libel Reform Campaign'.

8. The civil society campaign and the consequent public interest in reform of defamation law led to three UK political parties committing to reform of libel law in their manifestos for the General Election held in May 2010. There was substantial pre-legislative scrutiny of the proposed reform of defamation law in England and Wales, and the Bill received Royal Assent on 25 April 2013. With the exception of a

⁷In English law, libel is a type of defamation that is expressed in a written or other permanent form.

small number of provisions the Scottish Government elected not to extend the 2013 Act to Scotland.⁸

9. At the time the Scottish Government's view was that the law here had not attracted the same criticism as the law south of the border and there were therefore no plans for wholesale reform. This was borne out by the fact that when the Commission called for suggestions for areas of reform to be included in their Eighth Programme of Law Reform, defamation law was not seen as a priority. It was considered that Scots law in this area was robust enough for present purposes and had generally attracted little criticism, calls for review and reform being few and far between. Clearly this view had changed by the time of the Commission's consultation on its ninth programme.

10. While the 2013 Act forms the background to the Commission's reform project, the Commission considered the comments and criticisms made of sections of the 2013 Act in making their recommendations on appropriate reform of the Scots law of defamation.⁹

11. At the end of this chapter is a list of the Commission's recommendations with which the Scottish Government are minded to proceed without further testing.

12. This consultation paper therefore focuses on areas of defamation law where respondents to the Commission's reform project have raised a variety of issues.

These are:

- The statutory threshold test of serious harm;
- Proceedings against secondary publishers;
- The defence of honest opinion;
- Offers to make amends;
- Malicious publications; and,
- Limitation and the multiple publication rule.

Structure of the Consultation Paper

13. As far as possible each chapter of this consultation is focused on a single area of defamation law. At the beginning of each chapter the corresponding section of the Commission's Discussion Paper and Report that deals with that same area is identified as readers of this consultation paper may find this useful in understanding the wider context of the debate. An outline of the position in Scots law is given, along with a description of the issue raised by respondents to the Commission's reform

⁸The provisions enacted in Scotland were agreed to by a legislative consent motion of the Scottish Parliament.

⁹See paragraphs 1.17 to 1.21 of the Commission's Discussion Paper for more on the approach taken.

project. At the end of each chapter there is a list of the Commission's recommendations made in that specific area.

Responding to this consultation

14. We are inviting responses to this consultation by **5pm on 05 April 2019**.

Replying on-line using Citizen Space

15. Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/justice/defamation-in-scots-law>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of **5pm on 05 April 2019**.

Replying by post

16. If you are unable to respond using our consultation hub, please complete the Respondent Information Form and send to:

Defamation Consultation
Civil Law & Legal System
GW-15
St. Andrew's House
Regent Road
Edinburgh
EH1 3DG

Not accepting responses by email

17. We will not accept responses submitted by email.

Handling your response

18. If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

19. All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would

therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

20. If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

21. To find out how we handle your personal data, please see our privacy policy: <https://beta.gov.scot/privacy/>

Next steps in the process

22. Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

23. Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

24. After the consultation, the Scottish Government will publish their response to the consultation.

Comments and complaints

25. If you have any comments about how this consultation exercise has been conducted, please send them by post to the contact address above or by email to **Defamation.consultation@gov.scot**

Scottish Government consultation process

26. Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

27. You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online or by post.

28. Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

29. While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Impact Assessment

30. It is important to ensure that any resulting legislation, which has the potential to impact on us all, is robust and durable, with no unintended consequences and that it takes account of all relevant perspectives, including equalities considerations and any potential financial and regulatory implications.

31. As part of the consultation process, we hope to be able to gather information to enable us to assess the impact and costs of implementing any of the proposals, or indeed of not doing so, from the perspective of a range of interests. Previous experience in this area has revealed that such information can be difficult to access.

32. It is therefore important that we produce as robust financial and other impact assessments as possible if, following consultation, we are to take forward legislation which will be subject to close scrutiny by the Scottish Parliament.

33. As part of their reform project, the Commission have published a Business and Regulatory Impact Assessment (BRIA).¹⁰ This contains a detailed analysis of the practical impacts of the proposed reforms. It would be extremely helpful if you would consider this document in the context of any specific evidence and/ or wider knowledge, experience and expertise you may have.

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.

¹⁰Available at https://www.scotlawcom.gov.uk/files/2415/1316/5437/BRIA_-_Report_on_Defamation_Report_No_248.pdf

Recommendations the Scottish Government are minded to proceed with

34. The Commission gave consideration to 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.¹¹ On this issue, they did not make any recommendation.¹²

35. The Scottish Government have previously given consideration to some of the key issues relating to protections available in Scotland for a deceased person's reputation.¹³ This included the principle of whether the law should be extended to allow relatives to bring a defamation action on behalf of a deceased person in circumstances where defamatory comments are made posthumously about the deceased. The Scottish Government, after consultation, took the view that extending the law to protect the reputation of a recently deceased person may not be the most appropriate means of achieving the aim.¹⁴

36. Given the extensive consultation on this matter and having given consideration to the responses received during both consultations,¹⁵ the Scottish Government is minded to follow the approach of the Commission and thereby make no provision that would enable defamation actions to be brought on behalf of people who have died, in respect of statements made about them after their death.

37. The Scottish Government are minded to proceed with the other following 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.

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.

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

¹¹ See chapter twelve of their Discussion Paper and chapter ten of their Report.

¹² See paragraph 10.7 of their Report.

¹³ See Death of a Good Name – Defamation and the Deceased: A Consultation Paper published in January 2011, available at <https://www.gov.scot/Publications/2011/01/11092246/0>

¹⁴ The position of the Scottish Government is set out in a letter dated 27 October 2011, available at <https://www2.gov.scot/Resource/Doc/254430/0123401.pdf>

¹⁵ The collated responses to the Commission's Discussion Paper can be accessed at https://www.scotlawcom.gov.uk/files/8914/8034/5443/Table_of_consolidated_responses_-_Defamation.pdf while the responses to the Scottish Government's previous consultation on this matter can be accessed at <https://www2.gov.scot/Topics/Justice/law/damages/defamationresponses>

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

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.

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

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.

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.

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.

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.

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

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.

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.

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.

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

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.

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.

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.

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.

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.

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.

42. The principles underlying the three categories of verbal injury which relate to economic interests (i.e., 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.
44. Verbal injury should be renamed by a term which reflects more accurately the type of conduct it seeks to address (i.e., malicious publication).
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 (i.e., statements causing harm to business interests, statements causing doubt as to title to property and statements criticising assets).
46. The common-law rules providing for verbal injury relating to individuals should be abolished.
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.
48. The “single meaning rule” should not apply in relation to proceedings brought under Part 2 of the draft Bill.
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.

Part Two Defamation and a statutory threshold test of harm

38. The focus of this chapter is the actionability of defamatory statements and restrictions on who can raise proceedings.¹⁶

What is defamation?

39. Reputation has been described as an integral and important part of the dignity of the individual, and as forming the basis of many decisions in a democratic society which are fundamental to its well-being, for example, whom to employ.¹⁷ This forms the basis of the law of defamation: a person's character, honour and reputation should be protected.

40. Where a statement is made about a person which is false, derogatory in nature and is made maliciously, then the person concerned may be entitled to damages for solatium and patrimonial loss. Defamatory comments will most commonly be made about an individual. However, it is possible for companies, partnerships and voluntary organisations to be defamed.

41. The defamatory statement must be communicated for it to be actionable. Unlike English law, the communication does not have to be to a third party.¹⁸

42. The test of whether a statement is defamatory is objective – that is, would the statement lower the estimation of the person among right-thinking members of society generally.¹⁹ The objective test involves considering the context in ascribing the meaning to be given to the statement and whether it exposes the person to hatred, contempt or ridicule. The context is important as, for example, a statement that may have been considered defamatory 50 years ago may no longer be considered so.

43. The fundamental principles of the law of defamation are set out in case-law, and this includes the definition of defamation. Some responses to the Commission's reform project took the view that what constitutes defamation should be restated in statutory form. The Commission acknowledge the benefit of restating in statutory

¹⁶This section corresponds to chapter three of the Commission's Discussion Paper and chapter two of their Report.

¹⁷*Reynolds v Times Newspaper Ltd* [2001] 2 AC 127 at 201.

¹⁸The Commission, however, recommend that 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 general meaning. See recommendation 1 of their Report.

¹⁹*Sim v Stretch* [1936] 2 All ER 1237 at 1240. There are alternative formulations of the test. Although found in an English House of Lords decision, this test has been accepted as representing the law of Scotland in *Steele v Scottish Daily Record and Sunday Mail* 1970 SLT 53 and in *Thomson v News Group Newspapers* 1992 GWD 14-825.

terms common law definitions,²⁰ and in some jurisdictions what constitutes defamation is defined. In the Republic of Ireland, a defamatory statement is defined as, “a statement that tends to injure a person’s reputation in the eyes of reasonable members of society.”²¹

44. A statutory definition may also go some way to ensure that Scots law accords with the requirement of the European Convention of Human Rights that restrictions on freedom of expression should be accessible.²² Delineating the boundaries of what makes a statement defamatory could also be a means of pre-empting the abuse of overbroad legal terms which could be detrimental to both freedom of expression and to the protection of reputation.

45. The Commission, after consideration, rejected this suggestion, noting both that the reform project was not a complete consolidation of the law of defamation and that there was a lack of support for such a restatement. Added to this, they point out that what is meant by defamation is widely understood.

46. There is no single definition of defamation used in the common law, though the concept seems to be well-understood and there appears to be little confusion.²³ The benefits of producing a definition in statutory form is that it is accessible to all, but as there is no single definition universally used, there is the potential that some of the nuances of what may constitute defamation are lost in any restatement, thereby losing the full sense of the concept that we currently have. Furthermore, there is a risk that any new definition will result in satellite litigation, at least initially.

47. We therefore ask:

2. Do you consider defamation should be defined in statute?

The threshold test of serious harm

48. One of the recommendations made by the Commission is to introduce a provision similar to section 1(1) of the 2013 Act – otherwise known as the *threshold test of serious harm*. The effect of this test is to introduce a filter through which claims in defamation must pass before they are allowed to proceed further. In England and Wales, prior to commencement of the 2013 Act, there was already a (common law) filter in place that meant that trivial and unfounded claims were discouraged. Section 1(1) recasts in statutory form the criterion by which all claims in

²⁰See paragraph 1.12 of their Report.

²¹Defamation Act 2009. A copy of the Act can be accessed at <http://www.irishstatutebook.ie/eli/2009/act/31/enacted/en/print#sec6>

²²See the case of *The Sunday Times v. The United Kingdom*, (Application no. 6538/17) at paragraph 49 for a summation of this requirement.

²³A recent judgment issued in a defamation claim in England looked at 7 different definitions. See *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414.

defamation in that jurisdiction are filtered. In so doing, the threshold test is able to filter out such trivial claims at an early stage in judicial proceedings, that is before they exhaust judicial resources and impose disproportionate burdens on defenders.

49. In England and Wales, in order to raise a claim in defamation, it must be shown not only that the statement complained of is capable of bearing a defamatory meaning, but that it has caused serious harm to the claimant's reputation (or is likely to do so). This is the criterion for the filtering process that section 1(1) introduces. By contrast, in Scots law, it is enough that a pursuer establish that the statement complained of is capable of bearing a defamatory meaning.

50. One of the motivating factors for the civil society campaign to change defamation laws in England and Wales, was the perception that trivial proceedings were being raised (or threatened to be raised) in order to bring undue pressure on individuals and the media to prevent publication, adding to a chilling effect where freedom of expression is curtailed due to the threat of litigation.

51. Discussions of the common law threshold test in England and Wales centre on two cases. In the first, *Jameel (Yousef) v Dow Jones & Co Inc.*²⁴ it was recognised that given certain circumstances the courts could bring to a stop - as an abuse of process - defamation proceedings that were not properly serving the purpose of protecting the claimant's reputation, given that so little was at stake.

52. In the second case, *Thornton v Telegraph Media Group Ltd*,²⁵ it was acknowledged that whatever definition of 'defamatory' is adopted by the court it must include a qualification (or 'threshold of seriousness' test) in relation to harm to reputation. This has been paraphrased as follows:

"A statement is to be regarded as defamatory if it substantially affects in an adverse manner the attitude of other people towards the claimant, or has a tendency to do so."²⁶

53. Section 1(1) of the 2013 Act recast this common law so that a statement is not defamatory "unless its publication has caused or is likely to cause serious harm to the reputation of the claimant". What constitutes 'serious harm' has been left undefined.

54. How far section 1(1) altered the common law test in England and Wales has been questioned. As the Commission note, cases involving an imputation which has the tendency adversely to affect a person's reputation to a *substantial* degree are also likely to cause *serious harm*. Neither is it clear to what extent claims that could

²⁴[2005] EWCA Civ 75.

²⁵[2010] EWHC 1414.

²⁶See *Economou v de Freitas* [2016] EWHC 1853 paragraph 13.

have proceeded under the common law test of England and Wales would now be filtered out by the statutory test.²⁷

55. Since publication of the Commission's Report, an appeal against the decision of the Court of Appeal in the leading case on section 1(1) has been permitted.²⁸ The appeal focusses primarily on the ordinary meaning of the words set out in section 1(1), and whether it is necessary to go beyond the words of the statement complained of. The appeal was heard by the Supreme Court in November 2018, and a published judgement is anticipated in spring 2019.

56. In Scotland there is at present no filter (either at common law or in statute). If the Scottish Government were minded to proceed with, and the Scottish Parliament agreed to, the Commission's recommendation that third party communication becomes a requirement to bringing proceedings in defamation then this could lead to the development of a common law filter in Scots law on defamation.²⁹ The courts in Scotland may move towards adopting a common law threshold test similar to that described in the two English cases mentioned above (but not necessarily exactly the same).³⁰ In other words, Scots law of defamation could itself develop a test that filters out actions regardless of whether the Scottish Parliament agreed to adopt an equivalent criterion to section 1(1). In view of the small numbers of defamation actions brought in Scotland the opportunity for the common law to develop in this way is likely to be limited; moreover such reform could take a long time to occur.

57. It should also be noted, however, that Scottish courts do not yet have a power to strike out proceedings similar to their English counterparts. Lord Gill's review of civil courts in Scotland recommended that courts in Scotland be given power to enable any party and the court itself:

“... to seek summary disposal at any stage in the proceedings. The test should be whether the pursuer or the defender has no real prospect of success and where there is no other compelling reason why the case should proceed... The court should also have the power *ex proprio motu*, and as part of its active case management function, summarily to dispose of an action or defence by applying the same test.”³¹

58. This recommendation has not yet been fully implemented either in the Sheriff Court or the Court of Session, and therefore the law on defamation may not develop

²⁷ See paragraph 3.19 of the Commission's Discussion Paper.

²⁸ *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1327.

²⁹ See Part One above for a list of the Commission's recommendations that the Scottish Government are minded to proceed with.

³⁰ See paragraph 2.11 of the Commission's Report.

³¹ See the Report of the Scottish Civil Courts Review, Volume 1 at Chapter 9, paragraph 103, available here <http://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4>

along the same lines as was the case in England and Wales prior to 2013. The Commission highlight³² that the courts should be given enhanced case management powers in defamation actions, and these should extend to the power to strike out at an early stage actions that do not meet the serious harm test. On publication of their Report on 14 December 2017 the Commission wrote to the Lord President, in his capacity as Chair of the Scottish Civil Justice Council, to draw his attention to the fact that potential issues of procedure and efficient case management may arise in relation to the recommendation to introduce a “serious harm” threshold to defamation proceedings.

59. Given the relative lack of defamation proceedings raised in Scotland when compared to other jurisdictions of the UK, if Scottish courts were to develop a (common law) criterion similar to that which subsisted in England and Wales prior to the 2013 Act, then Scottish courts and practitioners would no longer have the same kind of access to *developing* decisions made by the courts in England and Wales, a practice that had developed in most areas of defamation law prior to the introduction of the 2013 Act. Instead, the courts in England will develop the criterion of serious harm rather than what came before commencement of that Act.

60. Although the requirement for a threshold test was generally well received during the Commission’s reform project, the point was raised that the criterion adopted in England and Wales was done so for a particular reason: to filter out trivial claims.³³ It was pointed out that given the low number of defamation proceedings raised in Scotland each year adopting this threshold test was unnecessary.³⁴

61. Writers, publishers and other respondents, on the other hand, express the view that a chilling effect on freedom of expression is often felt not when legal claims are raised, but when letters *threatening* legal action are issued. A threshold test similar to section 1(1), they argue, would help prevent the silence of criticism that results, although there is no explanation given for how a threshold test would do so. The Commission took the view that it was difficult to see why a claim that did not demonstrate serious harm should be allowed to proceed.

62. Evidence from England and Wales since the introduction of the 2013 Act indicates that the average number of claims raised in the three years prior to the Act is similar to the average number of claims raised after the Act.³⁵

³² See paragraph 2.15 of the Commission’s Report.

³³ The report on reform of defamation law in Northern Ireland recommends adoption of the threshold test of serious harm in that jurisdiction, although it also accepts that the argument for doing so is less compelling than for adopting other reforms – see the report’s Executive Summary . The report was completed by Dr Andrew Scott and published on 19 July 2016. A copy can be accessed at http://www.nilawcommission.gov.uk/reform_of_defamation_law_.htm

³⁴ See paragraph 2.11 of the Commission’s Report.

³⁵ See analysis available at <https://inform.org/2018/06/26/judicial-statistics-2017-issued-defamation-claims-up-by-40-highest-for-three-years/>

63. Against this discussion we ask the following questions:

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

4. If a statutory test is adopted, should we define what constitutes ‘serious harm’?

5. Do you have any suggestions about what should constitute ‘serious harm’?

Should a threshold test be applied to parties other than private individuals?

64. Legal proceedings in defamation are not restricted to being brought by an individual; an action for defamation may be brought by sole traders and bodies such as companies, partnerships and unincorporated associations, so long as the person bringing the action has a reputation.³⁶ Such legal persons cannot seek damages for hurt feelings and/ or emotional distress. Instead, any award is generally based on economic loss.

65. Section 1 of the 2013 Act included a variant of the statutory threshold test of serious harm that is applicable to these types of legal persons: they must have suffered serious financial loss (or be likely to do so).³⁷ This test is found in section 1(2) of the 2013 Act and states that “harm to the reputation of a body that trades for profit is not ‘serious harm’ unless it has caused or is likely to cause the body serious financial loss.” To ensure that this does not apply to bodies like a charity, or university – that is, non-profit organizations - section 1(2) applies only in so far as any allegedly defamatory imputation relates to the activities of a body whose primary purpose is to make a profit.

66. The method in which this statutory threshold test is applied appears to differ slightly from that applied to individuals under section 1(1). In a recent judgment it was said that:

“in [the Presiding Judge’s] view the pronoun ‘it’ in s1(2) must stand for ‘harm’ (that is ‘harm to reputation’). So it is the harm to reputation that must have

³⁶For instance, in the case of *Tierbefeier eV v. Germany*, (Application no. 45292/09), at paragraph 49, the ECtHR held that the protection of a company’s reputation may be considered a legitimate aim for restricting the Article 10 right to freedom of expression.

³⁷In *Steel and Morris v United Kingdom* (Application no. 68416/01), one of the reasons why the ECtHR found that the award of damages was disproportionate was because the company did not have to establish that they suffered any financial loss as a result of publication of the defamatory statement - see paragraph 96,. Section 1(2) of the 2013 Act alters this. Such a requirement was also recommended by the Faulks Committee in 1975.(1975, Cmnd 5909, para. 342).

caused or be likely to cause serious financial loss. By contrast with s1(1), where the court has to consider, as it were one step further back, whether the publication of the words has caused or is likely to cause serious harm.”³⁸

67. What is required for a body that trades for profit to satisfy this test, though, is uncertain. In one of the few cases dealing with this issue since the introduction of the 2013 Act in England, the court considered that although some statements of fact are needed to demonstrate actual (or likely) financial loss it will look at the context in which the statement is made to determine the question of whether the threshold has been met.³⁹ Similar to section 1(1), it appears that although some evidence of (financial) harm need be shown, it is not likely to be onerous for those bringing the claim to do so.

68. Whether those bodies whose primary purpose is to make profit should be able to raise an action in defamation proceedings at all was questioned during the Commission’s reform project. A series of high profile actions in defamation raised in England and Wales by legal persons were highlighted as egregious, and were regarded as an important factor when considering the chilling effect on freedom of expression. Such fears seem to be closely bound up with high legal costs associated with (defending) actions in defamation.

69. If the recommendations made by the Commission with respect to ‘verbal injury’ are taken forward by the Scottish Government and agreed to by the Scottish Parliament, then, it was argued, should legal persons seek to recover economic loss as a result of harm done they could do so by raising proceedings under this type of civil action (rather than under defamation law).⁴⁰

70. The focus on financial harm, however, fails to recognise the non-financial damage that can be done to a body that trades for profit. The very willingness of such bodies to raise actions in defamation could indicate the (non-economic) value of ‘reputation’ to their business interests, rather than be viewed as an attempt to restrict freedom of expression. In other words, it is not necessarily the case that publication of a defamatory statement will impact the finances of a company. Whilst specific losses must be averred in the pleadings in defamation proceedings, it is well established that a claim for damage to goodwill is admissible.⁴¹

³⁸ *Burki v Seventy Thirty Ltd & Ors* [2018] EWHC 2151 QB, paragraph 205.

³⁹ *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628 QB – see paragraph 30.

⁴⁰ Part Six of this consultation discusses further these types of proceedings.

⁴¹ Relevant cases include *Lewis v Daily Telegraph Ltd* [1964] AC 234 and *Waverley Housing Management Ltd v BBC* 1993 GWD 17-117.

71. As 99.3% of all private sector businesses in Scotland are classed as small or medium,⁴² restricting the ability of bodies that trade for profit to raise proceedings in defamation to only instances where financial loss has been suffered (or is likely to be) could be detrimental. These enterprises are said to rely heavily on their (non-economic) reputation. Such bodies could be left with no remedy for the harm done to such reputation by publication of a defamatory statement.

72. One option would be to follow the example of Australia, where bodies that trade for profit are prohibited from raising proceedings in defamation unless they employ fewer than 10 people (known as a micro enterprise).⁴³ The reasons behind such a policy was that small, for-profit bodies may be disproportionately affected by a defamatory publication and less likely to weather its consequences.

73. The Commission made the decision to follow the provisions of the 2013 Act, allowing legal persons such as companies to continue to raise proceedings in defamation on the condition of demonstrating that they have suffered serious financial harm (or be likely to do so). 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.

74. We therefore ask:

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?

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?

⁴²A small enterprise is one with fewer than 50 employees and an annual turnover not exceeding £50 million; a medium enterprise is one with fewer than 250 employees and an annual turnover not exceeding £250 million pounds – see http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en

⁴³Defamation proceedings cannot be brought by bodies formed with the object of obtaining financial gain and who employ ten or more full-time persons. See Part 2, Division 2, section 9 of the Australian Defamation Act 2005 - see <https://www.legislation.sa.gov.au/LZ/C/A/DEFAMATION%20ACT%202005/CURRENT/2005.50.AUTH.PDF>

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?⁴⁴

Restrictions on public authorities raising actions in defamation

75. During the Commission's reform project, it was suggested that the common law principle laid down in *Derbyshire County Council v Times Newspapers Ltd and Others*⁴⁵ ("the Derbyshire principle") should be restated in statutory form.⁴⁶ In that case it was held that a public authority has no right to raise an action in defamation – even if the functions performed are of a commercial nature. It was held that a public authority should use political means to protect its reputation and not litigation. For the Commission, restating the principle in statutory form enhances the clarity and accessibility of the law – but it is not their intention to extend (or recast) the principle.

76. Whether a person is a public authority for the purposes of defamation will be a matter for the courts to resolve based on the individual facts of each case. The Commission have included a power for Scottish Ministers to introduce regulations so that identified persons are not treated as a public authority.

77. Some responses to the draft Bill suggested that the definition of public authority is too wide, and may bar some natural persons from raising proceedings in defamation. To take the example of a doctor whose role extends to assisting in the running of a health board, it is argued that they may be barred from raising proceedings.

78. In so far as private companies provide identical or complementary services to those offered by local authorities, the Derbyshire principle does not apply. Over the last 20 years or more, the public sector has, to different degrees, delegated delivery of public services to private companies. A private company that runs a prison (which public function accounts only for a fraction of their overall business), for example, would be able to raise an action in defamation to protect their reputation whereas a prison run by the Scottish Prison Service would not. Covering these types of private companies would, the Commission point out, significantly extend the Derbyshire principle beyond its reach under the common law, resulting in a recasting and not a restatement.

⁴⁴A firm that employs fewer than 10 people and has an annual turnover not exceeding £2 million is defined as a micro enterprise - see http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_nl

⁴⁵[1993] AC 534.

⁴⁶See paragraph 2.26-2.29 of the Commission's Report.

79. Concern was also raised by some about the ability of public authorities to circumvent the Derbyshire principle by financially supporting an individual in their employ to raise proceedings in defamation. This would, it is argued, undermine the principle as already stated. It has the potential not only to create an inequality of arms that can lead to a chilling effect, but also undermines the public policy for which the principle was decided.

80. The Commission explicitly state that their intention is not to prevent an individual from defending their professional reputation against allegations relating to the discharge of their public functions.⁴⁷ They also explain that even were an individual able to raise an action of the type detailed above (which would not be the case in all circumstances), success would vindicate the reputation of the individual and not necessarily the local authority. Additionally, any amount of reward recoverable would be attributable to the damage done to the *individual's* reputation, not the local authority's.

81. Against this discussion we ask the following questions:

9. 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?

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

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

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?

⁴⁷See para 2.27 of their Report on Defamation.

Unjustified threats of legal action

82. Scottish PEN express the view that a chilling effect on freedom of expression is often felt when letters *threatening* legal action are issued, and not solely when legal claims are raised. In correspondence with the Scottish Government, Scottish PEN suggest that a model based on the unjustified threats provisions that exist in UK intellectual property (IP) law could deal with such threats when they are unjustified. This was not an issue raised during the Commission's reform project, and as far as the Scottish Government are aware no other jurisdiction operates a similar provision with regards to defamation law.

83. In short, and as applied to defamation law, the position would be that a person who is aggrieved by threats of defamation proceedings could bring an action to demand that the threatener justifies their threat. If the threatener cannot do so, then the pursuer would be entitled to declarator, a stop (interdict) to the threat, and/or damages. For example, where the author of a statement receives a letter threatening legal proceedings from a complainer who believes the statement to be defamatory of them, then the author can raise legal proceedings in order to force the complainer to justify their threat.

84. In the context of defamation actions, the cause of action would arise as soon as an unjustified threat of legal action is communicated. In practice, this could be the receipt of a legal letter or correspondence communicating an unjustified threat prior to any court action. This will not restrict communications sent to parties requesting clarifications or reasonable modifications on published statements but will focus on communications that contain implicit or explicit threats against parties that are deemed to be unjustified.

85. In the field of intellectual property rights, baseless threats of litigation based on patents, trademarks and registered design rights have been regarded as problematic. In England and Wales, threats provisions were introduced in the nineteenth century to clamp down on the misuse of threats.⁴⁸ In 2017, the UK Parliament reformed IP law to provide greater protection against unjustified threats of infringement proceedings by the holder of a patent, trade mark, unregistered design right or registered design. The law applies throughout the UK.

86. The Intellectual Property (Unjustified Threats) Act 2017 ("the 2017 Act") amended the relevant IP law to provide that a communication contains a threat if a reasonable person would understand from it that the relevant IP right exists and the person communicating the threat intended to bring proceedings.⁴⁹ Such a threat is actionable by the aggrieved person. If the court finds the threat of IP litigation was

⁴⁸See *Halsey v Brotherhood* (1881-82) LR 19 Ch 386.

⁴⁹Available at http://www.legislation.gov.uk/ukpga/2017/14/pdfs/ukpga_20170014_en.pdf

unjustified it is empowered to (a) issue a declarator that the threat of litigation is unjustified, (b) stop (interdict) the continuation of the threat, and (c) award damages to the aggrieved person in respect of any loss sustained by reason of the threat.

87. There are a number of exceptions which may apply to a threat such that it is not actionable, and one of those is a 'safe harbour' of 'permitted communications' which allow parties to communicate and take some steps towards resolving disputes without running the risk of triggering litigation. Certain conditions must be met, otherwise the threat is actionable.

88. There is also a defence available to a person who is sued for making threats by an aggrieved person, to show that the threat is justified because the infringement of IP rights occurred or was intended.

89. The unjustified threats provisions do not apply to a 'primary actor', such as a manufacturer or importer of an alleged infringing product.⁵⁰ Threats to retailers, and stockists in general, are not allowed as such actors in the supply chain are likely to be the most harmed and the least harmful in terms of IP infringement.

90. It could be said that, as applied to defamation, a provision based on the unjustified threats provision in intellectual property law could add to the chilling effect. If we take the example of a less well-resourced person who believes they are the subject of a defamatory statement, they may be unwilling to challenge a well-resourced person for fear of an action for unjustified threat being brought against them.

91. Further, introducing a provision dealing with unjustified threats could add a layer of complexity to defamation proceedings.

92. Finally, any such provision may have the effect of increasing litigation as a 'sue first, ask later' attitude could be adopted by complainers, and in so doing de-incentivize the use of other methods of dispute resolution.

93. Seeking initial views on the general principle of unjustified threats we ask the following 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?

⁵⁰ For who might be considered a primary actor in patents, trade marks and registered designs see sections 1(2), 2(2), and 4(3) of the 2017 Act respectively.

Summary of the Commission's recommendations

94. The following is a list of the Commission's recommendations relevant to Part Two of this consultation paper:

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.
3. Bodies which exist for the primary purpose of making a profit should, in principle, continue to be permitted to bring proceedings in defamation.
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.
5. Persons which are classed as public authorities for the purposes of the Bill should not be permitted to bring proceedings for defamation.
6. A person should be classed as a public authority if the person's functions include functions of a public nature.
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.
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.

Part Three Proceedings against secondary publishers

95. The focus of this chapter is the Commission's proposed definitions of author, editor and publisher in section 3 of their draft Bill, and on the parliamentary process by which such definitions can be updated.⁵¹

96. Communication of a defamatory statement by a second or subsequent party is actionable against that person as it is against the person who first made the defamatory statement. There is a presumption that a defamatory statement is intentional and there is no defence that it was unintentional. This means that, for example, both the person who places an allegedly defamatory advertisement in a newspaper and the publishers of that same newspaper could both potentially be held liable.⁵²

97. At common law, England and Wales developed a defence of innocent dissemination for newsagents and booksellers and a similar defence exists under Scots law. The common law has been overtaken in Scotland, England and Wales by section 1 of the Defamation Act 1996 ('the 1996 Act')⁵³ and regulations 17 to 19 of the Electronic Commerce (EC Directive) Regulations 2002 ('the 2002 Regulations').⁵⁴

98. Section 1 of the 1996 Act provides a defence to defamation if a person can demonstrate:

- i. that they are not the author, editor or publisher of the statement complained of;
- ii. that they took reasonable care in relation to its publication; and
- iii. that they did not know, and had no reason to believe, that they caused or contributed to the publication of a defamatory statement.

99. The expressions "author", "editor" and "publisher" are defined in section 1(2) of the 1996 Act.

100. The 2002 Regulations provide three defences for material transmitted by an internet intermediary but not created by them. The defences depend on the level of involvement of the intermediary in the transmission, storage and modification of the information. Liability attaches depending on how the internet intermediary is categorised.

⁵¹This section corresponds to chapter seven of the Commission's Discussion Paper and chapter four of their Report.

⁵²See *McLean v Bernstein* (1900) 8 SLT 42.

⁵³Available at <http://www.legislation.gov.uk/ukpga/1996/31/contents>

⁵⁴Available at <http://www.legislation.gov.uk/uksi/2002/2013/contents/made>

101. In England and Wales, section 5 of the 2013 Act created a defence for the operator of a website if they can show that they did not post the statement on the website, i.e., it was a third party.⁵⁵ If the claimant, however, can show that it was not possible to identify the person who posted the alleged defamatory material, that they informed the operator of the website of the posted material (by sending them a 'notice of complaint'), and that the website operator failed to respond to the notice, the defence is defeated. During their reform project, the Commission received responses to the effect that this defence is seldom used in practice and is regarded as unworkable by most website operators.

102. Further, section 10 of the 2013 Act provides that a court cannot hear an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.

103. The Commission make no final recommendations on internet intermediary liability, instead recommending an interim solution pending a UK-wide review. The UK Government has announced their intention to publish a White Paper on internet safety before the end of 2018, although it does not specifically deal with internet intermediary liability in defamation law.⁵⁶

104. The interim solution recommended by the Commission is to replace the defence in section 1 of the 1996 Act with a combination of section 1 of that Act and section 10 of the 2013 Act. Section 3 of the draft Bill provides that no defamation proceedings can be brought against a person unless the person is the author, editor or publisher of the alleged defamatory statement that is complained of, or else is an employee or agent of that person and is responsible for the content of the statement or the decision to publish it. This applies to all secondary publishers and not only internet intermediaries, covering both online and offline activity. This would have the effect of replacing the defence of innocent dissemination, and so there would no longer be a need for the defender to show that they took reasonable care nor that what was a reasonable lack of knowledge caused or contributed to the publication of the statement.

105. The approach of the Commission is to use definitions of author, editor and publisher that are familiar to the courts and practitioners; they are similar to those

⁵⁵An internet intermediary is any person who has provided the means by which allegedly defamatory material is published on the internet, and therefore have at their disposal the technology to delete, amend or edit that same material. An operator of a website is not defined in the 2013 Act, but it may be assumed that it is a person with effective control over the content of the website – see Duncan and Neill on Defamation (4th edn, 2015), para 6.32.

⁵⁶See <https://www.gov.uk/government/consultations/internet-safety-strategy-green-paper> for information on the consultation and the UK Government's response thereto.

contained in section 1 of the 1996 Act.⁵⁷ It includes a list of functions that are not to be taken to place a person in the category of author, editor or publisher. However, there is flexibility to amend this list by way of regulations made by Scottish Ministers.

106. Concerns were raised during the Commission's reform project about the way that the role of editor is defined.⁵⁸ It was said that the current definition is too expansive, and as a consequence would be unlikely to achieve the Commission's stated aim of removing a secondary publisher's liability. A number of other respondents suggested that the definitions of all three roles lacked sufficient clarity as to the extent of their scope. Against that the Commission observed that the definitions were well-established and well-understood in practice.

107. Against this discussion we ask the following 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?

108. The draft Bill gives Scottish Ministers the power to make changes, following consultation, to the Derbyshire principle (section 2(7)), secondary publisher liability (section 3(5)), and powers to specify persons to be treated as a publisher (section 4(1)). Some of the consultees to the Commission's reform project considered that any changes should be taken through Parliament in the form of a further Bill. They argue that any change to these provisions are of such importance that it should be done only after being subjected to an open and vigorous process that involves the scrutiny of a wide section of civil society.

109. The Commission took account of these views and altered the way that such regulations are to be made. Those being laid by Scottish Ministers in respect of these sections will be subject to both a consultation process and parliamentary approval by affirmative procedure, achieving a balance between scrutiny and the use of legislative resources, particularly the Parliament's time.

110. Against this discussion we ask the following 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?

⁵⁷The only substantive deviation is the insertion of clause 3(3)(g), which deals with moderation of statements.

⁵⁸For the definitions see clause 3(2) of the draft Bill in the Commission's report.

Summary of recommendations

111. The following is a list of the Commission's recommendations relevant to Part Three of this consultation paper:

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

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.

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.

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.

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.

Part Four Defences - Honest opinion

112. The focus of this chapter is the defence of fair comment (re-labelled honest opinion in the Commission's draft Bill) available to a defender in defamation proceedings under Scots law.⁵⁹

113. The Scots law of defamation recognises a difference between comment and a statement of fact. Comments (which include opinion) can be recognised by readers as a point of view, and as such they can either be agreed or disagreed with. A statement of fact, however, cannot be treated in a similar manner. If a comment is defamatory it is not actionable where the defence of fair comment applies. As recently affirmed by the Inner House of the Court of Session, the defence of fair comment is, "[t]he expression of an opinion as to a state of facts truly set forth [which] is not actionable, even when that opinion is couched in vituperative or contumelious language."⁶⁰

114. For a defence of fair comment to succeed the words complained of must:

- be shown to be comment (and not a statement of fact);
- the facts from which the comment is derived must be stated, or else implicitly specified;
- the facts on which the comment are based must be true, or protected by privilege; and finally,
- the comment must be on a matter of public interest.

115. If these requirements are met then the burden of proof shifts to the pursuer to show that the comment was not fair.⁶¹

116. The technical complexity of applying the defence means that it is less effective and less frequently invoked than it may otherwise be in protecting freedom of expression. The shortage of modern Scottish case law on the defence adds to the difficulties. The Commission recommend placing the common law defence on a statutory footing because of these uncertainties, thereby making the defence both clearer and more accessible. They also recommend renaming the defence 'honest opinion'.

117. While the Commission recommend restating the common law defence, they also seek to recast it. They recommend that a comment need no longer be on a

⁵⁹This section corresponds to chapter five of the Commission's Discussion Paper and chapter three of their Report.

⁶⁰*Massie v McCaig*, 2013, SC343, as previously explained in *Archer v John Ritchie & Co* 1891 18 R 719 at page 729.

⁶¹By 'fair', the law means that the defender must have genuinely and honestly held the opinion echoed in the comment – see *Merivale v Carson* (1887) 20 QBD 275 at 281.

matter of public interest, in part because the scope of “public interest” has been greatly expanded over the years.

118. Given the view expressed by a majority of respondents, the Commission recommend the retention of the requirement that the comment or opinion must be one in which its maker honestly believed. It was pointed out, however, that such a provision would likely have the effect of restricting freedom of expression as authors who use rhetorical devices like parody or satire may not be able to rely on this new defence. It was said that the way the author chooses to express themselves is not necessarily a clear indication of their honestly held opinion.⁶²

119. With respect to another condition of the recast defence – that the facts on which the comment are based must be stated, or else implicitly specified - some respondents have questioned whether such a qualification is needed. The purpose of such a qualification would be to make clear that in circumstances where the relevant facts are known (or likely to be known by those receiving the publication) there is no requirement to establish their evidential basis (and whether such evidence need be from a primary source, or whether from a trusted source such as a national newspaper). An example would be where a user re-tweets a linked article and provides opinion. The Commission take the view that any such qualification would simply lead to unnecessary debate about what facts were known and what facts were not known.

120. Against this discussion we ask the following questions:

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?

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?

Summary of recommendations

121. The following is a list of the Commission’s recommendations relevant to Part Four of this consultation paper:

⁶² The Commission respond to this issue at paragraph 3.34 of their Report.

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.

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

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.

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.

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.

Part Five Offer to make amends

122. The focus of this chapter is on the offer of amends remedy available in defamation proceedings.⁶³

123. Sections 2 to 4 of the Defamation Act 1996 set out a settlement process. This allows those who accept liability for a defamatory statement to avoid court proceedings by acknowledging their error and offering to make amends, so long as the offer is made before a defence has been lodged in a court action. Such a procedure offers efficiency by reducing the expense of raising an action and improves access to justice for the individual defamed because it reduces the time in which they need to wait in order to obtain vindication of their reputation. For the defender who cannot put forward a substantive defence, the procedure provides an alternative path to resolution of the dispute. The court is able to enforce the terms of settlement including, where necessary, determining the level of compensation.

124. The publisher of an allegedly defamatory statement can make an offer of amends and the offer may either be in relation to the statement generally or in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys (known as a qualified offer).

125. If the offer is accepted the pursuer may not bring (or continue) defamation proceedings in respect of the publication concerned against the defender, but they are entitled to raise proceedings in court in order to enforce the offer to make amends.⁶⁴

126. There is no period laid down in statute within which an offer to make amends must be accepted (or rejected), but the legislative policy behind the procedure is clearly to encourage early settlement of claims. During the reform project, the Commission received responses to the effect that the offer to make amends procedure has been useful in practice, thereby facilitating the early settlement of disputes.

127. It was pointed out by some that the interaction between the offer of amends procedure and the threshold test of serious harm could undermine the aim of settling disputes early. The argument put forward by these respondents is that in making an offer of amends the defender is at the same time admitting that there has been serious harm to the reputation of the aggrieved party. If this were the case, the defender would be denied the opportunity to make pleadings on this issue were court proceedings raised. If the view was taken that an offer to make amends is an

⁶³This section corresponds to discussion on the offer of amends remedy in chapter nine of the Commission's Discussion Paper and chapter six of their Report.

⁶⁴Unless it is a qualified offer, in which case proceedings continue in respect of that part of the action to which the offer does not apply.

admission of serious harm, then in marginal cases the procedure may not encourage alternative means of dispute resolution, and could instead incentivise court actions.⁶⁵

128. Against this discussion we ask the following question:

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

Summary of recommendations

129. The following is a list of the Commission's recommendations relevant to Part Five of this consultation paper:

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

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.

⁶⁵ The Commission respond to these concerns at paragraph 6.26 of their Report.

Part Six Types of verbal injury

130. The focus of this chapter is on reform of the Scots law of verbal injury (which the Commission recommend be renamed as ‘malicious publication’).⁶⁶

131. Defamation is not the only type of civil action available for an aggrieved party to seek redress for damage to reputation. Similar to defamation, verbal injury is a common law civil wrong that covers statements which are likely to be damaging, but the pursuer does not enjoy the presumption of falsity and must establish malice on the part of the defender. In other words, the onus of proof is now on the person bringing the action to prove what is ordinarily assumed in an action of defamation.

132. There are five recognised categories of verbal injury in Scots law:

- i. Slander of title;
- ii. Slander of property;
- iii. Falsehood about the pursuer causing business loss;
- iv. Verbal injury to feelings by exposure to public hatred, contempt or ridicule; and,
- v. Slander on a third party.⁶⁷

133. The scope of each category is poorly defined, and this causes uncertainty for the person bring the action.

134. The Commission have grouped slander of title, slander of property, and falsehood about the pursuer causing business loss together as they each can be said to relate to economic loss. They recommend the retention of the principles underlying these categories of verbal injury, but that they be restated in statutory form. This is on the basis that were these categories of verbal injury removed, then defamation would be the only actionable form of wrong. As a consequence, an aggrieved party who suffered this form of loss may be left with no means to seek redress for any damage caused.

135. The Commission, at the same time, take the opportunity to rename these types of actions as ‘malicious publications’ in order that they reflect more accurately the types of conduct they seek to address.

⁶⁶This section corresponds to chapters thirteen of the Commission’s Discussion Paper and chapter nine of their Report.

⁶⁷Paragraphs 13.10 to 13.25 of the Discussion Paper give a detailed outline of what the Commission understand constitutes each of these categories.

136. As for the other two types of action in verbal injury – those to feelings by exposure to public hatred, contempt or ridicule, and slander on a third party - the Commission recommend abolishing them, emphasising that they are obscure and have no practical utility.

137. In their draft Bill, the Commission make clear that a person (who may be a legal person) cannot raise court proceedings in a defamation action against someone other than the author, editor, or publisher of the alleged defamatory statement.⁶⁸ No such explicit provision is made with respect to actions raised in malicious publications. The Commission point out in their Report that in an action raised in malicious publication the defender can only be the person who has made the statement complained of.⁶⁹

138. In order to be successful in an action for malicious publication the pursuer must plead and prove that the statement complained of was malicious. In restating the categories of verbal injury in their draft Bill, the Commission has defined ‘malicious’ as a test with two branches:

- first, the pursuer must show that the statement complained of was presented as fact and was sufficiently credible so as to mislead a reasonable person;
- second, the pursuer must show either that the defender knew the statement was false (or was indifferent as to its truth) or that the statement was made with malicious intention.

139. A respondent to the Commission’s reform project suggested that the draft ‘indifferent as to its truth’ was too low a bar while at the same time recognising that, at common law, ‘malice’ is a higher bar.

140. Against this discussion we ask the following question:

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

Summary of recommendations

⁶⁸See section 3 of the draft Bill.

⁶⁹See para 9.25 of the Commission’s Report.

141. The following is a list of the Commission's recommendations relevant to Part Six of this consultation paper:

42. The principles underlying the three categories of verbal injury which relate to economic interests (that is, 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.

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

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 (i.e., statements causing harm to business interests, statements causing doubt as to title to property and statements criticising assets).

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

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.

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

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.

Part Seven Limitation and the multiple publication rule

142. The focus of this chapter is on two interlinked features of Scots law in defamation: the limitation period to which defamatory proceedings are subject and the multiple publication rule.⁷⁰

143. A fundamental feature of most civil law systems is that litigation should, if it is to be initiated at all, be done so promptly as it is conducive to legal certainty.

144. Under Scots law, proceedings in defamation must be commenced within a three year period. This is referred to as a limitation period. The limitation period begins on the date on which the cause of action *accrued*; the cause of action 'accrues' on the date on which the publication first comes to the notice of the person bringing the action. For example, if an article is published online at one date and then comes to the attention of the person bringing the action one year later, the date of accrual is the latter date. The intervening period of one year does not matter when calculating the period of limitation. The period of three years is consistent with the limitation period in actions of damages in Scotland. The court can choose to waive the limitation period in the interests of justice.

145. A cause of action accrues to each individual publication of defamatory material, even if it is the same as that previously published (or substantially so) and each cause of action has its own separate limitation period. This is often referred to as the multiple publication rule. In other words, each time a publication is read, sold or otherwise republished, a new limitation period begins from the date of the republication. Theoretically, the author of an allegedly defamatory statement could have a defamation action raised against them many years after the statement complained of was first published. They could, in other words, be subject to perpetual liability.

146. In England and Wales, the 2013 Act replaced the multiple publication rule with a single publication rule. There is a single limitation period of one year in respect of the same publication of a statement complained of as defamatory, and the date of accrual is the date of first publication. Republication of the same (or similar) material complained of as defamatory does not alter the date of the beginning of the limitation period, thereby eliminating the possibility of perpetual liability.

147. It has been a criticism of the single publication rule that the limitation period is tied to the date of *first* publication. It is easy to imagine a situation in which a pursuer has little time left in which to raise proceedings because they have only just become aware of a defamatory statement a significant time after its first publication.

⁷⁰This section corresponds to chapter ten of the Commission's Discussion Paper and chapter seven of their Report.

148. A more fundamental criticism of the single publication rule is that it does not take into account the effect that republication of a potentially defamatory statement may have. Damage could be inflicted each time a defamatory statement is made (or repeated), not solely in the first instance. For example, where a defamatory statement is first shared with a readership of 15 people, and is then republished 2 years later to a readership of 10,000 (including family, friends, and one's peers) it could be said that the harm done is greater upon republication. Of importance is not necessarily when the statement was made, but rather the impact of each publication.

149. The Commission recognise this issue and, in proposing a single publication rule with a 1 year limitation period for Scotland, have recommended that the court can take into consideration such facts when deciding whether repeating a defamatory statement should be treated as publication or republication.

150. It was recognised by the Commission that the courts currently have the power to dis-apply the limitation period.⁷¹ Where the courts consider it equitable to do so, it may allow the pursuer to bring the action, thereby over-riding the limitation period.

151. In recommending that the period of limitation is reduced to 1 year, the Commission were of the view that to have different periods of limitation in different jurisdictions of the UK would increase the amount of actions raised in Scotland.⁷² Litigants from other jurisdictions within the UK could seek vindication in Scottish courts in circumstance where their claims are time-barred in others.

152. Some respondents to the Commission's reform project, however, note that in practical terms there has been no significant increase in defamation actions raised in Scotland since the introduction of the 1-year limitation period in England and Wales, indicating that litigants are not turning to Scottish courts for recovery of damages in an action that would otherwise be statute-barred in their habitual jurisdiction.

153. Against this discussion we ask the following question:

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

154. The Law Commission for England and Wales recommended, in a 2001 report, that the period of limitation in defamation claims in that jurisdiction be raised from 1 year to 3 years, and with an added provision that judicial discretion to allow

⁷¹See section 19A of the Prescription and Limitation (Scotland) Act 1973 and paragraph 10.11 of the Commission's Discussion Paper.

⁷²The period of limitation for claims in defamation in England and Wales has been 1 year since 1996 – see paragraph 7.18 of the Commission's Report.

time-barred claims be removed.⁷³ The primary reason for such a change was that litigants had insufficient time in which to prepare their cases. In particular, it was felt that claimants could not carry out all the factual investigations necessary to serve a fully detailed statement of claim.⁷⁴ These recommendations have not been implemented.⁷⁵

155. It could be added that a 1-year limitation period would not help to encourage alternative ways to resolve a dispute. Research has suggested that the primary goal for a pursuer bringing defamation proceedings is swift vindication of their reputation,⁷⁶ a result that could be achieved more swiftly and at less cost than raising court proceedings. Yet to limit the time within which such proceedings can be raised could act as a disincentive to pursue these alternative methods, albeit that courts do have discretion to allow actions to proceed outside of this limitation period.

156. As mentioned above, the Courts have discretion to override the limitation period where it seems equitable to do so, and they have exercised this power on numerous occasions over the years,⁷⁷ although commentators have suggested that the approach taken by Scottish courts in the exercise of this discretionary power has developed over recent times.⁷⁸

157. If the Commission's proposed recommendation to reduce the limitation period to one year and tie the date of accrual to the date of first publication was proceeded with a variation on the approach would be to extend the limitation period so that it takes into account parties' efforts in trying to seek resolution by means other than court action.⁷⁹ For instance, the time parties spend in formal (rather than informal) mediation or arbitration could be taken into account when calculating the period of limitation. The time to be taken into account, however, may not always be clear or easily calculable.

⁷³ See paragraph 3.98 of the Law Commission's paper *Limitation of Actions* available at http://lawcom.gov.uk/app/uploads/2015/03/lc270_Limitation_of_Actions.pdf

⁷⁴ See para 3.98, as read with paras 4.38-4.46.

⁷⁵ In 2002, the then Government accepted the Law Commission's recommendations in principle, subject to further consideration of certain aspects of the report. On 19 November 2009, however, the Government announced to the House of Commons that it would not include the recommendations in the Civil Law Reform Bill and would not be taking the reforms forward, see <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm091119/wmstext/91119m0003.htm#09111944000027>

⁷⁶ See Bezanson, 'Libel Law and the Realities of Litigation: Setting the Record Straight' (1985) *Iowa Law Review*, 71, 215-233; 'The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get' (1986) *California Law Review*, 74, 789-808.

⁷⁷ See for example *Comber v Greater Glasgow Health Board*, 1989, SLT 639.

⁷⁸ See Eleanor J Russell, "Denying the discretion — a trilogy of cases" 2013 J.R. 95.

⁷⁹ See the report by the Justice Committee 'I won't see you in court: alternative dispute resolution in Scotland' at page 3 for a description of various types of dispute resolution, available here <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2018/10/1/I-won-t-see-you-in-court--alternative-dispute-resolution-in-Scotland/JS052018R9.pdf>

158. The effect of any such provision would be that time does not run while any arbitration or formal mediation is ongoing – in other words, the limitation period would be suspended for the duration of such dispute resolution. This may help encourage parties to explore options other than court action by giving them time to do so.⁸⁰

159. Against this discussion we ask the following 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?

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?

Summary of recommendations

160. The following is a list of the Commission's recommendations relevant to Part Seven of this consultation 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.

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.

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

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

⁸⁰ Section 19CA of the Prescription and Limitation (Scotland) Act 1973 already makes provision for this with respect to arbitration. This option would seek to extend this provision to other forms of dispute resolution.



Annex A Respondent Information Form

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:
<https://beta.gov.scot/privacy/>

Are you responding as an individual or an organisation?

Individual Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes No

Annex B 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.

Question 2

Do you consider defamation should be defined in statute?

Yes

No

Please explain your answer.

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.

Question 4

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

Yes

No

Please explain your answer.

Question 5

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

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.

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.

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.

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?

Question 10

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Annex C Handling of personal data

The data protection legislation has recently changed in the UK with the introduction of the Data Protection Act 2018. It gives you greater powers to protect your own privacy, and places greater responsibility on those processing your data for any purpose. The following is to explain your rights and give you the information you will be entitled to under the new legislation. Please note that this section only refers to your personal data (your name, address and anything that could be used to identify you personally) not the content of your response to the consultation.

The identity of the data controller and contact details of our Data Protection Officer

The Scottish Government is the data controller. The Data Protection Officer for the Scottish Government can be contacted at dpa@gov.scot.

Why we are collecting the data

Your personal data is being collected as an essential part of the consultation process, so that we can contact you regarding your response and for statistical purposes. We may also use it to contact you about related matters.

Legal basis for processing the data

Part 2 of the Data Protection Act provides that as a government department, the Scottish Government may process personal data as necessary for the effective performance of a task carried out in the public interest e.g. a consultation.

With whom we will be sharing the data

We will not be sharing personal data outside of the Scottish Government.

Your rights, e.g. access, rectification, erasure

The data we are collecting is your personal data, and you have considerable say over what happens to it. You have the right:

- a) To see what data we have about you;
- b) To ask us to stop using your data, but keep it on record;
- c) To have all or some of your data deleted or corrected, and
- d) To lodge a complaint with the independent Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law. You can contact the ICO at <https://ico.org.uk/>, or telephone 0303 123 1113.

The Scottish Government will not send your personal data outwith the European Economic Area. This data will not be used for any automated decision making. This data will be stored in a secure government IT system.



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