OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 1 September 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 1 September 2020

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JUSTICE COMMITTEE
19th Meeting 2020, Session 5

CONVENER

*Adam Tomkins (Glasgow) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP)
*John Finnie (Highlands and Islands) (Green)
*James Kelly (Glasgow) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Dr Stephen Bogle (University of Glasgow)
Ash Denham (Minister for Community Safety)
Annabelle Ewing (Cowdenbeath) (SNP)
Duncan Hamilton (Faculty of Advocates)
Dr Bobby Lindsay (University of Glasgow)
John Paul Sheridan (Law Society of Scotland)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Virtual Meeting

Scottish Parliament

Justice Committee

Tuesday 1 September 2020

[The Convener opened the meeting at 10:00]

Interests

The Convener (Adam Tomkins): Good morning, everyone, and welcome to the 19th meeting in 2020 of the Justice Committee. We have received apologies from Alasdair Allan MSP, who cannot be with us. In his place, we are joined by Annabelle Ewing, whom I welcome to the meeting and invite to declare any relevant interests.

Annabelle Ewing (Cowdenbeath) (SNP): I draw members' attention to my declaration in the register of members' interests, wherein they will note that I am a member of the Law Society of Scotland and hold a practising certificate, albeit that I am not currently practising.

Decision on Taking Business in Private

The Convener: Thank you. Our first item of business is to agree to take item 6 in private. I do not see any member disagreeing, so we agree to take item 6 in private.

Subordinate Legislation

Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2020 [Draft]

10:00

The Convener: Agenda item 2 is consideration of the draft Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2020. I refer members to paper 1, which is a note by the clerk on the affirmative Scottish statutory instrument.

I welcome Ash Denham, the Minister for Community Safety, and her officials Kieran Burke and Jo-anne Tinto. If any members want to ask the minister a question, I ask them to type R in the BlueJeans chat box. I invite the minister to make a short statement on the instrument.

The Minister for Community Safety (Ash Denham): Good morning. The regulations will amend the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 to provide that assistance by way of representation—ABWOR—can be made available without means testing in respect of persons seeking to appeal a decisions of the Scottish ministers to refuse an application to disregard a conviction for an historical sexual offence.

The Historical Sexual Offences (Pardons and Disregards) (Scotland) Act was passed by the Scottish Parliament on 6 June 2018, and its provisions commenced in the latter part of 2019. Committee members will be aware that the purpose of the act is to pardon persons who were convicted of certain historical sexual offences and to provide a process for convictions for those offences to be disregarded. The information about such convictions that is held in records will no longer show up in a disclosure check. Relevant historical sexual offences relate to consensual sexual activity between men, which was once criminalised but is no longer illegal.

A disregard is sought, in the first instance, by way of an application to the Scottish ministers. In the event that an application is rejected, there is the opportunity of review, which is provided by an appeal to the sheriff court. When an applicant wants to be represented in court for such an appeal, the regulations provide that non-means-tested ABWOR is available, subject to the Scottish Legal Aid Board being satisfied that the case has merit. That will help to ensure that it is as straightforward as possible to apply for, and to be granted, legal representation in such cases, while, at the same time, mitigating against cases that are without sufficient merit proceeding on the basis of being wholly publicly funded.

I am happy to take any questions from the committee.

The Convener: Thank you, minister. That was very clear. I am very grateful.

John Finnie (Highlands and Islands) (Green): I warmly welcome the regulations. An historical wrong is being righted. What has prompted this very welcome move by the Scottish Government? What is the extent of the problem—if, indeed, a problem exists—or have the regulations been introduced to pre-empt potential problems?

Ash Denham: The Scottish Government wants it to be as simple and straightforward as possible for individuals to progress applications for pardons and disregards for historical sexual offences. The reason why we are introducing the measure is that we do not want people to have to be subject to the normal financial eligibility test. There are the two other tests that I mentioned in my opening statement, but people will not be subject to the financial eligibility test, because we want to make the process as easy as possible for them.

John Finnie: Has there been a problem? What has prompted the regulations? I say again that they are very welcome as a way of providing ABWOR to individuals who have been the subject of an historical wrong, but has there been a problem with that?

Ash Denham: There has not been a problem yet. To date, eight applications have been made for disregard, and six of them were approved. One did not actually need to progress as, after a check, it was found that there were no longer any records of conviction, and one case is still pending, due to coronavirus lockdown preventing access to documents. We imagine that the provision will be very little used, given how many applications have been processed so far. The 2018 act requires us to introduce the measure, which was developed with stakeholders to make the process easy and straightforward, as I said.

The Convener: As no other member wishes to ask the minister questions about the instrument, we can move to its formal consideration. The Delegated Powers and Law Reform Committee has considered and reported on the instrument and had no comments. I ask the minister to move motion S5M-22554.

Motion moved,

That the Justice Committee recommends that the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2020 [draft] be approved.—[*Ash Denham*]

Motion agreed to.

The Convener: Do members agree to delegate to me the publication of a short factual report on our deliberations?

Members *indicated agreement.*

The Convener: I thank the minister and her officials for joining us. I hope that all our business is conducted so expeditiously.

Defamation and Malicious Publication (Scotland) Bill: Stage 1

10:07

The Convener: Agenda item 4 is to continue our consideration at stage 1 of the Defamation and Malicious Publication (Scotland) Bill. We will have two panels of witnesses on the bill this morning. The first panel is Duncan Hamilton from the Faculty of Advocates and John Paul Sheridan from the Law Society of Scotland. I warmly welcome them to our meeting this morning. I thank both of them for their written submissions, which, as always, are available on the committee's web pages. I invite them to make a short opening statement if they wish to do so, before we move to questions.

Duncan Hamilton (Faculty of Advocates): Good morning. As a former member of the committee, I know that the greatest gift that I can give you is brevity, so I will make only two points at this stage.

The first is on the general approach to the law in this area. Obviously, the Faculty of Advocates represents a body of practitioners who act for media interests and for private individuals. I make that point simply to say that what I hope to bring to the committee is the experience of practice both in defending freedom of expression and, where necessary, in restricting it. From reading the evidence that was given to the committee last week, I thought that it might be helpful today to have that balance and to understand that there is no monopoly on the definition of public interest in relation to either side of that argument—both have a legitimate role.

My second point is a general one in relation to the approach that the faculty has taken to the bill. We start from the position of the existing rights and responsibilities, and we simply invite the committee to remember that the onus is on the Government to set out what is deficient about the current position and why what is proposed will improve the situation. Again, if there is one key word in all of this, it is "balance". Some of the concerns and issues that we will go on to discuss arise from the sense in the faculty that some aspects require greater balance.

The Convener: Thank you—that is helpful.

John Paul Sheridan (Law Society of Scotland): I will be brief. Similarly to Mr Hamilton's approach, in advance of the committee meeting and the preparation of its written submission, the Law Society of Scotland convened a round-table event for all practitioners

who specialise in defamation, both in the media and those who represent private individuals. We seek to bring a balance to the debate between the interests of private individuals and the media.

We welcome this important and useful bill. In particular, the Law Society welcomes the fact that the bill will make the law of defamation much more accessible to the public generally: when a law is codified in certain places, it is much more accessible than trying to search through ancient case law. I have nothing further to add at this stage.

The Convener: That is very helpful. Thank you both very much.

I will move on now to questions. I remind members that if they have any supplementary questions they should type R in the chat box. Could every member please address their questions to a particular witness so that the witnesses know who should speak first and the broadcasting team know who to go to first.

I will open with Liam McArthur.

Liam McArthur (Orkney Islands) (LD): Having fallen foul of that process probably worse than anyone else last week, I take that reprimand in the spirit in which it is intended.

I thank Mr Sheridan and Mr Hamilton for their opening comments and for providing a perfect segue into the line of questioning that I will pursue. Last week, we heard from those with a media interest principally, but also from an academic perspective. Therefore, the focus was very much on the chilling effect that is alleged to surround the current laws on defamation. Those witnesses seem to have been looking for greater protection for freedom of expression, and their feedback seemed to have been fairly positive. Both of you have alluded to the balance that needs to be struck in the bill, and the committee would recognise that.

I am interested in Mr Hamilton's perspective on whether that balance has been achieved. He intimated that he does not necessarily believe that that is the case. It would be interesting to know where he sees the imbalance in the way that the legislation is currently framed.

Duncan Hamilton: In all this, the important starting point is that we are dealing with the rights to reputation and freedom of expression, which are both qualified rights. It is accepted that neither one of those rights trumps the other; there is very clear case law on that. Therefore, it follows that there will always have to be a chiselling of those rights in different areas, depending on the facts and circumstances of any given scenario.

It seems to us that, in terms of the bill, a very clear policy decision has been taken, understandably, to promote the freedom of expression side, which we support. However, the safeguards and the checks and balances that are in the bill are diminished to a level that perhaps tilts the table too far. Any one of the following points supports that view. We say that serious harm is too high a test; the position on single publication is a difficulty; the one-year limitation, again, goes too far on the side of freedom of expression; and the position in relation to secondary publishers is a difficulty.

That is not because the Faculty of Advocates is looking to be difficult; it is simply because, as we look at this as lawyers who deal with the issues in practice, it is important to remember that individuals, quite properly, are looking for a remedy from their courts. Part of the responsibility of the Parliament, the committee and the faculty is to ensure that the balance of legislation recognises the rights of those individuals. Everybody is in favour of freedom of expression until they are defamed, at which point that person takes a different view. When individuals look for a remedy, they need to know that the law that has been passed is balanced.

Liam McArthur: That is helpful. I will invite Mr Sheridan to give his view in a second.

You talked about how the balance may go too far the other way. Is it accepted that—as things currently stand—there is an imbalance that leans towards the protection of reputation and works against freedom of expression? It was referred to in last week's evidence as a "chilling effect".

You seem to be arguing that, although the pendulum should perhaps swing back towards freedom of expression, it may have swung too far in that direction.

10:15

Duncan Hamilton: Instinctively, as someone who is involved in media law, I promote and defend freedom of expression in court.

We have an opportunity to update the law, but that does not mean that the balance was necessarily wrong. There is an on-going and necessary tension between article 8 and article 10 of the European convention on human rights, between the right to a private remedy and the right to general freedom of expression. The role of Parliament is to try to create a legal framework within which those rights can be examined in the context of any individual case.

You asked whether we start from the position that a greater weight should be put on freedom of expression. The answer is not necessarily. The courts were already bound to look at freedom of expression and they already do so. The courts

give substance to those rights day and daily. If we are looking at refreshing and codifying some of that, we should not start from a position of saying that there is already an imbalance.

The "chilling effect" is a catchy phrase. It is a real thing in certain circumstances, but the phrase should not be adopted by those who want to say that freedom of expression trumps everything and that any attempt to restrict freedom of expression for any purpose has a chilling effect. One person's chilling effect is another person's opportunity to have a remedy as a private individual.

Liam McArthur: That is helpful. To give last week's witnesses their due, they gave evidence of the chilling effect as it applied and had been experienced in particular spheres.

Mr Sheridan, what is your take on those questions? A point was made last week about tactics that are often deployed, such as sending letters as a shot across the bows in the hope of discouraging publication. The letters may not suggest that there is any defamation, but they are used to disincentivise people from publishing.

John Paul Sheridan: The starting point is that we must bear in mind what the defamation remedies are for. They are not about protecting assets and income; they are about protecting reputation. We must look at this in that context of reputational protection. A reputation can take a lifetime to build up but can be quickly lost.

In that context, when we look at balance, the Law Society's position is that the balance appears to be broadly right. There are political decisions to be made. The thrust of the bill gives greater protection for publication. That is a perfectly valid approach. The Law Society thinks that the difficulty comes when one combines a number of factors, as that shifts the balance in favour of the media organisations.

Duncan Hamilton listed four areas, all of which tend to mitigate—[*Inaudible*.] There is the serious harm test, the one-year limitation period, the single publication rule and secondary publishers. All those are weighted in favour of one side rather than the other. Regarding the chilling effect, there is a lot of detail in sections 6 and 7 to define publication in the public interest and honest opinion. From one point of view, those alone provide adequate protection against the chilling effect.

I appreciate the practical effect that some private individuals have access to greater assets and legal advice than others. That is not something with which the bill could deal, but is more a matter of provision of equality of arms to individuals, which could be dealt with in other ways—through legal aid or otherwise. To a large extent, the bill will not do a great deal in relation to that issue because there will always be strong or wealthy individuals who want to get around it.

Liam McArthur: We will come to the issues of serious harm, secondary publishing and so on. What do you believe to be the implications of the bill for the rights of privacy and protection of reputation?

John Paul Sheridan: For the four areas that I have listed, the rights of privacy will, in my view, limit an individual's ability—[*Inaudible*.]—protection of their reputation.

Duncan Hamilton: Yes. By definition, relaxation of the protections for somebody's ability to enforce a defence of their reputation is a weakening of their position.

I want to go back to your point about pre-litigation correspondence and letters, because I saw that it was raised last week. I say again that we need to be careful in that situation. First, pre-litigation correspondence and engagement are actively encouraged in every area of law, because of their capacity to resolve matters without their going to court.

Secondly, have we got to the stage at which somebody is not able to instruct a solicitor to write a letter to defend their position or to put on notice somebody whom they believe has defamed them, after taking legal advice on the matter?

Thirdly, the idea that the people who are in receipt of such letters are not capable of dealing with them without their being suddenly put in a year-long state of fear and panic is simply not what happens. A regular stream of correspondence goes back and forth between solicitors and media entities: that is the very stuff of media litigation. I even saw a suggestion that an additional amendment, which would impact on the pre-litigation position, should be lodged. I strongly urge the committee to be cautious in going into that territory.

Liam McArthur: Mr Hamilton has made a fair comment. There is no expectation that the committee should go down that route, but a distinction would be made between larger-scale media outlets, which deal with such matters as matters of customer practice, and others for which the impact of the letters could be different.

The Convener: In the view of our witnesses, could the statute define defamation, or should judges continue to define defamation in common law?

Duncan Hamilton: At the moment, our position is that understanding what is meant by "defamation" is not difficult—the courts implement the meaning daily. However, we understand the desire to define it in the context of an act whose purpose is to put it all in one place.

The committee is aware that the difficulty of legislation is that it sometimes takes away flexibility in such matters—flexibility that can be useful. The common-law test can be put into statute. Would that improve matters? Not particularly. Would it detract? Not particularly.

John Paul Sheridan: I broadly agree. I go back to my opening remarks about accessibility and where it is clear from the statute for members of the public what the law is—[*Inaudible*.]—a lot easier for accessibility purposes. However, that would not change the test and there is no particular reason to do it beyond that.

The Convener: That is helpful. Thank you. What about the actual definition in section 1? Does Mr Sheridan have concerns about how defamation is to be defined in the legislation?

John Paul Sheridan: No. That really reflects the common-law test, so the Law Society has no difficulty with that.

The Convener: I will ask Mr Hamilton the same question. Concerns have been brought to the committee's attention about some of the language that is used in the definition of defamation in section 1 of the bill. There is reference to "ordinary" people, and the requirement that opinion in society generally be lowered appears to have been removed. I know that Rona Mackay wants to ask questions about serious harm so, absent the serious harm element of the definition, do you have concerns about how defamation is defined?

Duncan Hamilton: All definitions are open to criticism, and I accept that both points could be concerning. However, equally, if we were to put in statute the phrase

"right-thinking members of society",

which is part of the existing definition, that would also be open to criticism.

The courts have adopted a range of tests that all come to broadly the same place. On the existing definition of defamation, in the context of how it works in practice, I have never encountered the court being unclear or there being a real dispute between parties about that definition. That being the case, to stay as close as possible to that makes some logical sense.

The Convener: That is really helpful. Thank you.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning, panel. I want to return to serious harm and the new threshold for that. You will know that our witnesses last week were largely supportive of it. I will go back to something that Duncan Hamilton said about pre-litigation letters. Are you saying that none of them is vexatious or frivolous? You alluded to the fact that they are common practice, but are they necessary? Would the new threshold have an impact on the less-necessary ones?

Duncan Hamilton: I cannot see why that would be the case on pre-litigation correspondence, specifically. I am not aware of solicitors in the field sending vexatious letters; that is not what solicitors do. It is perfectly true that one might send a letter on behalf of their client that does not ultimately reflect what a court would find, and that one might seek to assert a position on behalf of the client. So be it: that is in the nature of what solicitors do in their clients' best interests, and that is how they are bound to act. However, that will not change as a result of having a serious harm test in legislation because, if a solicitor is going to send a letter for that purpose, they will send it anyway. The serious harm test kicks in only as a matter of law when a further stage is reached.

I do not really understand the pre-litigation point, because it must be right that people have the opportunity to assert their right through their instructed solicitor, regardless of any test being adopted in statute.

Rona Mackay: Before I ask Mr Sheridan the same question, I want to ask about the threshold and how reaching it can be demonstrated. What are the criteria for that threshold? You mentioned reputational damage, which is, of course, pretty obvious. Would loss of earnings or any other factor be included? Who would define that? That is a question for Mr Hamilton.

Duncan Hamilton: I beg your pardon—I thought that you were waiting for Mr Sheridan.

Rona Mackay: That is fine. I will come on to Mr Sheridan.

Duncan Hamilton: All those things would be included. I am sorry: do you still mean in the pre-litigation correspondence?

Rona Mackay: No. I have moved on to the serious harm threshold. How would that be defined? Who would make the judgment about whether there was reputational damage or otherwise?

Duncan Hamilton: The court, ultimately, would do that. The Supreme Court has held that there must be two parts to that: the serious harm that arises from the words, and evidence of actual impact based on actual factual material. That could be across a wide range of things, including reputational or patrimonial loss.

10:30

Before we move on to that aspect, there is, from the faculty's perspective, an important point to

make about the concept of serious harm. I think that the point is made in the written submission. The committee will remember a phrase from 1999, when the Parliament started. It is

"Scottish solutions to Scottish problems".

What we are dealing with here is an English solution to an English problem. It was brought in on the back of various cases—including Jameel v Wall Street Journal Europe Sprl and Thornton v Telegraph Media Group Ltd—and arose from a sense that unmeritorious or frivolous claims were being brought forward; hence the need for a higher threshold. From the position of Scottish practice, that has simply not been the case, so it would be the opposite of adopting a Scottish solution to a Scottish problem. Therefore, before we go any further and simply adopt it, I stress that, in my view, it is not an appropriate fit.

Rona Mackay: Thank you. That is interesting. I will ask John Paul Sheridan a question that is along the same lines. What is your view on pre-litigation stage letters, and on the threshold for the serious harm test?

John Paul Sheridan: On pre-litigation correspondence, I have two points to make. First, I agree with Duncan Hamilton, in that the serious harm test does not really come into correspondence between solicitors prior to litigation.

That is qualified, however, by my second point. The serious harm test potentially comes in and becomes relevant if a publisher or a journalist makes an offer of amends. We might come later to whether making an offer of amends is, of itself, an implicit acceptance that there was serious harm. The offer of amends being accepted would prevent the argument from being taken in court.

The general point in pre-litigation correspondence is that one should not think that the serious harm test—[*Inaudible*.]

On that second point, the wording for the serious harm test has, as Duncan Hamilton suggested, been taken directly from the Defamation Act 2013, which applies in England. Relatively recently, that went to the Supreme Court, which has held that there has to be, as a matter of fact, evidence of reputational loss or of serious harm to reputation or financial position.

That was designed in England because of suggestions of libel tourism, and that was proceeding through—[*Inaudible.*]—without merit in the English courts. I echo Duncan Hamilton; there is no evidence that that is an issue in Scotland.

The legislation and the test of serious harm have been in place in England for a number of years, but there has been no uptick in Scottish defamation proceedings during the period. There are probably a number of reasons for that, not least of which is the fact that our courts tend to be a bit less generous with awards of compensation. The problem is specific to English libel courts and, as far as the Law Society is concerned—I sense that the Faculty of Advocates agrees—it does not apply in Scotland at all.

Rona Mackay: Thank you.

From what you and Duncan Hamilton have said, is there really a need for the legislation? Does the definition from the Defamation Act 2013 need to be refined?

John Paul Sheridan: To go back to the point that I made at the start, I say that it is useful that there is codification of certain aspects. There is also a point to be made about accessibility.

The wider problem with defamation, which the bill does not address, is the issue of internet publication. It deals with it to a limited extent, in the sense of retweeting—

Rona Mackay: We will come on to that.

John Paul Sheridan: The Law Society is in favour of the bill, but queries certain aspects, including whether it gets the balance right in the serious harm test. Our position is that it goes a little bit too far.

Rona Mackay: Thank you.

The Convener: Thank you very much. Liam McArthur has a brief supplementary question.

Liam McArthur: I will pick up on points that were made by Mr Sheridan and Mr Hamilton. Mr Hamilton referred to

"an English solution to an English problem".

Obviously, the bill has emerged from work that was carried out by the Scottish Law Commission. Is it your view that the Scottish Law Commission has misunderstood the issues that need to be addressed, or does the bill deviate from what the commission came up with in its deliberations?

Duncan Hamilton: Remember that the Scottish Law Commission drew heavily on the 2013 act, so the history of the issue goes back to 2013 when that act was brought in in England. The Scottish Government at that time decided not to follow that path, so a gap was created. The Scottish Law Commission quite properly decided to fill the gap and to examine the issue.

The commission looked very closely at the 2013 position; there was a fork-in-the-road choice. I made the point to the commission at the time that in Scotland we do not have sufficient defamation cases for proper healthy development of jurisprudence. Ireland, for example, has booming defamation practice, so it has nothing to do with the country's size.

We can either develop a system that is healthy, or we can accept that Scotland has so few defamation cases that we should take from England an off-the-peg position. There is an argument that if Scotland does not follow aspects of the English legislation, it will, because of the absence of cases, end up out of kilter and difficulties will arise. That is a perfectly legitimate position.

I just want that to be a clear choice that people make with their eyes open. We cannot simply accept that because it is in the 2013 act and others have looked at it in that context, it is appropriate in this context. The faculty's clear position is that we know that the serious harm test is inappropriate because it has arisen from circumstances that are not present in Scotland. We do not have too many cases; we have too few.

The Convener: That point has been thoroughly made, thank you very much.

John Finnie: I will first ask Mr Sheridan a question. It is about the Derbyshire principle, which is currently recognised in Scots law. The bill creates a version of it that includes specifically preventing public authorities and councils that hold a "majority of shares" or that appoint a majority of members, or that otherwise exercise significant control, from bringing proceedings. That would cover arm's-length external organisations.

However, the bill would create an exemption for businesses and charities that deliver public services only "from time to time". We know that the landscape of public services has altered considerably over the years, including that we now have private prisons, for instance. As with other aspects of the bill, there seems to be a—[*Inaudible*.]—in the media. Legal correspondents in the media—if we can call them correspondents—are concerned that the exemption would prevent proper public scrutiny and that it could, because of the different ways that local authorities configure their workloads, create a postcode lottery and undermine the Derbyshire principle.

Legal respondents to the call for views say that the implications of section 2 are not clear and could be wider than they are currently. For instance, they might prevent housing associations, universities and others who do public functions such as lawyers and nurses from raising actions.

Could I have first Mr Sheridan's then Mr Hamilton's opinion on the provisions in the bill around the Derbyshire principle?

John Paul Sheridan: First, I say that we are very much in favour of retention of the Derbyshire principle, but the problem that we have identified—it is set out in more detail in our written submission—is about the drafting and how the definition is extended. On the matter of principle, broadly speaking the reason why public authorities were not able to raise defamation proceedings was because, ultimately, public scrutiny of public decisions was to be encouraged, and decisions about that should be at the ballot box rather than in the courts, in relation to defamation. That is broadly the situation.

The difficulty that arises now is because of the multifarious nature of delivery of public services. There could be an anomalous situation if a private body was carrying out public functions, whether in respect of prisons, housing homeless people or whatever. In one respect, the company would be able to protect its reputation with defamation proceedings, but in respect of its performing public functions it would be unable to do so.

The Law Society has a particular problem with the definition of what is to be covered. Does it include universities, housing associations and even individual civil servants or nurses? The provision in the bill is oddly drafted. I am not sure that there is a good solution, but the drafting needs to be tightened up substantially.

John Finnie: Ironically, people may look to the likes of yourself and the Law Society to provide alternative wording, so it may be time to reflect on that.

John Paul Sheridan: We have made detailed comments in the written submission about that and about the various sections that we think need to be amended.

Duncan Hamilton: I agree with pretty much everything that Mr Sheridan said and with the point that you raised about the question of "from time to time". If a wholly private company is not a public authority because it carries out public functions "from time to time" under section 2(3), presumably if it did so more often, it would be caught. That would create the potential anomaly of a private company being able to raise proceedings in relation to its work in the private sector but not its work in the public sector. We absolutely accept and embrace the fact that the principle should be enshrined, but there is an issue with those definitional sections that needs to be looked at.

In relation to the earlier part of section 2(3) about "non-natural" persons, all the points that you made about that are right, but by definition there are presumably also natural persons. In section 2(2), for example, the phrase "functions of a public nature" creates some degree of question mark. One of the people on the panel that looked at it at the Faculty of Advocates raised the question of general practitioners: what does a GP do in that position? Are they performing "functions of a public nature"?

Section 2(5) states:

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

That does not necessarily clarify the situation. I know what the bill is trying to do, but I am not sure that taking it all together makes it very clear. Mr Sheridan made the very good point that part of this exercise is about making things accessible, clear and well understood. However, I do not think that anyone would look at that section and say, "Aha, I now understand what you mean."

John Finnie: That is helpful. Thank you both very much.

The Convener: I want to come back to that in a minute, but I will bring Annabelle Ewing in first.

Annabelle Ewing: On a related subject to do with eligibility to raise an action, I understand that last week Scottish PEN suggested, as have media respondents, that the right of a business to sue should be limited to businesses with fewer than 10 employees. That call has been motivated by what people term an equality of arms. I would be interested in the views of Duncan Hamilton and John Paul Sheridan on the principle behind that and the threshold being proposed.

Duncan Hamilton: We cannot support that. We do not really understand it. There is no position in principle that supports it. There is nothing magic about the number 10—or 20 or 30. If a company has the right to raise proceedings as a matter of legal principle, we see no basis whatever for the suggestion of a threshold of 10 employees. I cannot give you a legal principle behind that because I do not think that there is one.

John Paul Sheridan: I have nothing to add. I agree entirely about equality of arms. Some media organisations who might be recipients would have at least the same financial clout behind them as any business would, so I do not even think the point about equality of arms and certainly nothing from point of principle would support that.

10:45

Annabelle Ewing: Thank you for those unequivocal responses. I understand that those who propose such an approach cite what they term to be the Australian model which, they suggest, is exactly that the right to sue is excluded for businesses with 10 or more employees. Is either of you aware of that?

Duncan Hamilton: I have to say that I was not aware of it before I read the suggestion. There is also slight confusion about equality of arms. Lots of parties that go to court start from a position of not being equal in resources. That is why other things come in to level the playing field and ensure that there is equality of arms, whether it be legal aid or anything else. Unless we say that categories of people in a range of areas of civil law are not to be allowed to raise actions because they are just too big and too successful, I do not see where the proposal takes us. With the greatest of respect, it is a total red herring.

John Paul Sheridan: I have nothing further to add to that.

The Convener: Can I just go back to the question of the so-called Derbyshire principle in section 2, which the panel was exploring with John Finnie a few minutes ago? I hear the force of the point being made that section 2 is perhaps not the most elegantly drafted section of the bill and that it raises as many questions as it answers, given how broadly the scope of the Derbyshire principle is drawn.

Perhaps Mr Hamilton can help me with this. If we think that section 2 is not very elegantly drafted, we can think about ways in which we can change it, and we might want to expand the scope of the Derbyshire principle or we might want to constrict it. We might want to move in either of those directions depending on what we think the principle is trying to do. What is the legal principle that underpins the rule in Derbyshire that public authorities may not sue in defamation? Is it that elected office-holders should expect their reputation to be assessed at the ballot box and not in the defamation courts? Alternatively, is it that we want to somehow protect those who deliver public services, however they do it, from the risk of litigation for defamation?

If we take the former view as the underlying principle behind Derbyshire, we might want to constrict its scope and its definition, and if we take the latter view, we might want a much more expansive definition. Mr Hamilton, what do you think of that?

Duncan Hamilton: I would have instinctively gone for the former view, simply on the basis that the judgment was trying to draw a distinction between appropriate accountability and the mechanism for that. It was part of the principle that there is freedom to criticise a public body in the exercise of its public functions, which is what creates the problem here. If it is right that I can criticise a public body in the exercise of its public functions, and those public functions are now to be outsourced to a private entity, surely I must be allowed to criticise the private body that is carrying out those public functions? If the idea is correct that the private body would not have the right to respond to that, but at the same time it could raise an action in relation to a private contract, then, whichever side you want to come down on—there is a perfectly legitimate argument for both—that is

a fundamental inconsistency that has to be addressed.

The Convener: Mr Sheridan, do you have anything to add to that?

John Paul Sheridan: No, not really. My understanding of the Derbyshire principle decision is that it was more about the former view, in that the accountability of elected representatives is at the ballot box. The delivery of services is a different matter. Elected representatives have always been able to sue for defamation in relation to allegations about their private lives or anything else, and that would be logically consistent with the approach that Mr Hamilton suggested.

The Convener: That is helpful—thank you both.

Rona Mackay: I want to go back to the subject of secondary publishers, which Mr Sheridan touched on earlier. The bill would prevent legal proceedings for defamation from being raised against someone who is not the author, editor or commercial publisher of the material, and it would create immunity for other parties who make defamatory material available, and in particular internet intermediaries. I know that Mr Sheridan believes that there are risks to that approach, particularly with regard to the internet, which is of course—[*Inaudible.*] What is your view on that? Is it only with regard to the internet that you have concerns about that section of the bill?

John Paul Sheridan: It is with regard to the internet. The way newspapers were passed around in the past was very different from the way news stories can be passed around the world now. It is partly about a combination of the provisions on secondary publications and some of the other provisions. For example, if someone with no assets was in effect put up to publish a story and then a substantial media organisation became the secondary publisher but was able to avoid liability because it was simply repeating or forwarding something that someone else had published, that could lead to injustice.

Rona Mackay: Is there a solution that you think would be preferable to, if you like, police the internet? I know that that is not a phrase that people like, but there obviously is a concern. Should there be an entirely separate process for internet intermediaries?

John Paul Sheridan: The Scottish Law Commission said that a much wider internet regulatory position was being considered across the United Kingdom, and that still needs to be done. To an extent, dealing with the secondary publication in isolation without dealing with the principal problem first is a little bit cart before horse.

Duncan Hamilton: It might be helpful to the committee to give a practical real-life example of how the secondary publication provisions might operate. When an individual puts up something defamatory, we often do not know who that person is—it is sometimes difficult to find the identity of the individual. If it is then published again, by, for example, an internet provider that can be contacted, the issue can be brought to its attention. Under section 1 of the Defamation Act 1996, there is a defence for somebody if, broadly speaking, they could not reasonably have been aware of the fact that the statement was defamatory. However, by fixing that person with knowledge that they are publishing defamatory content, that puts them in a position where action has to be taken. We should bear in mind that what people are after is a remedy. Most of the time, it is not about money or having a court action; they simply want something that is defamatory about them to be taken down. By fixing that entity with knowledge, you can do something about it.

The bill repeals section 1 of the 1996 act. On top of that, section 5 in the English act—the Defamation Act 2013—deals directly with operators of websites in a way that is not carried across into the bill. In England, even after the 2013 act, there is still section 1 of the 1996 act, as well as a body of case law, such as the Tamiz case, which allows you to say that, after notification, a website operator has a problem. That will not be the situation in Scotland, which we say is a difficulty, because it tilts the table too far. What is my possible remedy as a private individual trying to address the wild ramblings of a keyboard warrior? What do you want me to do with that? We have a difficulty with that.

You were given evidence that there was some kind of protection under section 3(3) of the bill, as a nod in the direction of limiting the exemption, but that is nothing as to the protection that is in place at the moment. That concerns a very minor aspect.

I would contrast the position under section 5 of the 2013 act with where we are in relation to the bill. The view was taken that the matter was going to be considered on a UK-wide basis, but there is a difficulty with that. The whole purpose of the bill was to put in one place something that was publicly accessible and clear to understand, yet the single greatest medium that we all use is missing from the bill, and the existing protections are being removed. My query is whether that will lead to a fair and sound system.

Rona Mackay: I will ask you about a generic point. Will it be an enormous task to get the balance right in the bill, taking into account freedom of expression and a sensible way for people to access justice?

Duncan Hamilton: I think personally, and we think as a faculty, that the bill needs quite a lot more work if you are going to find that right balance. This is obviously a matter for the committee and for Parliament. If the Scottish Parliament decides that it is unhappy with the current balance, that it wants to create a regime that is heavily skewed towards freedom of expression and that it wants to remove existing rights for private citizens, that is a choice that the Parliament is entitled to make. The faculty's concern is simply that, if the Parliament chooses to do that, it does so with its eyes wide open to what it is doing. That would be a fairly fundamental change to what is a delicate balance.

Rona Mackay: Thank you both.

James Kelly (Glasgow) (Lab): I turn to the matter of defences. This is for Mr Hamilton first, followed by Mr Sheridan. The bill sets out some areas of legitimate defence: "truth", "publication on a matter of public interest" and "honest opinion". What do you think about those? Do you think that there is sufficient clarity around them in the bill?

Duncan Hamilton: Let me go through the three. Starting with veritas—truth—I think that that is basically fine, although I would point out that nobody is unclear about it at the moment. However, there is no harm in codifying it.

More problematic would be the defence of honest opinion, which I will return to. The defence "on a matter of public interest" is essentially the replacement for the Reynolds defence. Here, I agree with the evidence that was given last week. The Reynolds criteria have been extremely useful in practice, allowing journalists and lawyers to give a range of criteria and to ask questions such as, "Does this constitute responsible journalism?" "Have you looked at the origin of this?" and "Have you given a right to reply?"

We now have something that does not include those criteria, and I suppose that the question that would have to be asked—and would only be answered in court—is on the degree to which the Reynolds criteria will continue to inform the decisions of the court in relation to the new defence that replaces them. That is an unknown. I simply note that moving away from Reynolds might diminish clarity, strangely, which would be the opposite of what is trying to be achieved.

Regarding the defence of honest opinion, replacing that of fair comment, the biggest difficulty is the justification that is given for the removal of the public interest aspect of the existing fair comment defence. It is easily and regularly applied by the courts. I was struck, last night, by something when I looked at the policy memorandum. You might not have it in front of you—hopefully, your lives are more exciting than mine—but I will read from paragraphs 99 and 100 of the policy memorandum.

The justification for the removal of public interest is given as follows:

"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."

I simply do not accept that, given my experience or that of those in the faculty.

It continues:

"The shortage of modern Scottish case law on the defence adds to the difficulties.

At the same time as placing the common law defence in statute, the opportunity has been taken to reform it."

The policy memorandum notes that the new defence has no requirement for public interest, and says:

"This is for several reasons. First, the concept has not played a significant role in practice for many years, owing to the scope of the notion of 'public interest' having been greatly expanded."

That is simply not correct, in my experience.

The policy memorandum continues:

"Second, a person should be equally free to make a comment on a private matter as on a public one."

That is interesting. There is a really big argument to be had about that; I would not simply assert it.

The policy memorandum then says:

"Third, abolition of the requirement for comment to be on a matter of public interest would help to simplify the defence and make it more straightforward to apply in practice. Parties would no longer have to contend with the uncertainty arising from the imprecise boundaries of the concept of public interest."

11:00

I do not detect any difficulty in giving legal advice on the definition of public interest or in the courts applying that. Members will note that public interest itself is part of the previous defence, so the legislation relies on the concept of public interest in a different context. In that case, why does that argument stand any scrutiny? We therefore have a difficulty with the removal of public interest.

On the opinion aspect, it may be of interest to note that section 6(5) of the bill includes the public interest defence applying to comment as much as it does to fact. That leaves the question what exactly is being achieved by the removal of public interest.

I am sorry; maybe that is too much information in one go. The bottom line is that we are not convinced by the justification for the removal of public interest.

James Kelly: That was comprehensive and helpful.

John Paul Sheridan: Given Mr Hamilton's comprehensive answer, I have nothing to add.

James Kelly: Okay. We will move on to compensation and parties needing to go to court to allow a compensation figure to be settled. That approach, which is set out in the bill, is different from what happens currently, whereby there is an opportunity for the defence to offer to make amends, and that offer is taken into account in calculating the compensation figure. Is the approach provided for in the bill fair? Do you have any concerns about the offer to make amends process not being used to the same degree?

John Paul Sheridan: There is concern about that. The assumption is that most cases do not go to court, and resolving them outside court is very much to be encouraged. At present, if a publisher or media organisation makes an offer to make amends that is not accepted for one reason or another, a discount is applied. There is no provision in the bill for a discount. I think that that would discourage out-of-court settlements or offers being made out of court. That is inequitable in the sense that, if someone currently makes an offer, they are entitled to a discount. If that were not replicated, it would be problematic.

Duncan Hamilton: Absolutely. The offer of amends procedure usually results in a discount of perhaps between 20 and 30 or 40 per cent on the damages, precisely because that position has been avoided.

I am not sure that the court is not empowered to apply that—it may still have the flexibility to do so, given that it looks at the whole circumstances. That is how I read the bill. If there is any confusion about that and an amendment is required to make it clear that the court is entitled to apply that discount, there should be one. In fact, the approach would defeat in many ways the whole point of the offer of amends procedure.

I am not entirely sure that the court could not already apply a discount under the bill but, if the committee is concerned about that, it should perhaps seek clarity from the Government.

James Kelly: Thanks a lot. We will certainly do that.

Liam Kerr (North East Scotland) (Con): I will move on to section 21 onwards, on malicious publication. I have three questions for the panel.

It has been argued that, as the bill is drafted, there is a danger that businesses can bypass the protections on freedom of expression in part 1, on defamation, because, for example, the malicious publication provisions have no requirement to demonstrate serious harm. The question that I had in mind before this evidence session was along the lines of whether there should be such a requirement. Having listened particularly to Duncan Hamilton, I wonder whether the answer is no. Duncan Hamilton, should the serious harm test be taken out altogether?

Duncan Hamilton: Yes. We propose exactly that. The second option that you give is the way to achieve consistency. We do not support the serious harm test in either context. That is my very short and, I hope, very clear answer.

Liam Kerr: It was short and very clear. John Paul Sheridan, do you have another answer?

John Paul Sheridan: No, I agree with that. If the serious harm test was going to be enforced in the defamation provisions, it would appear to be logical to apply it in the malicious publication provisions, but, like Mr Hamilton, we think that it should not feature in either.

Liam Kerr: That is interesting. I will move on.

John Paul Sheridan, you mentioned drafting. I would like to explore an element of that with you. Section 21 states that the pursuer must show that the defender has

"made a false and malicious statement".

Section 21(2)(b) gives two definitions of whether a statement was malicious. The first is that the defender

"knew that the imputation was false or was indifferent as to the truth of the imputation",

and the second is that the defender's

"publication of the statement was motivated by a malicious intention",

and so on. Does that drafting suggest that a pursuer could bring a case of malicious publication simply by showing that the defender was indifferent to the truth of the statement that they made? If there is not a requirement to show malice, as I think that there is generally, is that not a significant lowering of the current threshold?

John Paul Sheridan: The drafting might not be brilliant. We should look at it in the context of section 21(1)(a), which refers specifically to a statement having been "malicious"—the intention of the statement is that it is malicious. However, if your interpretation of section 21(2)(b)(i) is correct, that could lower the threshold, which would be particularly problematic, given the difference in the burden of proof between malicious publication cases and defamation cases. If you can prove that a statement is false and was made maliciously, the burden does not shift. It would potentially have that impact.

Duncan Hamilton: The important point is that, since the case of Horrocks v Lowe, indifference to

the truth is already part of the question of determining malice. Your question was whether section 21(2) would alter that. It would not; it is already part of the equation. If I say something, whether I have been wilfully reckless as to whether it is true can be a basis for determining malice. The provision will have been included for that purpose, arising from that body of law. I do not think that it will change the legal position.

Liam Kerr: That is very helpful.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Section 30 of the bill would enable a court to order a third party to remove contentious material as an interim measure before a final decision on whether it was defamatory was reached. When we took evidence on the bill last week, we heard some concerns about that. Do you share those concerns? If you do, do you have any alternatives for how that might work?

Duncan Hamilton: Although I do not remember the specific concerns, I have concerns that are related to what I have already said.

In relation to looking for an immediate remedy, there is already an opportunity to do that through the pre-litigation process. There is already reliance on established case law that says that, if I notify you of something and you do not do anything about it, you can become liable. Section 1 of the Defamation Act 1996 and section 5 of the Defamation Act 2013 do not read across. All the other things that I have said about that previously are, arguably, the way to approach the issue.

The difficulty is that section 30 proposes that you have to apply to the court to take such material down. That, in fact, arguably makes it more expensive and more onerous than having some form of either informal or regulated take-down procedure. As a matter of practice, because most of the companies that people are dealing with are not in Scotland and are more used to dealing with English solicitors, it tends to be that there is, in fact, a reasonable chance of material being taken down.

However, if what is going into the bill is the protection, first, it is not in our view sufficient. Secondly, it seems to be a very onerous and expensive way of achieving that. The Government, at various points, relies on an argument of uniformity, and yet in other areas it does not apply that. This would seem to be one area where it should apply it.

The Convener: Do you have anything to add on that question from Fulton MacGregor, Mr Sheridan?

John Paul Sheridan: There is nothing that I want to add other than to say that, obviously, it is not mandatory to go to the court to do that, and so there would be nothing in principle to stop take-down provisions from being dealt with separately.

The Convener: That is very helpful, thank you. I think that Shona Robison wants to ask about a proposal that Scottish PEN put to the committee last week.

Shona Robison (Dundee City East) (SNP): You are probably aware of the evidence that was given last week—you referred to it earlier—in which Scottish PEN put forward proposals for a new court action to provide protection from unjustified threats of defamation action. Do you have any views on that and, in particular, on how it would operate in practice if it were to be adopted?

Duncan Hamilton: I am sorry, are you asking me or Mr Sheridan?

Shona Robison: Both of you, please.

Duncan Hamilton: I will go first, in that case. It is not a proposal that we support. Although I have not seen the detail of the proposal, I note again that we are really in danger of traversing into people's substantive rights in relation to their defending their own reputation.

I am not sure what the threshold for that would be and I am not sure how it sits with professional responsibilities. I would need to see a lot more about the proposal before giving you a full critique of it; however, in principle, it does not sound like an idea that has a great deal of merit.

John Paul Sheridan: Similarly, from the Law Society of Scotland's point of view, people should be free to enter into pre-litigation correspondence and write about protection of reputation without any fear that that letter itself would potentially give rise to a claim. I agree with the faculty's submission on that.

Shona Robison: Thank you. If you want to submit any further detail, you could perhaps follow up on that by writing to the committee. However, that was helpful.

The Convener: I have two final, technical questions. Although I think that this area has been touched on, I want to make sure that I have fully understood your views about the reduction in the bill of the limitation period for defamation actions from three years to one.

The second question is about an area of the bill that I do not think that we have touched on at all, which is section 19, which places significant restrictions on the jurisdiction of the courts in Scotland to hear defamation claims.

Those questions of limitation and jurisdiction are quite technical, but we nonetheless want your views on both those issues on the record, if we may.

11:15

John Paul Sheridan: Perhaps I can deal with the first question and Mr Hamilton can deal with the second. On limitation, we see no basis for reducing the period. I know that there is the protection in the bill that will allow the courts, in effect, to extend the period. The practical difficulty with that is that someone would need to raise a speculative action in order to know whether the court would allow it to be heard out of time, which I think defeats the purpose of providing certainty. We would therefore be reluctant to support any shortening of the period of time in relation to raising proceedings.

On jurisdiction, more generally, Mr Hamilton might comment in more detail, given that he has mentioned the issue. One of the problems with Scottish defamation law is the lack of cases, rather than our having too many. Any attempt to restrict the jurisdiction would mean even fewer cases, which would not be good for jurisprudence or for Edinburgh's attempts to promote itself as a centre of excellence in a number of litigation areas.

Duncan Hamilton: Although it is a technical point, the question of one year as opposed to three is important, because it touches on a very substantial right. We are against a move from three years to one year; we see no reason for such a move and no particular justification for it is given. As does anyone in this field, I have experience of a range of cases that were not raised within a year. Many—perhaps most—cases are raised within a year, but many are not. An obvious example is a case in which an individual defames someone for years until eventually there is a straw that breaks the camel's back and the person decides to proceed. Are we really saying that if the defamation happens over a three-year period, previous incidents will not be matters in relation to which an action can be raised? There will be a range of reasons, given people's lives and circumstances, why things do not necessarily happen within a year.

The onus is therefore very much on the Government to tell us why the current right, which is to raise an action within three years, must be restricted to one year. What is the argument for that? So far, it has been suggested, first, that cross-border litigation is an issue. There is absolutely no evidence for that. I do not think that even the committee's witnesses last week suggested that cases are coming across the border. Even if that were the case, I am not sure why Scotland, as a country, should be uniquely terrified of having litigation. Most countries around the world are trying to find ways to drive economic growth, and if we are an appropriate place in which to litigate, why is that a difficulty? We do not find people in Dublin or Dubai saying, "Don't come here to mediate. Don't come here for arbitration." I am slightly perplexed by the argument.

Secondly, it has been argued that the current approach has a chilling effect. I struggle with the idea that, after a year, the newsroom will be on tenterhooks to know whether or not it will be sued.

The third argument is that we can say, "Don't worry, because the court can always exercise its discretion to give you more than a year." As Mr Sheridan rightly said, removing legal certainty cannot be a basis for putting a bill together.

The case for moving from three years to one simply is not made. That is an important point, in that the restriction, allied with all the other restrictions, adds to the sense of the table being tilted.

On jurisdiction, for the reasons that we have outlined, we would not support anything that made it more difficult to litigate in Scotland. It is already the case that the court will consider the most appropriate forum, with reference to various regulations of which Professor Tomkins will be well aware. That position should maintain. Any change to restrict the position in Scotland is not justified.

The Convener: That was very helpful, thank you.

Liam Kerr: I found Duncan Hamilton's final point persuasive. However, if we were to go to a one-year limitation period, would a solution to the issues that you raised be to have some kind of continuing-act limitation, such that things do not age out if they are part of a continuing act, and/or some kind of state of knowledge, akin to what happens in a personal injury claim? Is it your view that that would be to overengineer the approach and we really should not move to a one-year limitation period?

Duncan Hamilton: Rather than fix a problem that we have created for ourselves, let us avoid creating the problem in the first place. Ultimately, we could get into arguments such as you have made; such solutions would be open to us. Nevertheless, why should a litigant be put in a position of uncertainty when seeking to go to their court to seek a remedy for what they consider to be a legal wrong? I do not know how we have managed to put ourselves in a position in which we have to justify that as being a good thing.

It sounds terribly as though I am banging the drum in just one direction. I absolutely embrace, support and argue for freedom of expression. I just think that when we consider each matter individually and in detail, the question for the committee at this stage, in the context of the general principles of the bill, is whether the balance is right. For all the reasons that I have

given, the point that I urge upon you is that the balance is not yet right.

The Convener: I thank both Mr Sheridan and Mr Hamilton for their evidence: this has been a really useful hour. You have been generous with your time and I am most grateful to you.

We will have a five-minute break before we hear from our second panel.

11:21

Meeting suspended.

11:26

On resuming—

The Convener: Welcome back, everyone. We move to our second panel of witnesses on the Defamation and Malicious Publication (Scotland) Bill.

I welcome my colleagues from the University of Glasgow school of law Dr Stephen Bogle and Dr Bobby Lindsay. I am a member of the school of law at the University of Glasgow, but Dr Bogle and Dr Lindsay are representing their own views, not any connected view of the school. I have never discussed any aspect of the law of defamation with either of them, although I look forward to doing so in this evidence session. I thank the witnesses for their written submissions which, as always, are available to the public on the committee's web page. I invite Stephen and Bobby to make short opening remarks.

Dr Stephen Bogle (University of Glasgow): Good morning and thank you for inviting me to give evidence. Generally, I am in favour of the bill and welcome it. It is important that areas of private law in Scotland are reviewed periodically by the Scottish Law Commission and the Parliament. The law of defamation, in particular, needs to be reviewed regularly.

The bill improves accessibility to the law, which is a good thing, but there are some caveats. First, in debate, we have exaggerated the problems with the existing law—there has been a tendency to suggest that the common-law approach in Scotland is somewhat antiquated or out of date and not up to scratch—but I think that that has been exaggerated. That is not to say that the bill is not important. Secondly, some tweaks need to be made to the bill. If those tweaks collectively are not made, there will be problems with the bill, but if they are, we could have a bill that is perhaps not perfect but will be an improvement on the current one.

The Convener: That is great—thank you. We will run through broadly the same questions that we did with the first panel in the same order, unless I screw it up. I will start with Liam McArthur.

11:30

Liam McArthur: Good morning. I hope that both of you heard our session with the Faculty of Advocates and the Law Society of Scotland. It would be fair to say that they are both somewhat more critical of the bill as regards the tweaks that are required to achieve the balance between protection of freedom of expression and protection of the right to privacy. What tweaks would allow that balance to be properly struck? How can the meeting of the obligations under the European convention on human rights best be achieved?

Dr Bogle: I would feel more comfortable starting by saying that the existing law and the bill are compliant with the expectations of the ECHR and the Human Rights Act 1998. What we are talking about are the policy and political decisions about where the balance that you referred to should be struck.

It is clear that, collectively, the bill's provisions lead towards a balance that is more in favour of freedom of speech. That is what I would say that the bill is doing. Whether that is a good thing or a bad thing is a political decision as much as anything else because, from a legal point of view, there is no problem. There is no concern from the point of view of the ECHR.

Did you have a second question?

Liam McArthur: Last week, we took evidence from those who approach the issue from a media or publications perspective. This week, although the Faculty of Advocates and the Law Society found themselves on both sides of the argument, we have exposed some of the apprehensions about the rebalancing that you identified. If the political drive is about rebalancing the law in favour of freedom of expression, what are the implications for the right to privacy? You have made it clear that there is not necessarily an ECHR concern, but last week we heard that there are concerns about the implications for those who feel that they have been defamed and wish to exercise their rights in that respect.

Dr Bogle: If the bill is moving more in favour of freedom of speech, there are particular things that we need to be mindful of. We will come on to discuss the serious harm threshold. I do not want to go into that now, but we need to be mindful of the fact that the serious harm threshold might not do what we think it will do. The debate has framed it as a very significant and important protection for freedom of speech, but I am not sure that that is what it will be in practice.

Liam McArthur: We will come on to that.

Dr Lindsay, would you like to add anything to what Dr Bogle has said?

Dr Bobby Lindsay (University of Glasgow): Good morning.

No, I have nothing to add, other than to point out that, even prior to the Defamation Act 2013, the balance in English law—which, on such broad balancing questions, is very similar to Scots law—has been taken to the Strasbourg court a number of times and, except on the provision of civil legal aid, the Strasbourg court has broadly held that the balance as it was struck even before the reform that is similar to the reform that is under consideration today has been struck perfectly, or, at least, within the state's margin of appreciation. Therefore, I have no real concerns about the balance as it is struck presently.

Liam McArthur: It was described by Duncan Hamilton from the Faculty of Advocates as

"an English solution to an English problem."

Do you recognise that? With the bill, are we at risk of seeking to provide an English solution to an English problem?

Dr Lindsay: Absolutely. It follows the Defamation Act 2013 closely. Even in provisions or areas wherein a good case exists for Scotland to do something different—the previous panel made that point well—the decision has seemingly been, from the early days of the Scottish Law Commission's consideration, to closely tack to the English approach. We certainly recognise that.

Liam McArthur: That is helpful. We will get into the details of some of the stuff that Dr Bogle has hinted at, so that is all from me.

The Convener: Does Dr Lindsay have any concerns about the definition of defamation that the bill offers, and is the bill right to offer such a definition?

Dr Lindsay: As the earlier panel has stated, the definition of defamation is really not a difficult one. If one types it into Google, one gets a good definition from the authoritative case. In that sense, I do not see any particular concerns about accessibility. The really difficult questions, which a statute cannot answer, are ones such as how the definition applies to a particular statement, or whether a statement is one of fact or opinion. Answering those questions will always be difficult and a definition ensconced in statute will not help.

We have some concerns about the way in which the bill frames the definition, which perhaps shows that it was not part of the Scottish Law Commission's consultation exercise. One of the concerns that we flagged has to do with the use of "ordinary person", but I will leave that for Dr Bogle to go into and I will focus on more technical points.

First, I want to focus on the requirement that the statement be "about a person". In our mind, that is a change in the present law, which requires that the "reasonable reader" of the statement would take it to identify or to refer to the subject of the statement—an objective test. The phrase "about a person" is a bit looser and more subjective than the test that presently operates in well-established case law. In adopting that formulation, the bill might unwittingly widen the scope of actionable statements.

I have in mind the phenomenon of sub-tweeting, whereby somebody says something about someone but does not specifically identify who it is about. Under the present law, a "reasonable reader" of a sub-tweet will probably not be able to tell who the tweet is about, but were the law to simply state that the tweet—the communication—had to be "about a person", that sort of situation would potentially be actionable should the potential pursuer find out that they were the target of the defamatory remarks.

On another technical point, the use of the term "publication" throughout the bill is slightly strange. In defamation, we tend to use "communication"—we know that term well. The term "communication" brings to mind the idea that the matter is not about putting something down in hard copy that is made available to the public but simply about making something known to, as it stands, at least one other person. We are not clear as to why the bill goes through the hassle of using "publication" to then define it as communication. That also raises potential issues with the limitation provisions in section 32(3).

We have those two technical objections, but the committee is about to hear more substantive objections to do with the use of "ordinary" and the lack of evaluative criteria beyond that.

The Convener: Do you want to pick up the gauntlet that has been thrown down to you, Stephen?

Dr Bogle: Yes. In some ways, we are trying to codify a definition that is very familiar not just in Scotland but in England, Wales and common-law jurisdictions more generally. However, what we see in the bill is a reference to "ordinary persons", so that if the court is asked whether the reputation of a person has been affected, it needs to ask whether it has been affected in the mind of "ordinary persons". That is what the bill says.

That is not a familiar definition in England and Wales, nor in the present law. The present law has the important qualifier of "reasonable". In England and Wales, the position was confirmed by the Supreme Court in 2019 in the Stocker v Stocker case, in which the phrase that was used was "ordinary reasonable reader". It is important that

we do not wander too far into anything, particularly when we are doing something that would otherwise be a tricky but nevertheless straightforward task for a drafter. When we put down the definition of defamation, we need to put in the qualifier of "reasonable". That means that the judge does not have to say things such as, "Opinion polls say," or whatever. The qualifier also helps the court to rise above the transient opinions of people at any one time and to think about what, in a progressive society, the reasonable person would think.

I think that we need that qualifier—including it is a small tweak. I think that it has been inadvertently missed, but the effect of not including it could be quite significant.

The Convener: Thank you. We will now move to the eminently reasonable Rona Mackay.

Rona Mackay: Dr Bogle, I would like to bring you back to the issue of the serious harm threshold. I think that it is fair to say that the previous panel were vehemently opposed to it. Can you expand on your thoughts on it?

Dr Bogle: I understand what the Scottish Law Commission wanted to do, I understand what the Scottish Government wanted to do and I understand Scottish PEN's position, but, in reality, I do not think that it is going to address the mischief that everyone has mentioned.

The proposal is taken from the English provisions. As we have heard, the provision in England and Wales was put in place to address a problem that was faced down there—they still have a huge amount of defamation litigation, for various reasons. The provision was meant to stop some of what we call libel tourism and ensure that only the most important cases came before the court. Bobby Lindsay might be able to add something to that, because there are some statistics that might tell us that the provision has not had the desired effect in England and Wales.

The problem is that, if you think that your reputation has been seriously harmed and you have the resources and the stomach to raise proceedings against someone or even initiate pre-litigation correspondence, you are going to do that. The idea in England and Wales is that, in a court case, you must establish first that the statement was defamatory and then, as the process goes along, you need to show that it did serious harm. That does not get rid of all the problems that have been identified in the mischief of pre-litigation correspondence having some sort of chilling effect. It may not be that effective.

Rona Mackay: You referred to the pre-litigation letters as a mischief. Do you think that that part of the process is a problem, and would the serious harm threshold affect the amount of those letters that are clearly just a threat and are not going anywhere?

Dr Bogle: Through the process of talking about the reform of the law of defamation, I have learned quite a lot from the consultations that the Scottish Law Commission has done, and from various events. A problem that we have, which is not exclusive to Scotland, is that the media industry does not always have the resources to defend actions or the ability to have legal advice. *The Times* might, but some of the media that are based in Scotland cannot do that. However, I do not think that the serious harm threshold will stop that happening.

In some ways, if you are going on a bear hunt, you might expect to find a bear who is going to come after you, so there is going to be litigation or, at least, pre-litigation correspondence. I do not see that there is much of a way around that, unfortunately.

11:45

Rona Mackay: In discussing the issue with last week's panel, I got the impression that it is almost an expected practice. Because the letters come in so frequently, they do not have much meaning—they are almost expected as part of the process, which devalues them. I wondered what you thought of that, but you have just said that you do not think that the serious harm threshold would affect that practice at all.

Dr Bogle: It would not. The limitation changes might actually focus people's minds and get the issues sorted out quicker rather than later.

Rona Mackay: We will come on to that.

Dr Lindsay, can I have your views on the questions that I asked Dr Bogle?

Dr Lindsay: I completely agree with Dr Bogle. It is described as a serious harm threshold, which suggests that it is quite an impressionistic binary question that can be answered at a glance, but the experience in England and Wales has been that it actually involves quite a multifactoral and intensive inquiry.

The evidence from England so far, scant as it is, is that, if the purpose was to curb the number of defamation actions proceeding before the English courts, it has manifestly not fulfilled that purpose. The year 2019 saw the highest level of defamation claims issued in England and Wales for quite some time. There were 132 claims initiated in 2013, the year before the provisions of the 2013 act came into force. In 2019, there were 323 claims, which is almost 200 more claims.

In the cases that deal with the threshold, especially after the Supreme Court's consideration

of the test, there is a sense from judges that it is a resource-intensive question that cannot be answered right away or simply by looking at written statements. You need to hear the evidence and you first need to work out what the statement means. The fact that it is called a threshold makes it seem like it is the first hurdle but, actually, before that hurdle is dealt with, you first have to work out what the statement means, and the parties to a defamation claim never usually agree on that.

The fact that it adds cost to litigation might act as a disincentive to litigate. Also, where there is a claim that arguably can get over that threshold, there is no doubt that such a test will increase the burden and cost of litigation, which in defamation claims are already severely high.

Rona Mackay: Thank you—that is really useful.

Liam Kerr: Rona Mackay asked about letters before action. For clarification—I genuinely do not know the answer to this, because I have never practised in this area—does the panel know whether a pre-action protocol is in place in Scotland in actions for defamation, which would mandate the sending of such a letter prior to taking any action?

Dr Lindsay: I would have to defer to my colleague Dr Bogle, as he is the only one of us with a practising certificate. A more general point might be that the whole nature of defamation law procedure in England and Wales is far more developed than it is in Scotland. That might be an aspect of the issue, but I cannot comment on that specific point.

Dr Bogle: My practising certificate expired a while ago, so I would not want to comment on the ins and outs of the procedure. It is a pity that we do not have Duncan Hamilton here, as he probably could have answered that quickly.

However, even before an action is raised, it is inevitable that there will be some sort of correspondence between parties. People always interpret lawyers' letters very seriously, but those who know a bit of law realise that it is often a bit of strategic positioning and that people might not be serious about going to court. However, it is sometimes difficult to decode that.

I am afraid that I do not know the direct answer to your question.

Liam Kerr: I think that you are right in your summary of the general practice of where a letter would be sent and why the correspondence takes place.

It is my understanding—I stress that this is not my practice area—that there is a pre-action protocol in England. Convener, I wonder whether we might write to the witnesses on the previous panel to establish whether there is a similar pre-action protocol in Scotland.

The Convener: I will not answer that question now. I will turn to John Finnie, who has been very patient.

John Finnie: I thank Dr Bogle and Dr Lindsay for their written submission.

I know that you listened to the previous evidence session but, nonetheless, for others who may be watching who have not heard that, I will ask again about the Derbyshire principle, which prevents public bodies from suing for defamation and is replicated in the bill. The issues that have arisen as a result of the principle relate to the fact that, nowadays, we have many different models of delivering public services, and I understand that people want to have public scrutiny of those bodies. The bill would create an exemption for businesses and charities that deliver public services "from time to time".

Media correspondents and legal representatives have different positions on many aspects of the bill. The media people are concerned that the exemption would prevent effective scrutiny, lead to a postcode lottery and indeed, fundamentally undermine the Derbyshire principle, whereas you will have heard from legal representatives that the effects of section 2 are not clear and are much wider than the current situation. There are implications for housing associations, universities and individuals who deliver public services, such as doctors and nurses, in that it could prevent them from raising actions.

Several legal representatives suggested alternative models of drafting section 2, potentially focusing on bodies that are definitively covered, including central and local government. Dr Bogle and Dr Lindsay's submission suggests that an indicative or definitive list of those that are covered should be included for clarity. Sometimes, it is felt that definitive lists can be problematic.

Can you comment on the Derbyshire principle and how you would address the issue?

Dr Lindsay: So—[*Interruption*.] Sorry, Stephen, you can go first.

John Finnie: I should have directed my question to one of you. My apologies to the broadcasting team.

Dr Bogle: Dr Lindsay was probably going to tell me to answer it, anyway.

The question of how to draft that provision is very difficult. My instinct is that we need more guidance from the Parliament and in the bill, or, dare I say it, that we need better drafting. Drafting is not easy, but there needs to be some attention

to it. Mr Finnie highlighted the phrase "from time to time", which feels very loose and uncertain.

Section 2(8) mentions regulations, and that might be the place where more specificity could be added. An indicative list would be helpful. The decision should be made by the legislature rather than its being handed over to the courts. Think of the law as an analogue that has been digitised, and the digitised version is then handed back to the courts—that is tricky. The Government, as the bill's sponsor, should provide more clarity as to who it wants the section to capture.

John Finnie: Dr Lindsay, do you have a view, particularly on the question of a list and any problems that could be created by having a definitive list?

Dr Lindsay: On the Derbyshire principle as a whole, it is important to remember that it is not a defence; it is an absolute prohibition on stipulated bodies, which are unable to sue. The issue with extending that into private providers of public services is that it is really a question of degree. We are all agreed that local authorities and central government should not have the power to sue in defamation cases, and that is the justification on which the Derbyshire principle was founded. However, if private companies that provide a public service are allowed to sue, there will usually be a very good argument under section 6 that there is a defence in relation to publication in the public interest.

Another issue is that those companies enjoy human rights. A private company that is excluded from suing in defamation might launch a challenge to that under the provisions of the Scotland Act 1998. It might be more proportionate to say that the provision is simply about central Government and local government and that, when it comes to private companies providing a public service, the section 6 defence might do much of the lifting.

On the topic of the stipulated list, it certainly should not be an exclusive or exhaustive list. Certainly, concerns have been raised about things such as schools and universities. If a list were to expressly stipulate certain bodies that are not subject to the Derbyshire principle or the section 3 provision—the prohibition on suing—that might be helpful. However, it should by no means be an exhaustive list.

John Finnie: Can you comment on the fact that some services are delivered by multinational corporations, often on lengthy contracts, and on the relationship between that and the electoral cycle, which is intended to be a way of scrutinising? There should not be areas of public life where public scrutiny is impossible. You could argue that, if you cannot hold individuals responsible at the ballot box, the part of the public service that is delivered by private companies should be open to more scrutiny.

Dr Lindsay: The crucial part might be that the initial decision to delegate those functions in the first place is challengeable at the ballot box. In framing the definition, the more narrow a definition of public authority that you have, the more that you are going to be able to have those things ventilated in the courtroom. For things such as the issue that you are talking about, especially with regard to multinational corporations, that might be a more effective way of their trying to clear their reputation than a local authority council meeting would be. However, I certainly take your point.

Annabelle Ewing: On the wider issue of eligibility in general, it was suggested by Scottish PEN at last week's meeting, and in correspondence from representatives of the media, that eligibility should be restricted as far as businesses are concerned to those with fewer than 10 employees. I understand that that is motivated by a desire to see equality of arms.

Will you provide your thoughts on the issue as a matter of principle and on the particular threshold that is being discussed?

Dr Bogle: In principle, companies should not be able to sue in defamation at all, because they are not natural persons. Companies benefit from a different characterisation of their legal personality. However, that would be a very innovative change to introduce. Corporations should, in principle, be able to follow part 2, which concerns malicious publication. Those provisions are tailor made to ensure that companies can protect their assets, property and interests.

It would be quite innovative for Scotland to do that and it is quite a late stage to introduce something like that in the bill. For pragmatic reasons, this is not the best time to do it. Unless there is to be a significant review of the policy behind the bill, I do not think that we can do it at present. However, in principle, I would be interested in doing something like that.

12:00

Annabelle Ewing: When you talk about companies, do you mean simply limited companies not being natural persons, as opposed to other business structures that might not involve incorporation?

Dr Bogle: It would be organisations that benefited from the limited liability. If you provide that limited liability, you are characterising them completely differently in terms of their legal persona.

Annabelle Ewing: Thank you for that clarification.

Dr Lindsay: This is one of the few points on which Dr Bogle and I disagree slightly. In principle, there is a good argument for saying that companies have a right to reputation. You might have heard of the McLibel defamation case that ran between McDonald's and two English people in the 1990s. That was taken to the European Court of Human Rights, which made the point that it is sometimes important for large multinational corporations to have the right to defend themselves, and the means by which legal systems provide that is within a margin of appreciation.

That is my point of principle. My point of practice would be that it is easy for a company director or shareholder to read something that defames the company and make an argument that that is defamatory of them in a personal capacity. In that way, the restriction on the ability of the legal entity to sue might be easily circumvented. That is recognised in the Australian model law provisions that have been mentioned. It is important to note that, although we talk about them as Australian provisions, they are in force only in New South Wales at present. There has been some review of whether that position should still obtain.

We can draw an analogy with a related part of the law of delict, which is the delict of harassment. The delict of harassment is not one that is open to a company to litigate for; it is specifically limited to an individual. However, we have seen in the case law private companies and representative bodies taking action on behalf of their employees or members in order to sue for that. Therefore, I think that, in practice, there would definitely be an easy way round that restriction. That raises the question: why bother in the first place?

Annabelle Ewing: Thank you for that answer and for the clarification that the so-called Australian model is actually the New South Wales model.

Liam McArthur: I want to return to the question that John Finnie pursued in relation to the Derbyshire principle. Last week, it was suggested that the principle was founded not so much on the nature of the service that is provided—either entirely by the public sector or, from time to time, by the private or voluntary sector—and more on a principle that is to do with the elected nature of local government and national Government, which means that there are other remedies. Is that the underlying principle here, and are we in danger of moving away from that through the bill?

Dr Lindsay: I agree that that is the underlying principle and that you are in danger of straying from it by expanding the definition.

Liam McArthur: That is helpful—thank you.

Rona Mackay: I would like to return to the issue of secondary publishers. Dr Bogle, you will have heard the first panel answer questions on that. What are your views on what is proposed in the bill, particularly with regard to the internet, which is a huge issue?

Dr Bogle: I am not as concerned about it as the previous panel was, although I come at it from a perspective of asking what the policy behind the bill is, what the provisions do and whether they match up. It appears that, in this section, they match up.

There is so much defamatory stuff said on social media, it is quite incredible. Trying to solve those sorts of problems with a defamation bill would be pretty ambitious. Those problems will have to be resolved at a much larger level than that of individuals raising actions, although that is not to say that individuals should not have the opportunity when it arises. The provisions that are in the bill at present make sense, and I am not as concerned about them as the previous panel was.

Rona Mackay: In America, internet providers have complete immunity from defamation claims. Obviously, this is an area of on-going concern. I take it that you are content with the proposal that secondary publishers would not be liable.

Dr Bogle: Something needs to be done about the issue. When the Scottish Law Commission looked at it, my response was that it is a difficult matter that should be solved at a UK, if not a European, level. To try to solve it in the bill directly is jumping the gun.

It is a difficult situation for Parliament. Do you go ahead with saying very little about operators and intermediaries? What do you do? I think that you should just go ahead with what you have and, fingers crossed, something will come about to solve the problem of intermediaries hosting content. There are existing solutions, but they are very cumbersome.

Dr Lindsay: I agree with everything that Stephen Bogle said. The complicating factor is that the website will always be based in another jurisdiction. As much as we would love to have the rules apply across the world, foreign courts do not really listen to Scottish court orders on such matters. There is a slight exception to that in so far as we are part of the European Union, where courts might listen, but obviously that will not be the case relatively soon, sadly.

Rona Mackay: Are you saying that there is no easy solution to the internet problems?

Dr Lindsay: There is no easy solution, and there is also no national solution.

James Kelly: Good morning, panel. What are your views on how defences are codified in the

bill? They are the defence of truth, the defence of publication on a matter of public interest and the defence of honest opinion.

Dr Bogle: In general, the codification is fine for me. The restatement and updating of defences is fine.

I have concerns about section 8, which is entitled:

"Abolition of common law defences and transitional provision".

It abolishes the existing defences, which are being replaced by the provisions in the preceding sections. It is fine for clarity that those doctrines are abolished, but I would not want the baby to be thrown out with the bath water. For example, the Reynolds defence and the case law around it are very useful, and we should not create the assumption that they should not be looked at.

The explanatory note suggests that there should still be some consideration of case law, but in recent litigation in England and Wales, courts have been saying that the Defamation Act 2013 has introduced a new regime and is not a mere cut-and-paste from the common law, although you can go back to the law that pre-dates the 2013 act to seek guidance. I would want it made very clear, in the explanatory notes at least, that although those defences have been abolished, rich resources of case law exist and can be used, whether they are in England and Wales, Scotland or elsewhere.

Dr Lindsay: I agree. My first point is that there is not a complete codification of the defences that are available to a defamation action. Some are omitted for one reason or another, such as the idea of fair retort and the general qualified privilege defence, which is very important. In addition, beyond section 9, there is no codification of the situations in which a statement would be absolutely privileged. That is fine, perhaps; we have a good grasp of what those defences are and perhaps we do not need to codify them. However, if we codify three, that raises the question of why we do not consider the others.

In their evidence, Professor Reid and Professor Blackie raised the point that the qualified privilege provisions in sections 10 and 11 need to make it clear that the existing general common-law qualified privilege option is unaffected by the statute. It might be possible to read the statute as abolishing that, but that is certainly not its intention, and it has not been mentioned or suggested anywhere in the reform process.

There is no issue with the three defences that are included. On the public interest defence, I echo what Dr Bogle said: it is important to make it clear that the preceding English case law, specifically, can still be turned to and the factors can be considered. The committee heard last week about the 10-part test that is part of the Reynolds judgment, which is a useful checklist for a journalist.

The previous panel expressed some concern about the removal of the public interest qualification in the defence of honest opinion. I note that the inner house of the Court of Session recently considered that defence in the case of Campbell v Dugdale, and the opinion of the Lord President did not place much emphasis on that requirement. It is unclear what role it continues to play.

It would not be an issue if the public interest qualification were to be retained, because it is relatively easy to show that something is in the public interest. The most recent UK Supreme Court cases held that reviews about a wedding band on a website were sufficient to engage the public interest for that test. It is not something that I have a strong feeling about, but it adds some colour to the prior remarks. Overall, I am happy with those sections, subject to those modifications.

James Kelly: So, the current bill is fine in that area but there will need to be proper reference to case law, which might need to be added to.

I turn to the area of compensation. You might have heard the discussion with the previous panel about the offer to make amends and discounts being available. Does that principle need to be retained in the new legislation?

Dr Lindsay: That pertains to section 14(5), which I agree with Mr Hamilton can be read as suggesting that the discount is still an option for the court to take into account. However, it would aid clarity if that was specifically made clear.

The submission by Campbell Deane touches on the relationship between the provisions on the offer to make amends and section 19, which is on jurisdiction. We will come to jurisdiction later, but it makes more sense to address this point now. Raising a jurisdiction challenge should not by itself remove the ability to make an offer to make amends, but the reading of section 13(2)(a) suggests that it does. It needs to be made clear that challenging the jurisdiction of the court is not a belligerent act of saying, "I am not sorry," but simply about working out the proper place for the dispute to be heard. Once the dispute is properly allocated to a particular court, that is normally the stage at which the case will settle. To say that the opportunity to make amends is clipped at the point of raising a jurisdictional challenge is problematic, for the reasons that Campbell Deane has clearly set out.

12:15

Dr Bogle: I thought that section 14(5) actually allowed the court to take that into consideration when awarding compensation, so that is certainly not how I read the bill, which maybe validates the point that Bobby Lindsay has just made. A simple clarification under that section or around that particular subsection would be useful, because I did not think that the existing position had changed. I thought that the section allowed the court to take that into consideration.

James Kelly: That is obviously an area that we will need to clarify when the Government gives evidence.

Liam Kerr: I shall cut straight to the chase. If the serious harm test was retained, could it be ported into the area of malicious publication, particularly given that, in section 21 and the following provisions, the pursuer does not need to show actual financial loss but only that a statement is "likely to cause" such a loss?

Dr Lindsay: Absolutely—100 per cent yes. The malicious publication delicts that we find in this part of the bill are really arcane and archaic. I do not recall seeing them featured in reported litigation since about 2003, and we certainly do not want to reanimate them and make them a valuable line of attack for a business. There is always a risk that a defamation claim will be bundled up with a claim under those delicts—if a malicious publication claim fails, defamation will be a fallback and vice versa.

My personal preference would be to abolish those delicts entirely, but there is no real harm if the serious harm threshold is put in. As you have stated, the current provisions simply refer to financial loss, not serious financial loss. For consistency, it makes sense that, if we are going to retain serious harm, it should also be part of these provisions.

Dr Bogle: I completely agree with Bobby Lindsay. One could interpret the bill as assuming that serious harm applies in part 2. If part 2 is to remain, it needs to be in there.

Liam Kerr: I imagine that both of you saw the earlier panel's evidence, during which I specifically asked about an interplay between particular provisions in section 21. Does either of you take a view on whether the inclusion of indifference as a qualification with relation to harm is a lessening of the threshold, if you like, in the current provisions?

Dr Bogle: I will hand that over to Bobby because I know that he has particular opinions on that point.

Dr Lindsay: Actually, I do not have particularly strong opinions on that. I agree with Mr Hamilton that the provision is merely reflective of the present law and does not water it down to any great degree. If we are going to retain those provisions, I am content with the bill as drafted.

Liam Kerr: I have a brief question for Dr Lindsay. Given what you have just said and what you have said generally, do you have any views on whether the sections on malicious publication have the potential to undermine freedom of expression?

Dr Lindsay: I do not really think so. All they do is offer more options to a potential corporate pursuer: they get one bite of the cherry with defamation and a second bite with malicious publication proceedings.

The fact that the pursuer in a malicious publication action has to prove not only that the statement is false, but that it was intentionally made to harm, is enough of a control mechanism. The law of defamation has been criticised sometimes because it shifts the burden. In the case of truth, it shifts it to the defender, and malice, in most cases, is irrebuttably assumed. In terms of freedom of expression, those two control mechanisms are perhaps sufficient. My concern is more one of legal horticulture: the provisions are not particularly tidy, nor are they necessary if we are retaining defamation in its current capacity to apply to profit-making bodies.

The Convener: Excellent, thank you. "Legal horticulture" is a new one on me—I am not quite sure who is on gardening leave here.

I will go to Fulton MacGregor next and then to Shona Robison.

Fulton MacGregor: I will go back to the same line of questioning that I put to the previous panel on section 30 of the bill and some of the concerns that we have heard about that.

As you will know, section 30 allows the court to order a third party to remove contentious material as an interim measure before a final decision on whether that material is of a defamatory nature has been reached. Do you have any concerns about section 30? If so, do you have any possible alternatives?

Dr Lindsay: I do not have any real concerns about section 30 at the moment. It might be useful to cross refer to section 12 of the Human Rights Act 1998. That says that if you are trying to get an interim remedy—a remedy that is awarded before the dispute has been concluded—particularly keen attention needs to be paid to the importance of freedom of expression.

The only other point that I would make is that, as I have said before, a Scottish court can try as it might to make an order for a website that has been set up on a server in Panama to take down a defamatory blog post, but the reaction will be that

that will not be welcomed or entertained by a foreign court. Sadly, with secondary publishing, there is a limit to what a national solution can achieve in that regard.

Dr Bogle: I do not have any concerns about section 30. It is particularly important that we retain the court's existing powers. Very recently, the Court of Session made an interim order of specific implement for the removal of material. Obviously, the existing law is able to comply with ECHR requirements, and the Court of Session showed that what it already has is sufficient. However, there is no harm in having section 30 in place.

Shona Robison: You might have heard or read the evidence from Scottish PEN last week. It has put forward a proposal for a new court action to provide protection from unjustified threats of defamation action. Do you have any views on that and how it might operate in practice?

Dr Bogle: As I said, if you go on a bear hunt, you will find a bear, and you will get into trouble with that. I do not know how the introduction of some sort of counter-measure would help, because it would get you tied up in human rights concerns about access to the courts. It would also be pretty novel—I know that such a measure exists in intellectual property law, but the context there is different.

You would not quite know where to draw the line if you introduced a such a provision. Would you introduce it for contractual or negligence disputes, for example? At what point would you draw the line and say, "No, it just applies to defamation. We want people to play nicely and are going to have a counter-action for a defender?" Unfortunately, I do not think that the proposal would be a good idea. I have to disagree quite strongly on that one.

Dr Lindsay: It is certainly an interesting proposal, but it would need much more discussion and thought before it could go on to the statute book. Stephen Bogle is quite right that the Intellectual Property (Unjustified Threats) Act 2017, which is the model for the proposal, is a very different context. It applies to registered intellectual property rights that someone can look up in a register and find out the extent of. Defamation is not that clear, unfortunately, and the bill will not do enough to make it crystalline.

It is important to note that there already is some protection in the law, in the form of the delict of harassment, which I mentioned earlier. If someone repeatedly makes unjustified threats of legal action that cause someone alarm and distress, case law has held that an harassment action can be brought to claim for damages or a non-harassment order. That would cover only extreme cases, but perhaps it is only the extreme cases that we need to worry about.

The proposal is perhaps emblematic of the fact that civil procedure in Scotland, as we have heard, is not as sophisticated as it could be, as compared with that in England and Wales. In England and Wales, if you get a defamation letter through and the claim form is served, you can make a motion to have that struck out of the English courts. That is not a power that the Court of Session has, on the face of the rules of court. I think that this was mentioned in the context of the civil justice reforms, but such a device might be a more useful mechanism than creating a new delict, the parameters of which we are unsure of.

The Convener: That has been helpful; thank you. As I have been listening to your evidence, two questions have nagged away in the back of my mind. I want to pose both of them to you. You might not be able to answer them right now, in which case please feel free to say so and to write back to the committee before we report later in the autumn.

The first is about something that Bobby Lindsay raised a few minutes ago Section 12 of the Human Rights Act 1998 is designed to show that, although it is true that articles 8 and 10 of the ECHR are both qualified rights, some qualified rights are more important than others, and freedom of speech is a very important qualified right, in particular when compared with article 8, on privacy.

We have heard from many witnesses that the bill shifts the balance a little—some would say that it shifts the balance a lot—in favour of freedom of speech and away from the protection of privacy and reputation. Section 12 of the 1998 act was already designed to do that, so my first question is whether that provision has made any material difference in practice in the 20 years that it has been in force? Have the courts paid particular credence to section 12? Has it made any material difference in defamation cases, either in England and Wales or in Scotland? Bobby Lindsay, do you have any information that you could share with us on that question?

Dr Lindsay: Dr Bogle might be able to talk more fully about the recent Court of Session case that considered section 12. However, I can say that there are signs that the courts are taking that section into account, especially when it comes to issuing a remedy before the final resolution of a claim. There are real signs that it is being followed quite closely and carefully.

Dr Bogle: The Court of Session obviously pays attention to section 12. It is difficult: we do not have a lot of case law in Scotland on defamation, and particularly not on procedural requests of the

court to make an interim order. We do not always get those reported.

However, it seems that it is quite straightforward for the court. In fact even on the existing law, without section 12, I think that the court always takes into consideration the importance that the freedom of speech—[*Inaudible*.]—should be, on the balance of convenience, what the court pays more attention to. I think that it does make a difference.

12:30

The Convener: That is helpful. I have a final question that I would like you both to reflect on. Everyone seems to think that the bill is a good idea, in large part because it codifies in a single statute most of the core elements of our law of defamation. However, is there a risk in codifying defamation, in the sense that the single biggest change to the law of defamation in the past 20 years was made not by statute but by the courts, in creating the Reynolds defence, in the case of that name, which is now enshrined in section 6?

Is there a risk that, by codifying our law of defamation in legislation, we will inhibit the courts from making further such progressive changes to the law of defamation when the public interest requires it? If so, is that a risk that we should take? Do the benefits of codification outweigh the costs? Should we include in the bill a statement that nothing in the bill is designed to inhibit the future development of the law of defamation by the courts in appropriate cases, or is that not the sort of thing that could be described as elegant drafting?

Dr Bogle: That touches on section 8 and the idea of clarifying in the explanatory notes what the intention is. Defences are the most important thing here. In my opinion, I think that courts can continue to develop the law. The problem is that we do not have a lot of case law in Scotland. Legally, it would be fine not to pass the bill, but there is a lot more to be considered in terms of the policy behind it, the public perception and how it is important, symbolically, that Scotland makes clear that it has put the law of defamation into statute.

Legally, the courts can develop the law of defamation. I do not distrust judges—some people distrust judges and want Parliament to do all the work, but I do not mind judges doing all the work. However, for policy reasons and so on, it is important that we get something in statute.

Dr Lindsay: I completely agree with that. In so far as the bill will create a framework for defamation law, I do not see it as a particularly stultifying or ossifying framework. There are certain provisions that could make the relationship with the existing law a bit clearer: section 8 is certainly one of them, the offer of amends proceeding is another and so on. However, on the whole, this is very much a floor, not a ceiling.

The Convener: That is helpful. Thank you both very much; you have been generous with your time.

That brings the public part of this meeting to a close. Our next meeting will be a week today, on Tuesday, 8 September, when we will continue to take evidence on the bill.

12:32

Meeting continued in private until 12:50.

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