OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 8 September 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 8 September 2020

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JUSTICE COMMITTEE
20th Meeting 2020, Session 5

CONVENER

*Adam Tomkins (Glasgow) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Annabelle Ewing (Cowdenbeath) (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:

Mark Scodie (TripAdvisor Ltd)
Dr Andrew Scott (London School of Economics)
Gavin Sutter (Queen Mary University of London)
Ally Tibbitt (The Ferret)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Virtual Meeting

Scottish Parliament

Justice Committee

Tuesday 8 September 2020

[The Convener opened the meeting at 10:00]

Interests

The Convener (Adam Tomkins): Good morning, everyone, and welcome to the 20th meeting in 2020 of the Justice Committee.

Under item 1, I welcome Annabelle Ewing as a new member of the committee and invite her to declare any relevant interests.

Annabelle Ewing (Cowdenbeath) (SNP): Thank you, convener. I draw members' attention to my declaration in the register of members' interests to the effect that I am a member of the Law Society of Scotland and I hold a current practising certificate, although I am not currently practising.

The Convener: Thank you, Annabelle, and welcome to the Justice Committee. It is good to have you with us.

Decision on Taking Business in Private

10:01

The Convener: Item 2 is for the committee to agree to take item 5 in private. Item 5 is consideration of a draft report on the reopening of the courts. Are members agreed that we take that item in private? I see no dissent, so I will take that as agreed.

Defamation and Malicious Publication (Scotland) Bill: Stage 1

10:01

The Convener: We now return to the Defamation and Malicious Publication (Scotland) Bill. This morning, we will take evidence from two panels of witnesses at stage 1 of the bill. I warmly welcome Dr Andrew Scott, associate professor of law at the London School of Economics, and Gavin Sutter, senior lecturer in media law at Queen Mary University of London. I thank Dr Scott and Mr Sutter for their written submissions, which, as always, are available to members and the public on the committee's website.

Before we go to questions, I invite our witnesses, if they wish, to make short opening remarks. Dr Scott, would you like to begin?

Dr Andrew Scott (London School of Economics): I thank the committee for inviting me to attend today.

In general terms, I would say that this is a good bill that will make some contribution to better balancing individual and social interests in reputation and free speech. It does some things that I think are really quite innovative and which I happen to welcome, such as the tightening of the definition of who is to be understood to be a publisher and the revisions to the defence of fair comment or honest opinion.

For me, however, the key concern about the law of defamation is and always has been the sheer cost of potential embroilment in legal proceedings. That cost allows claimants sometimes to weaponise the law of defamation. It also makes it difficult for many, if not most, plaintiffs to access justice when they feel that their reputation has been besmirched.

In that context, I was quite struck by the words of one of your previous witnesses, who picked up on one dimension of that issue when he referred to the opportunities afforded by the law to those with

"thin skins and thick wallets".—[*Official Report*, *Justice Committee*, 25 August 2020; c 4.]

I was further struck when, in discussing that concept, the witness suggested that the problem with thin skins and thick wallets was not going to be solved in our lifetime, and certainly not by the bill alone, which I take to be a really rather dispiriting starting point.

When I was conducting reviews for the Northern Ireland Law Commission and writing a report for the Northern Irish Government, I also felt that

sense of deflation from the outset. As a result, I felt behoven to think laterally and a little bit differently about the law of defamation, and perhaps by doing so, to think of an alternative way through so that the better balance between reputation and free speech that we are all seeking might be more fully achieved.

As a result, I made proposals that placed a much greater emphasis upon bringing proceedings or the resolution of defamation concerns outside the courtroom, thereby reducing costs. That might be something that the committee will want to pick up on later on—I would be happy to speak to it later.

The Convener: Thank you, Dr Scott. Does Mr Sutter have anything to add before we move to questions?

Gavin Sutter (Queen Mary University of London): First, I agree with Andrew Scott on many things about the bill. It is a great bill and I applaud the fact that it has brought most of the key issues in relation to defamation under one bill in a more consolidating approach than was taken in England for the Defamation Act 2013, which was a real missed opportunity.

I have two things to add. I think that it will come out in discussion that Andrew and I have a different take on the defining of publishers in sections 3 and 4 and how that is worked out. At this stage, I will just say that that also relates to a broader problem in dealing with the internet. We are in a situation online in which what should be, or what has in theory always been, the public square where people may speak freely, subject to certain limits, is increasingly dominated by private interests who provide that public space. A lot of the complications are tied up in our lack of an overall answer to that general media trend.

I very much agree with Andrew in terms of cost and admission—the pay to play side of defamation, as it were. Something that was referred to a lot at an early stage in the debate on what became the 2013 act in England was the idea of creating a fast-track libel tribunal that could reach binding decisions. I begin to wonder whether that might not be such a bad idea, given the difficulties and costs involved.

The Convener: That is very helpful and nicely anticipates a number of the opening questions that Liam McArthur would like to bowl gently at you.

Liam McArthur (Orkney Islands) (LD): I welcome the witnesses who, as the convener said, have both touched on areas that I want to delve into a little deeper, including the fact that the bill draws heavily on the Defamation Act 2013. Do the witnesses believe that the balance between freedom of expression and protection of reputation has been well struck? They alluded to areas where work still needs to be done on fine tuning, but I get the sense that they both feel, broadly speaking, that that balance has been achieved. Does Dr Scott have any further thoughts to offer in that regard?

Dr Scott: I tend to agree with that. It is difficult to be too upset with the position that is achieved in the 2013 act. However, it is probably fair to say that the law was more or less balancing those interests prior to the introduction of the 2013 act, and that its introduction did not make a profound difference in many areas of the law. Where there are quibbles with the 2013 act, the types of change that I would seek tend to have been introduced in the bill. Hence, I commend the Scottish legislation more strongly than the English version.

I come back to a point that I made at the outset: fundamentally, what the law is—[*Inaudible*.]—the problem with libel or defamation law being the capacity to weaponise the law.

To illustrate that point further, I will refer to US law. We all understand that the United States is the land of free speech and so on. The committee may be aware that Sarah Palin is currently pursuing defamation proceedings against *The New York Times* on account of something that her office published, which, on some people's account, resulted in the shooting of and injuries caused to Gabrielle Giffords.

In the United States, under The New York Times Co v Sullivan defence, you can essentially publish anything that you like about a public figure—in the case that I described, Sarah Palin, as an electoral candidate, is a quintessential public figure—and claimants can bring an action only if they can prove actual malice.

Palin is pursuing legal proceedings alleging actual malice in the circumstances—the judges in the courts are accommodating that, and the case is now going to a hearing. This is a quintessential case in which one would think that the result would be different in the United States in comparison with other common-law jurisdictions. Nevertheless, even in the US, it is possible for Sarah Palin to drag *The New York Times* through the legal process.

It may well be that Sarah Palin thinks that she has a case and that there was in fact actual malice—let us not pre-empt the judgment. However, I surmise that she is really engaged in warning *The New York Times* by saying, "Any time you want to write about me or anybody associated with me, or anyone of my political persuasion, there will be a cost to pay."

As I said, we can introduce piecemeal changes to the substantive law, but fundamentally that

opportunity will still be there, in so far as we are relying on the legal dispute resolution mechanism.

Liam McArthur: I will bring in Gavin Sutter to see whether he has any views on that. First, however, I observe that, during last week's evidence session, representatives of the legal profession said that they saw the bill very much as a rebalancing towards the protection of freedom of expression, and a dilution, in a sense, of the protections around reputation. Would Gavin Sutter agree with that characterisation? We can come back to Dr Scott if he wants to add anything.

Gavin Sutter: I am very much on the same page as Andrew Scott. As he said, the weaponising of libel law really comes down to the cost of fighting a suit. I emphasise—we discussed this back in 2018, when I last spoke to the committee on the subject—that it is not always the case that the poor journalists of the media are the ones being picked on by the meanie who wants to censor them. Equally, it is not always the case that the media are the meanies who ruined somebody's reputation unfairly. Perhaps the fact that we do not have an obvious good guy/bad guy split between the claimant and defendant aspects is one of the elements that makes the issue difficult.

I cannot help but feel that the issue cannot be solved through the prism—strictly speaking—of defamation law. It is a much broader issue. I remember that, when the subject of the Defamation Act 2013 was first broached, the issue of costs was very much raised, but it was then swept under the carpet as part of a wider civil law review in England, and the issue has not been addressed since.

Other than seeking to establish some kind of fast-track tribunal for libel law, as we have discussed, I do not think that there is an obvious answer to the problem of costs. That is very much the big difficulty.

The bill is very good, by and large, at balancing, or seeking to balance, those interests. In particular, the defences—those that the bill proposes and those available in English law already—are a very important part of the balance. Of course, that is in the context that libel remains a strict-liability issue, so there is no opportunity to say, "Oh, but we didn't mean that," or "We didn't intend to". That makes for a very delicate balancing act. Overall, I feel that the bill gets the balance about right, subject to the concerns that Andrew Scott and I have raised about the issue of costs.

Liam McArthur: That is helpful. It might be useful if you were able to provide additional evidence on the idea of a fast-track tribunal. You will be aware that Scottish PEN has put forward its own thoughts, which I think that other colleagues will cover in different lines of questioning later. Further information on the proposal of a fast-track tribunal would certainly be of interest.

10:15

Dr Scott referred to the weaponising of the process. Clearly, we have had evidence to date that suggests that some legal letters, from wherever they emanate, are a means of closing down the process, leading to what has been referred to as the "chilling effect". In the main, legal stakeholders suggest that that is a legitimate part of the negotiation and a way of keeping things from having ultimately to go to court.

I would be interested in your observations as to whether what is in the bill balances those different rights and reduces the extent to which such processes can be weaponised. That might give a degree of comfort to Andrew Tickell, who talked about

"thin skins and thick wallets"—[*Official Report, Justice Committee*, 25 August 2020; c 4.]

Maybe there is hope that, going forward, the issue can be better addressed. Does Gavin Sutter have a view on that?

Gavin Sutter: Could you rephrase the question? I did not catch all that on my connection.

Liam McArthur: Do you feel that the bill, as it stands, goes as far as it can in moderating the weaponising of the process, if not avoiding it entirely?

Gavin Sutter: Broadly speaking, it does. As we will come on to, I take a different line on the desirability of sections 3 and 4 as an approach, but that is another matter. By and large, I think that the bill goes as far as it can within the strict letter of the law. I feel that the weaponisation aspect is predominantly one of cost. If we were talking about a system in which it costs somebody £20, for the sake of argument, to bring a case and damages might be another £20, pretty much anybody would fight their corner. However, once bringing a case costs £2,000 or £20,000, with costs of more than £100,000 per day—we see such figures coming up in the courts down here—people start to think, "I am 99 per cent sure that I can win but I don't think I'm going to fight the case, because that is too big a risk. I don't want to lose my house over a law case." That quite literally happened to Katie Hopkins in her defamation case, which she probably should not have fought. I think that the cost is central to that weaponisation or chilling effect. My feeling has long been that all the other things that we could add, saying "That is a chilling effect"—[*Inaudible*.]—when we scratch the surface to look for the problem, it is typically because of cost. That is the calculation and very

much the central issue in any difficulty. The bill on paper, purely as a matter of law, without putting the money in, so to speak, is—[*Inaudible*.]

Liam McArthur: Before we move on, does Dr Scott want to add anything?

Dr Scott: Broadly speaking, I am very much on the pro-free-speech side of almost any debate, so I welcome the things that we find in the bill. Potentially, the most profound change is a subtly expressed one: the idea that, in the defence of fair comment, one can rest one's comment or opinion on facts that one "reasonably believed" to be true. I agree that that is a desirable move forward, but it could be a profound move in the law. I re-emphasise the point that I made a few moments ago about the capacity for people still to weaponise the law, irrespective of the likely outcome. Winning the case is often not the goal that is being pursued.

I have one concern, which I put in my written evidence. It speaks to a couple of points that Gavin Sutter has already made about sections 3 and 4—[*Inaudible*.]—primary publishers is desirable. I was slightly concerned about the seeming absence from the bill of any follow-on to that. Often, the claimant's only recourse is to bring an action against some form of intermediary, whether that is Facebook or a newspaper that hosts user-generated content.

Merely to narrow the concept of publisher so that various people who could be sued today cannot be sued in future might be to significantly underestimate the issue's importance and the difficulty of the claimant's or plaintiff's position.

In the Northern Irish context, I sort of absolved myself of concern in that regard by thinking through what would happen, in the absence of liability, to the intermediary. In Northern Ireland, as in England and Wales, there is a special rule in defamation law with regard to the obtaining of an interim order requiring take-down. Essentially, that is the rule in Bonnard v Perryman. It says that, if the defendant comes to the court and vouchsafes their intention to defend the action, the court will not make an interim order compelling take-down or non-publication. Essentially, it is a "We'll see you in court" type rule.

If we consider how that would apply in a circumstance where we removed the potential legal liability of the intermediary, essentially, what would happen is that the plaintiff would go to court and make their case, and unless the actual author came forward, there would be no counterpoint to what the claimant was saying. Although they would be compelled to give the court the gist of the other side of the argument, the court would be in a position where it was faced with a seemingly bona fide complaint but nobody came forward to say that they were going to defend the action. In that circumstance, a take-down order could be made.

You might say that that is quite a convoluted process, and it is, relative to what we have at present, whereby the person gives notice and seeks a take-down. The fundamental difference is that a judge would issue a legal determination on the basis of the gist of the case as to the appropriate balance between the article 8 and article 10 interests that were at stake.

I surmise that the same type of opportunity would be available in Scottish law, although I am not a specialist on Scottish civil procedure. As far as I can see, it looks like, with the sheriff court, there might be an opportunity to gain take-down quickly via a legal route, which would address the concerns over access to justice for the claimant while also avoiding collateral censorship by potentially liable intermediary publishers or secondary publishers.

The Convener: I want to move on to how defamation is defined and whether it should be defined in the statute. I note that the bill includes a definition of defamation, and I ask Dr Scott, first, whether that is wise. Is it right that the legislation should define defamation? Do you have any reflections on the definition that is given in the bill? Are there any ways in which it could be improved?

Dr Scott: I will answer the second part first. I think that it is as good a definition—[*Inaudible*.] There is always a—[*Inaudible*.]—defining something in law.

If we compare that with the position in the common law in England and Wales, which is neatly expressed in Thornton v Daily Telegraph, we find that Mr Justice Tugendhat set out 10, 11 or 12 different definitions that judges have used over time in the English courts and which tended to speak to slightly different factual circumstances. The definition of what is meant to be defamatory that has been applied in the context of a corporate claimant might be subtly different from what would be applicable in a more domestic case, because of the different interests that are at stake.

[*Inaudible*.]—in the case of Sim v Stretch is pretty similar to what we find in section 1 of the bill. In so far as that definition will be interpreted with nuance by the Scottish courts, I do not see any real problem, although that is subject to the general caveat about putting anything down in legislative terms.

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

Gavin Sutter: I was not able to catch everything that Andrew Scott said, given the connection. By and large, however, as I say in my written

submission to the committee, I would be in favour of adopting a positive definition.

I think that the English legislature got half way there with the 2013 act giving a negative definition, in a sense. On that point, I respectfully disagree with the interpretations of the court that it would be—[*Inaudible*.]

It seems to me that the definition is very good. It is long overdue—the Fox committee called for it in 1975. I think it was right then and it would be right now. The definition in the bill is a pretty good general definition. The only thing that I would suggest adding to it—particularly in this context in Scotland where there was a long debate about whether you should be able to protect the dead person's reputation against defamation, which was brought up in light of the very tragic Watson case—is that it would be worth inserting that, as regards natural persons, it should be a living person who can be the subject of a defamation, rather than leaving that open to question, because of that very specific debate that was had. It is worth putting very clearly in the law that it is living people whose reputations can be damaged in this sense.

Other than that, as I say, what the bill proposes is a very solid definition and it is a real shame that the 2013 act in England and Wales did not do something similar.

The Convener: That is helpful. I just want to say to both of the witnesses that your connections are cutting out intermittently and we are having some difficulty hearing everything, although I think we are all getting the gist. Could I have much crisper answers? I think that that would help. We still have quite a lot to get through and we have asked only a couple of questions so far, so if we could just speed things up a little bit—but please bear with us if we do not catch everything that you say—that would be extremely helpful. Thank you. With that in mind, I go to Rona Mackay.

I am sorry, Rona, but your mic was still muted.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I would like to move on to talk about the serious harm test, which is contained in the Defamation Act 2013. Mr Sutter, I will come to you first. I see from your submission that you are in favour of the serious harm test. Could you expand on that? Do you think that it has been successful in protecting against the alleged chilling effect of defamation claims?

Gavin Sutter: Yes, it is worth setting that out in statute. Given that the interpretation that the Supreme Court has set at a fairly low standard is arguably not law as it was previously, I do not think that it has made a significant change in practice. However, perversely, I think it is worth having it there to clarify things, effectively for non-lawyers in many ways.

Rona Mackay: Previous witnesses have raised concerns that the test in England has proven to be complex and resource intensive for courts to operate. We know that there are far more defamation cases in England. Do you agree with that, and can you compare what would happen in England with what we are proposing in the bill?

Gavin Sutter: I think that Andrew Scott has done a bit more direct research on that specific point than I have so he might be able to give a clearer answer. My feeling is that it is appropriate, but it has meant that there is an extra stage in cases. I would want to see how many cases it ended, because if it is not stopping many cases or very few cases fail that test, in one sense, there might be an argument about the difference that it makes. As I say, Andrew Scott has done more work than I have on some of that in practice, so I would defer to him.

Rona Mackay: Dr Scott, could I ask you to comment on that? Also, I am interested to know what you think of the threshold. How high should that test be set so that it would make a difference?

10:30

Dr Scott: In the English debate, we talked about comparing tests of the threshold of seriousness, which derive from the common law and Strasbourg jurisprudence. To me, it is a question of semantics; we are talking about something having to be a "significant" defamation.

In the English courts, the real issue with the serious harm test, as Gavin Sutter has suggested, is that it has been interpreted and reinterpreted as it has gone through litigation in Lachaux v Independent Print Ltd.

To start with, Mr Justice Warby said that the test was a higher threshold and, importantly, that evidence would have to be pled, in order to meet the threshold. The Court of Appeal then said, ultimately, no—it was pretty much the same as we had in common law, so inferences were fine, and there would be no additional hurdle. However, the Supreme Court has come back and reiterated Mr Justice Warby's view.

That means that, whereas we thought that serious harm would be a question of threshold, and thus would be able to be dealt with at a preliminary hearing, very often it will have to be heard at a substantive hearing—at the end point of the legal process. In addition, very often, significant evidence will have to be pled, in order to show that the threshold has been met. That adds cost and complexity to the legal proceeding.

In the Northern Irish report, I suggested that I was neutral on it, because, at that time, the position in law, in England, was that which was held up by the Court of Appeal. I would be much more circumspect today about the introduction of any serious harm test that required substantive pleading of evidence in court.

A rejoinder to that is to say that the Supreme Court left room for the finding of inferential harm, if you like. Under the Supreme Court position, it is still possible to presume harm—in some cases, but not all. I can certainly concur with earlier witnesses who have been worried about that.

Rona Mackay: If it has to go to the Supreme Court, that would seem to defeat the purpose, given that the serious harm test is meant to be there at the outset.

Dr Scott: With any new rule, there will, over time, be some sort of interpretation in the courts. I suspect that, in any litigation proceedings, much greater attention may be given to that question than one might have hoped when introducing it as a sort of gateway test.

Rona Mackay: From that, I take it that you are not convinced by it.

Dr Scott: When I reported to the Northern Irish Government, I thought that it could work okay; however, today, I would be much more circumspect and more concerned.

The Convener: That is very helpful.

John Finnie will ask about section 3 of the bill and the Derbyshire principle.

John Finnie (Highlands and Islands) (Green): Good morning to the witnesses. I will direct my question to Mr Sutter, in the first instance.

All aspects of the bill involve a balance between freedom of expression and the protection of individual reputation. The bill includes the Derbyshire principle—the ban on public authorities suing for defamation.

The statutory definition will cover arm's-length organisations and other bodies. That reflects the different model of public service delivery in Scotland. There is an exemption for businesses and charities that are engaged in delivering public services only "from time to time".

Views differ. Media concerns, rightly, are about effective scrutiny, whereas members of the legal profession have expressed some concerns that the definition has been drawn more widely than at present. We have also heard about the implications for individuals such as doctors.

Will Mr Sutter and then Dr Scott comment on the application of the Derbyshire principle in the bill?

Gavin Sutter: I am very much in favour of the Derbyshire principle, as a way of preventing public bodies from using libel as a shield against public accountability.

I have two concerns. With regard to my first concern, which is about the general principle, I do not think that there is a clear answer. Research has shown that in England and Wales, a number of local councils effectively subverted the Derbyshire principle by having the party quietly fund an individual to protect their reputation as an individual, so that when the individual was cleared, the party was cleared by implication. There is a concern about abuse in that regard.

My second concern is specific to the bill. Section 2(3) states:

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

John Finnie referred specifically to that wording in his question.

My concern—maybe it borders on paranoia—is that there could be potential for a public body, in doing something that it feels might be controversial or that it does not want to be critiqued, to deliberately outsource that activity in order to use the outsourced company as a shield to subvert the Derbyshire principle.

My feeling is that, if we are going to permit an outsourced body to act in a public context, the law should work, as indeed it does with elements of human rights law, such as article 10 of the European convention on human rights and so on. A private body that is acting in the capacity of, and on behalf of, a public body should be treated in all respects as a public body, which includes adhering to the Derbyshire principle.

John Finnie: Perhaps Mr Sutter can clarify something. What would the link be there? Would it be that there was public expenditure connected with the function?

Gavin Sutter: Essentially, the activity—whatever it is—would be carried out on behalf of a public authority. That activity is being done with taxpayers' money, and the public body should be accountable in the same way that it would be accountable for any other activity. The system should not be open to abuse, and the authority should not be able to evade scrutiny simply because it has outsourced the activity to somebody else. That is partly the principle.

John Finnie: I want to push you on that. I am trying to imagine a situation. Some multinational corporations run public services in Scotland, but similarly a local plumber might do some work on the village primary school or hall—

Gavin Sutter: Something on that level would be fine. I am thinking of a major infrastructure project that is contracted out, or a privatised contract to run a railway—big-level stuff, not individual or low-level stuff.

John Finnie is right—there would have to be some clarification of the level at which such a principle would apply. However, I am thinking of significant bodies that are acting in the long term and doing specific projects that deal directly with the public. For example, my flat, from which I am speaking today, is an ex-council flat, and the day-to-day management of the block is outsourced to a private company. That is the kind of scenario that I am thinking of.

John Finnie: Dr Scott, do you have any views on that?

Dr Scott: In the light of the convener's instruction to be brief, I will pass on that question—I have nothing substantive to add.

John Finnie: In that case, I will raise with you a secondary point on the same area. Some media stakeholders have argued for wider restrictions on the ability of businesses to raise defamation proceedings. Scottish PEN proposed that only companies with fewer than 10 employees should be able to sue for defamation, under the so-called Australian model. Have you any views on that?

Dr Scott: I will begin with the Australian model. It is not dissimilar to—[*Inaudible*.]—just a moment ago. In Australia, under the rules that govern corporates' right to sue, or corporate standing, there is nothing that would restrict a corporate director or manager from suing on their own behalf. It is thereby possible to circumvent that type of restriction.

More generally, I am sceptical about the desirability of limiting the right of corporations to sue per se. These days, a company's primary asset is fundamentally its reputation, so it seems almost bizarre that one would prevent a company from having the right to use the cause of action of delict, which would give it immediate access to the court to defend its reputation.

I would much prefer an alternative approach, which I think Scottish PEN put forward. That would be to assess the impact of actions brought by corporations when talking about what, in common parlance, would be referred to as anti-SLAPP—strategic lawsuit against public participation—legislation. If a corporation was bringing an action that might be designed to prevent, but certainly had the effect of preventing, a critic in the public sphere from making their points volubly, that type of action should be used rather than the general action being brought by corporations.

Corporations tend not to sue on defamation. Many other devices are available to them to defend their reputations. A review of reputation management text books will find that law barely gets a mention.

John Finnie: Thank you. I will leave it there, convener.

The Convener: We have had to cut the video feed from Mr Sutter—he is now audio only and we can hear him much better. I am sorry that we cannot see you, Mr Sutter, but we can hear your evidence more clearly.

Annabelle Ewing will take up the theme of looking comparatively at aspects of defamation.

Annabelle Ewing: I want to pick up on points that our witnesses made earlier that, although the bill by and large gets it right, there are issues about how it will need to operate in practice if people are to avail themselves of it, one way or another. In that regard, I understand that there is a pre-action protocol in England and Wales for media and communications claims in general, which includes defamation claims. Is either of our witnesses aware of how that works in practice in providing at least a partial solution to some of the issues that you have both highlighted? Dr Scott, will you start?

Dr Scott: I confess that I have limited personal experience of that. The purpose of the pre-action protocol is to narrow the contentious field so that, as the case goes through the litigation process, it focuses on the real concerns—the crux of the issue. That, allied with active judicial case management, which has been a feature of legal proceedings in this area for the past five or 10 years in England and Wales, leads to much more efficient resolution of libel disputes. Beyond that, I cannot comment on the efficacy of the protocol directly.

Annabelle Ewing: Does Gavin Sutter have any comment?

Gavin Sutter: I have nothing to add to what Andrew Scott said.

Annabelle Ewing: I turn to the issue of looking at the defamatory meaning of the words that were employed in any case. You will be aware that it has been suggested that there should be a quick court procedure to look at that specific issue. What are your thoughts on that?

Dr Scott: Are you saying that there has been a proposal for early hearings in Scotland?

Annabelle Ewing: It is not in the bill, but I understand from evidence sessions thus far that it has been suggested that that would be a help. It would be a question of looking at that in the round,

understanding what it would mean and, in terms of precedent, how it has operated elsewhere.

Dr Scott: You would think that the question should be easily determined. The legal test is impressionistic and considers what the average person would understand the publication or imputation to have meant on a bare reading or passing hearing of it.

There is, in effect, an early determination of that in the English courts, as it is invariably one of the preliminary matters that is brought to the court before a case goes near the substantive hearing. That is one dimension of the judicial case management that I talked about. I am particularly interested in the issue and, in my written evidence, I give details of research that I have been undertaking.

Since 2014, the average number of days taken for those preliminary hearings to reach a resolution on the meaning of a phrase that the average person is taken to understand on an impressionistic basis is around 580 days. That is 580 days of lawyering and one or possibly two legal hearings. In some cases, that costs over £100,000; it generally costs tens of thousands.

10:45

Therefore, that seems to be a sensible thing to do, and it is highly desirable as a means of rationalising litigation that will go through the courts. However, it does not get away from the fact that you do not want to get embroiled in the game of libel proceedings at all, because of the cost.

I spoke to that point in my report to the Northern Irish Government, in which I asked how it could be done differently. I have submitted written evidence on that. If you want to ask any questions about it, I am happy to respond.

Annabelle Ewing: You have both referred to the fact that the 2013 act is deficient in some areas. Taking account of the experience of legislation down south, and leaving aside the issue about people availing themselves of the bill in practice, is there any key issue that the bill fails to deal with or does not deal with well?

Dr Scott: To follow on from my previous comments, the determination of meaning could be taken outside the court process altogether, so that only contested meanings would ever go to court. At the moment, there are hundreds of days of arbitrage between the sides, which is unbelievable. We are asking a simple question about what something meant, and the answer should be straightforward.

The other issue is one that I already alluded to in the Scottish PEN evidence: the potential desirability of anti-SLAPP legislation. To give a comparative perspective, such legislation has been introduced in many US jurisdictions and recently in Ontario in Canada. The approach in Ontario is interesting, because it solved a perennial problem with such legislation. A SLAPP is a strategic lawsuit against public participation. It is a bullying action, and often a bullying defamation action. Anti-SLAPP legislation usually allows an early means of having a court strike out such action. In some variants, the legislation also allows the recovery of damages for the impact on a person's freedom of speech. That gives the individual an incentive to pursue the action and has a collateral benefit for wider society.

The Ontario law focuses on the effect of what is being proposed and of the action that is being taken, rather than moving into the murkier territory of trying to understand the motivation of the litigant and the plaintiff. It is quite quick and neat. It is also quite new, but there has been some research into its efficacy. The committee and the Scottish Parliament might benefit from adding anti-SLAPP provisions to the bill.

Annabelle Ewing: That is interesting.

Mr Sutter, do you have any points about key issues that are missing from the bill, or about anything that could be refined?

Gavin Sutter: Andrew Scott has raised helpful ideas about anti-SLAPP legislation. That could be worked in alongside the notion of some sort of tribunal, although I would see the tribunal side as arising from something separate, rather than from the bill.

Apart from the critiques that I made in my written evidence, the bill as it is designed addresses all the key issues.

Annabelle Ewing: It is rare that witnesses think that a bill as introduced is in such good shape, but that is interesting. We will consider your interesting suggestion carefully.

The Convener: We turn to a quite technical and complex area of the bill—namely, the provisions that pertain to secondary publishers, on which Rona Mackay will lead the questioning.

Rona Mackay: The issue was discussed earlier and I do not propose to go over what has been said already, unless the witnesses want to expand on that. I want to focus on the fact that the bill does not deal directly with online publication, although excluding secondary publishers from liability would have a huge impact in that respect. Should there be more focus on online publication in the bill?

The United Kingdom Government has put forward its proposed reforms of internet regulation in its "Online Harms White Paper". What impact do

you think that those developments will have on online defamation?

Internet regulation is a huge issue. First, I would like to hear the views of Gavin Sutter.

Gavin Sutter: I will first address the question of whether the bill needs to reference online publication directly. I do not think that that is necessary. It is clear enough from sections 3 and 4 that the provisions have been drafted with the online focus very much in mind. I mentioned the proposed online harms bill in my written submission. It is still not clear where that English bill is going, but the broad substance of the idea is to make social media providers responsible by giving them a duty of care towards their end user. It is possible that a number of the harms that are identified, such as cyberbullying, could have a direct crossover with the issues involved in defamation. That could have the advantage of giving a number of claimants who might not otherwise bring—or feel emboldened or able to afford to bring—defamation proceedings.

However, my concern about the online harms issue is how many of the harms that are identified are not actually illegal things. I am a bit concerned that what is proposed could have a chilling effect on expression and on speech. I am not convinced of the practicality of trying to bind in that way a giant such as Facebook, which in the past has openly stuck up two fingers to many states with regard to what their law says and said, "We're Facebook, and we do it the Facebook way." Therefore, we cannot rely too much on the idea of online harms as an answer to the issues that affect defamation.

Rona Mackay: Would the serious harm threshold apply to online publication, too? I presume that it would.

Gavin Sutter: Yes. The bill as drafted is not directed towards any particular medium for publication; it applies to online publication in the same way as the libel law, which originally applied to print, also came to apply to broadcast, when that came along as a form of mass media.

Rona Mackay: Dr Scott, could I have your views, please?

Dr Scott: Certainly. On whether there should be explicit reference to the online context, I concur: I do not think that that would be particularly advantageous. As Gavin Sutter suggested, we have seen the development of various rules in the common law and in the legislation that plainly speak to the online context but which might have some bearing on traditional forms of publication. Therefore, explicit reference to online publication is simply unnecessary.

On secondary publishers, I refer to what I said earlier, but there is an additional point that I would like to make you aware of. If you recall, I suggested that the bill does a good job in absolving secondary publishers of potential liability. That was also the position that the Law Commission of Ontario reached when it considered the issue. It rested its viewpoint on the work of two Canadian scholars called Emily Laidlaw and Hilary Young. Their proposal married the removal of potential liability from secondary publishers with the possibility of the imposition of a public fine on publishers if they fail to interact with the claimant and the primary author in the way that is described in guidance. That took away the liability issue, albeit it reintroduced the potential stick of public fining. That is definitely worth looking at.

Rona Mackay: That is helpful.

The Convener: James Kelly will ask questions about the defences that are provided for in the bill.

James Kelly (Glasgow) (Lab): What is your view of the defences of honest opinion and publishing in the public interest that are set out in the bill? Do you have concerns, or are the defences adequate?

Dr Scott: In my written evidence, I raised a point about the defence of truth. I want to renege on that point, because I think that I was guilty of not fully reading the bill. I queried whether it was obvious or clear whether what was intended was a reiteration of the existing Scottish law or the introduction of something known as contextual truth, which is familiar in Australian jurisdictions. It is palpably clear that it is the former, which is fine.

However, a normative question is left open: whether a defence of contextual truth would be desirable. In that regard, I note that New South Wales has recently revised its defamation law. It has moved away from the uniform defamation laws that were introduced in Australian jurisdictions in 2005 as, it hopes, a precursor to the institution of similar changes elsewhere. New South Wales has sought to clarify its defence of contextual truth, which is defined in section 26 of the uniform Defamation Act 2005. It clearly thinks that contextual truth is a desirable facet of the suite of defences. The committee might want to look at that, although I would not necessarily propose such a measure.

What is really desirable is one of the changes that the bill would institute in the defence of honest opinion. As I mentioned earlier, formerly, in order to be able to defend an opinion or comment, a person had to be able to show that the underpinning facts were true or privileged. The bill extends that defence to facts that a person reasonably believes to be true. That is innovative

and has not been done anywhere else, and it will help Scottish law to move away from the surfeit of technicality in this area of law.

Often, in the context of honest opinion, the debate is not about the validity or otherwise of the comment or opinion that has been expressed, but rather whether the underpinning facts were true. Depending on the factual circumstances that someone is speaking or publishing in, they may have no way of determining whether something is true. For instance, if I am blogging on something that I am watching on "Newsnight", or that I read in *The Times,* I have no way of knowing whether, if pushed, "Newsnight" or *The Times* would be able to prove their case. I would be entirely reliant on the adequacy of their legal checks.

The innovation in the bill will mean that, if it is reasonable for me to adopt the position that what I am hearing or reading is true, I can express my opinion. That is precisely what we want journalism for—we want journalists to investigate matters of public importance, publish on them and thereby inform the public. We then want the public to communicate to one another what they have heard. That is the very basis of public information. The defence of honest opinion will allow that to happen to a much greater extent. It might be too great a defence for freedom of speech but, as I intimated earlier, it is something that I am happy to see. I can certainly see a counterpoint to that being raised with you but, for me, it is a really desirable reform.

11:00

Gavin Sutter: I completely concur with Andrew Scott's point that a defence of honest opinion, with an explicit reference to an honest mistake as the basis of that, is a good move.

Broadly speaking, I am in favour of all the defences in the bill. If I am nit-picking, as I mentioned in my written evidence, I am uncomfortable with truth being used in place of provable fact. I would much rather have a defence of fact in the context of a court deciding on the basis of the balance of probabilities, but that is a minor point.

There is an important minor point in relation to the public interest defence. It is a very good defence; it clearly reflects section 4 in the 2013 act but it is better laid out and clearer than the section 4 attempt to put Reynolds privilege on a statutory footing. The only thing that I would suggest is that the UK bill originally had the defence of

"responsible publication on a matter of public interest",

but the word "responsible" was dropped in the final act. That is a shame, because referring to "responsible publication" hammers in the point that it is a defence for responsible journalists acting in the public interest, not an excuse for saying, "Well, we can't do truth, we can't do honest opinion, so let's try this one out."

The only other point that I would make on defences is to congratulate the drafters of the bill on how well they have laid out the offer to make amends defence, because that is important in helping to say to people, "Look, behave like adults—sort it out between yourselves." If somebody has been unreasonable, it is useful for the other party to have that to rely on in court, where appropriate. The defence is wonderfully drafted, very clear and, in its clarity, far surpasses what remains in England under the Defamation Act 1996.

I have nothing else to say about defences at this point.

James Kelly: That is very comprehensive.

The Convener: Thank you. Liam Kerr has two questions; one is about malicious publication. Liam, do you want to ask your question about limitation at the same time?

Liam Kerr (North East Scotland) (Con): Yes, I will. I have three questions around malicious publication, but I shall be appropriately brief. Part 2 of the bill is on "malicious publication". The bill will create a court action for malicious publication to protect business interests. The serious harm threshold does not apply to malicious publication. In his submission, Mr Sutter specifically says that he is in favour of a serious harm test. If the committee is minded to agree with that, should a serious harm test apply also to malicious publication?

Gavin Sutter: That is the context in which the idea of a serious harm threshold originally arose. You might remember the McDonald's Corporation v Steel & Morris case—otherwise known as the McLibel trial—which was the longest and one of the most expensive libel trials in English legal history and ended up in the European Court of Human Rights over the issue of inequality of arms and expenses. It is another case that links back to our earlier comments about cost being a factor that prohibits people from fighting cases, even when they have a good case. McDonald's Corporation v Steel & Morris inspired the idea that a business should have to show a reasonable level of harm before it could bring a case. I would be very comfortable with applying the serious harm test there. There is an argument that it is more appropriate for businesses to protect themselves with a malicious publication action than with a libel action, but I would not go so far as to cut them off from libel.

Liam Kerr: I will ask Dr Scott my next question. If Mr Sutter takes a different view on the issue of serious harm, he can elaborate briefly on that.

I am interested, in particular, in Dr Scott's comments about secondary publishers. The bill as it is drafted would exclude secondary publishers from liability for defamatory material. However, it appears that that may not be the case for malicious publication. Do you accept that? If so, is that a lacuna that requires to be filled?

Dr Scott: I confess that I have not paid particular attention to the area of malicious publication. On the serious harm dimension, I refer you to my earlier comments on the potential escalation of costs associated with it. From what you have said, that aspect sounds interesting, and I am curious that a different approach has been adopted. I would certainly want to interrogate that, but I am not personally in a position to do so.

Liam Kerr: Mr Sutter, do you have a view? If not, I will move on to my third question on this area.

Gavin Sutter: No—I have not specialised much in the area of malicious publication. I believe that the English equivalent is long gone. All that I can say at this point is that, if the provision is intended to be an alternative to libel as a way for businesses to protect themselves, it may have a different shape. If it is considered to be a very similar action to libel and you want it to be held to the same standards, uniformity in all aspects may well be preferable. I could not say more on that question without further research.

Liam Kerr: I am grateful. I direct my final question specifically to Mr Sutter. It is on limitation. There are differing views on the reduction of the limitation period to one year. Legal stakeholders seem to suggest that one year might be too short, while others take a very different view. In your submission, you support the reduction. However, it seems, from reading your submission document, that your argument has been cut off—at least in the version that I am looking at.

Gavin Sutter: Yes.

Liam Kerr: Would you mind delivering that argument now—as briefly as you are able to, please—to persuade me that one year is appropriate?

Gavin Sutter: Apologies—I am not quite sure what happened. Something may have been lost in the formatting.

As I said in my original submission, I approve of the measures—in particular, the reduced time limit for bringing a libel action. The speed of modern media cycles has rendered the old three-year period unnecessary, and any injustice that might otherwise occur with that shorter period can be addressed through the statute of limitations, which provides for judicial discretion to hear a libel case outside the normal limitation period if the court feels that that is in the interests of justice.

That happened about 10 years ago in the High Court. The singer Steven Patrick Morrissey was allowed to bring a case four years after the original publication, on the basis that he was aware of it at the time and wanted to bring an action but he was too busy being sued by other former members of the Smiths and losing a case on unpaid royalties, and he brought the case as soon as he could raise the funds to do so. The court actually allowed the case to go ahead—afterwards, it was settled. The case law would suggest that the bar for interests of justice is relatively low, and I think that it is reasonable to place that decision in the hands of the judiciary.

In some other jurisdictions, the one-year period would be considered quite long. I am reliably informed that in France you are allowed four months in which to launch your action if it refers to something that was mentioned in a newspaper, on the assumption that, if it was really going to damage your reputation to the point at which you would bring a case, you would kick off much earlier than that. I think that that bar is a little low, but a year seems like a reasonable time in which to make the decision to file suit.

The Convener: Thank you. That is helpful.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I want to return to the subject of court orders to remove material. We have heard some conflicting evidence on that, with some people expressing concern and some being in support of it. Media stakeholders, in particular, have expressed concern that section 30 of the bill would enable a court order for a third party to remove contentious material as an interim measure before a final decision on its defamatory nature had been reached. Do you think that interim measures are appropriate in this context?

Convener, this is my only question, and I am quite happy for the witnesses to answer it in any order.

The Convener: Let us go to Dr Scott first.

Dr Scott: I refer you back to the point I made earlier about the Bonnard v Perryman rule and the relative difficulty that it introduces for claimants having material taken down at an interim stage. As I say, that is a hedge in favour of freedom of speech, but it is beginning to be contested on a human rights basis, and the bare rule maybe does not allow for an appropriate balance between ECHR article 8 protection of reputation and article 10 freedom of speech.

It was accepted as legitimate in the case of Green v Associated Newspapers, in the Court of Appeal in about 2006. However, Strasbourg discourse has moved on since then. To me, the desirable position is very much publish and be damned, at least in this context, where we are talking about truth rather than the invasion of privacy.

Gavin Sutter: I tend to agree with Andrew Scott. In discourse in the UK, we have traditionally seen privacy and libel as representing different things—the public and the private persona, if you like. There is a justification from the Bonnard v Perryman position on the basis that with libel you have the chance to clear your name with on-going litigation, whereas with privacy, once it is out there, it is out there.

The only flag that I would raise is that it is not entirely unusual for that to be reached around in many cases. For example, the Beckhams famously took to court an ex-nanny who sold her story to the press. Although they later launched a libel action against her that they ultimately settled out of court, initially they were able to prevent much of the material from being published because they cited a confidentiality agreement in her contract. In some cases, therefore, there will be a reach around in the Bonnard v Perryman rule, which suggests there are more limits to it than it presents on the face of it, if there is an overlap with your defamation and potential confidentiality. Other than that, I do not think there is a problem.

It is reasonable to have that section in the bill, subject to the approach that it would only really be used when it is considered to be absolutely necessary and justifiable under the article 10/article 8 balance.

Fulton MacGregor: Thank you. That is helpful. I am happy with both answers, convener.

The Convener: The final question will come from Shona Robison, who has been waiting very patiently.

Shona Robison (Dundee City East) (SNP): I want to ask about the Scottish PEN proposals—which I am sure you are aware of—for a new court action to provide protection from unjustified threats of defamation action. What are your views on that? Could we go to Mr Sutter first, please?

Gavin Sutter: I have not seen the full detail of the proposal, but I do not think that the key idea is unreasonable. It would seem to be a logical broadening of existing harassment laws, so that we would logically feel that, if somebody is harassed by threats of legal suit in bad faith, the law should prevent that in the interests of justice. I would therefore look favourably on the broad concept.

Shona Robison: Dr Scott, can I ask you the same question? Do you agree with the proposal in principle and do you think that it is workable in practice?

11:15

Dr Scott: Again, I refer you to my earlier comments about the position in Ontario. I have not seen the details of the proposal either, but traditional concerns about measures of this type are usually based around article 6 and the right of access to the court. That is why the Ontario version places great emphasis on the effects—or the article 10 dimension, if you like—rather than motivation, which would be picked up by any requirement of bad faith, as Gavin Sutter said. That would be quite the norm in US versions of this law. Beyond that, I would just say that you should maybe have a comparative look at the position in law in Canada.

In general terms, however, it is highly desirable. If our concern is about the weaponisation of libel law and defamation, why not have a cause of action or response that allows you to directly respond to that perceived problem? I am all for it, if it can be made to work.

Shona Robison: Thank you. That is me finished, convener.

The Convener: That ends the questions for this panel of witnesses. I thank Andrew Scott and Gavin Sutter for their time and generosity today. I am sorry that we had one or two technical glitches along the way, but we got there in the end.

I suspend the committee for five minutes to enable a changeover of witnesses.

11:16

Meeting suspended.

11:21

On resuming—

The Convener: Welcome back, everyone. I welcome our second panel of witnesses: Mark Scodie, who is senior corporate counsel at TripAdvisor, and Ally Tibbitt, who is a journalist and director and co-founder of *The Ferret*.

I thank the witnesses for their written submissions, which are available on the committee's web pages, and I invite each of them to make a short opening statement before we get into questions.

Mark Scodie (TripAdvisor Ltd): TripAdvisor broadly welcomes the bill, which, as others have observed, tips the balance of Scottish defamation laws towards freedom of speech. From our point

of view, that helps to reduce a potential barrier to consumer speech online, which in turn benefits any traveller who is based in, or coming to, Scotland, as well as travellers and business owners in the global travel industry and ecosystem as a whole.

TripAdvisor is the world's largest travel website: it features more than 860 million reviews and opinions on 8.7 million places to stay, places to eat and things to do. TripAdvisor's belief and experience is that the more travellers can share their experiences—good and bad—with the rest of the travelling public, the greater the benefits to all involved.

The vast majority of businesses that are listed on TripAdvisor understand that point well and see user review websites as forums where word-of-mouth reviews can provide some of the best advertising that they could ever get, while mixed or negative criticism equally provides them with swift insight on the things that they could improve.

In exceptional cases, however, some businesses respond differently to criticism: they can be unwilling to accept it and can react in a more adverse manner, the result of which can sometimes be that they attempt to have recourse to the defamation laws in one jurisdiction or another. Although they will sometimes go to solicitors or lawyers in the jurisdiction, they will sometimes go to online reputation experts to get them to clean up—supposedly—their online reputations. Defamation laws can be deployed as one of the weapons that we might see in action.

Against that background, we welcome some of the bill's reforms, which redress some of the weaknesses that might otherwise be present under the existing Scottish legal position, not only for the consumers who write the reviews but for the online platforms that host that speech. We think that those reforms reduce the likelihood of travellers being cowed into self-censorship of what would otherwise be useful statements and public records of their own experiences of businesses that trade with the general public. Equally, they reduce the potential need for those who host such material online at great scale to make excessively cautious decisions to remove material that appears to be—as far as they can tell—perfectly lawful.

Specifically, we welcome the shortening of the limitation period from three years to one, in line with the English and Welsh position; the raising of the seriousness threshold; and the introduction of the serious financial loss requirement, which again mirrors what happened in England and Wales with corporates that trade for profit.

We very much welcome the introduction of the single publication rule, which would remove the otherwise somewhat unreal position that internet publications are infinitely actionable for ever.

Finally—although this might address a problem that was not huge in practice—we welcome the rule limiting the potential phenomenon of libel tourism in Scotland and tightening the rules on when the Scottish courts would and would not have jurisdiction. London has been shaking off its former reputation as the libel capital of the world by virtue of its own reforms some years ago. There has been some discussion of other places that might take on that role, such as the Republic of Ireland or Sydney. We welcome this attempt by the Scottish legislature to guard against that happening here.

Another strong positive is that we welcome the innovative and thoughtful attempt that is being made to pin down who is and who is not a publisher. In particular, section 3(4)(g) clarifies, in a way that I have not seen done quite so explicitly in other jurisdictions, that a website operator can moderate content in its attempt to be a responsible host of third-party speech and to not get put on the proverbial hook in defamation cases just by virtue, for instance, of cleaning up swear words or carrying out some other moderation process.

As to matters that might merit further discussion—

The Convener: I am sorry to cut across you, but we will get into all those issues in detail in the questioning, and we will definitely come back to that final issue in a few moments. Before we get into the questioning, does Mr Tibbitt want to make any opening remarks?

Ally Tibbitt (The Ferret): I am delighted to be able to speak to the committee today, so thank you for inviting me. I think that the best thing that I can do at this stage is provide an introduction to *The Ferret*, because we are a relatively new, insurgent organisation.

We were established in 2015 to tackle the perceived decline in public interest investigative journalism. We are a co-operative, with nearly 2,000 paying members. We have places for our readers and our writers on our board, so we have quite a different business model from most media organisations.

Crucially, we are the first organisation in Scotland to adopt a Leveson-compliant independent regulator, which means that we are regulated to higher editorial standards than most of the press. We could get into the detail of why we did that, because it is important to the evidence that we will give later on. We also operate Scotland's only independently accredited non-partisan fact-checking project.

We are large in numbers and large in impact. We often work with the printed press. Our materials have appeared in media from across the political spectrum, from *The Guardian* and *The Scotsman* to the *Daily Record* and *The National*.

However, we are still relatively small in turnover, and that might make us interesting to the committee. For example, we have had practical experience of the chilling effect, which I know that committee members are interested in. Even if we were to win a case that was related to a public interest story that we had been involved in, the legal fees would cost us about a fifth of our annual turnover. Fundamentally, that is why we are very keen on reform of defamation and why we have supported the public-specific campaign.

The Convener: Excellent. We will go straight to questions.

Liam McArthur: Mr Tibbitt has provided much of the response that I was looking for on the practical effect of defamation law as it stands on your organisations. Do you have anything to add, Mr Tibbitt, before I turn to Mr Scodie?

11:30

Ally Tibbitt: Broadly speaking, our interest in this process is very much about reducing the cost and the time that is taken, and simplifying the process of dealing with disputes.

Obviously, our work can be controversial and can annoy rich people with thin skins—that phrase came up earlier and in previous meetings. We do our best to get it right, but there are disputes. Our written submission indicates that an arbitration process is available to independently regulated publishers, particularly those that are regulated by the Press Recognition Panel. That process is independently available to potential complainers and is set up to deal with defamation claims. We believe that the committee should consider building in some mechanism for incentivising and encouraging people to use those statutory arbitration processes as a means of cutting the cost and reducing court time for all the parties involved.

Liam McArthur: Mr Scodie, you alluded to what you hope that the bill will help to achieve in future. Could you set out more precisely what sort of effect the current defamation law is having on the way in which TripAdvisor operates and interacts with customers and clients?

Mark Scodie: As TripAdvisor is a global business and I help to support the business with legal matters in multiple jurisdictions, I have developed a sense of how the Scottish legislation compares with laws in other jurisdictions.

For instance, the three-year limitation rule means that if, at a given moment, a business wants to attempt to use legal levers to clean up negative reviews so that it is left only with positive reviews, it can go back disproportionately far into the past. If that worked, it could result in a real imbalance in the overall picture of consumer sentiment that is available on a review website. I should not overstress the scale of that, as it has not happened a great deal; from what I have seen, Scottish businesses, by and large, do not feel the need to have recourse to legal threats.

Moreover, the lack of a single publication rule means that it would be possible to go back even further than that. TripAdvisor is fortunate enough to have the resources to be able to consider such matters at a specialist level—it can use internal and external counsel—but a smaller website with fewer resources or less time to devote to such matters might be inclined just to remove the material altogether, rather than have what it might consider to be a disproportionate amount of stress and challenge over one piece of user-generated content.

Liam McArthur: Thank you—that was helpful.

Obviously, there is a balance to be struck between freedom of expression and the protection of reputation. The witnesses that the committee has heard from seem to have a common view that the bill shifts the balance more in favour of freedom of expression. We have not yet heard from the Scottish Government, but I rather suspect that that is a deliberate intent. In your view, is that balance now better struck in the way that the bill is structured?

Mark Scodie: I think that it is. I will flesh out a point that I made earlier, which relates to the notion that one avenue of potential attack on freedom of expression has been closed down. For years, a claimant lawyer's method would be to identify anyone who was potentially liable for a given publication. Frankly, they would look to identify the weakest link in the chain. If someone's primary aim is not even to get damages but is just to get some material taken down or deleted, they will try to find anyone in that group of people who might be liable and will attack the one who might be the least likely to put up any kind of resistance.

The fact that the legislature has very thoughtfully tried to close off attacks against a website that is perhaps moderating or only hosting content is an important shift in favour of freedom of speech towards those who wanted to speak in the first place.

Liam McArthur: Mr Tibbitt, I suspect that I know the answer to this question, but I will ask it anyway. Does the bill better strike that balance?

Do you see it as a deliberate shift in favour of freedom of speech?

Ally Tibbitt: Yes, I hope that it shifts the balance towards freedom of speech.

However, Mr Scodie made an interesting point about pursuers going for the "weakest link". That does not apply only to online, civilian commentators. One of the consequences of the current situation is that, in effect, it means that larger media operators with big pockets can afford to take risks that smaller operators cannot. That has implications for media diversity and competition because, in a way, the current situation supports the status quo, and that makes it very hard for new entrants to grow and develop without taking on proportionally more risk.

I come back to the idea of independent regulation and arbitration. One of our reasons for deciding to join IMPRESS is that it offered an arbitration process that we hoped would help to provide a mechanism to resolve things that did not involve a significant legal bill that would basically put us out of action in the event of a legal scrape. There is a temptation for people who are dealing with us to think that it is worth while sending us a legal letter, because they know that there is greater potential for them to be able to stop a story of ours coming out. That is because *The Ferret* could not take the risk, whereas a larger publisher could.

Liam McArthur: That is very interesting, and your answer leads me on to my final question, which is on pre-litigation letters. Witnesses on one panel described them as threats that are deliberately there to incentivise. However, the legal stakeholders whom we spoke with last week said that they are very much a part of the normal negotiation process and can avoid costly legal action down the track. Where do you stand on that, and do you think that those perceptions can be bridged? Mr Tibbitt, you have clearly been in receipt of such letters. What response did they elicit?

Ally Tibbitt: I regret that I cannot go into detail about some of them, for obvious reasons. However, I previously worked for STV—where I was a journalist—and many of the founding and current directors of *The Ferret* have worked for much larger media organisations. Our experience is very much that if you work for a larger organisation you are much more willing to dismiss that kind of thing and regard it as part of the normal rough and tumble of publication and the process of journalism.

I saw that the preliminary paper from the Scottish Law Commission said that there was no evidence of that kind of pre-emptive letter closing down publication. I assure the committee—or at least, I can provide evidence to the committee—that when you work for a small organisation and your livelihood is potentially on the line and you get those letters you do not take the risk, even when you have pro bono support. That is because not only your money but your livelihood is on the line, as is also, potentially—because we are a co-operative—the money that our members invest. We would be putting that at risk to publish one story. The approach has delayed and wasted our resource and prevented publication. That is very much why I am in favour of reform of the law and of any kind of reform that reduces costs.

Liam McArthur: Would you accept the argument that one would presumably want some form of pre-litigation process to exist, to reduce the likelihood of or the need for costly court action, and that some of that activity, however unpleasant it might be when you are on the receiving end, is an inevitable consequence of that?

Ally Tibbitt: Absolutely. There will always be the potential for disputes but, to reiterate what we said in our written evidence, that is why we have an independent regulator who can channel people into an arbitration process. That is where we would be keen to see the bill scare people or at least take account of the publishers that have such processes in place, because they benefit both sides of the equation, quite frankly. It is not just for our benefit; it is also for the other affected party.

Liam McArthur: Mr Scodie, can you comment on your experience of being in receipt of such letters or correspondence?

Mark Scodie: TripAdvisor receives many such letters from jurisdictions all over the world, every year—[*Inaudible.*] There are those which contain a specific legal threat and which frequently refer to defamation. Scottish ones are unusual, but they happen.

That process is really valuable. It is also valuable for those exchanges to have weight such that if the defending party sets out clearly and convincingly why the claim or the threat should end there, but the claim is pursued and that correspondence ends up in front of a judge, the judge should be able to act on that and it should have some ramifications.

Forgive me for not being up on Scottish procedure, but you will be aware that that is basically the principle in England and Wales. In other European jurisdictions, you can have it out in correspondence and it will not mean anything in terms of how the litigation plays out in court. The claimant party can just take another shot and ignore everything that you said and have a crack at it in front of the judge anyway.

Liam McArthur: That is very helpful. Thank you.

The Convener: Rona Mackay wants to ask about the serious harm test.

Rona Mackay: To follow on from Liam McArthur's line of questioning, the serious harm test sets a threshold before someone can raise defamation proceedings. What are your views on that? Would such a test dampen down the number of pre-litigation letters, which have almost become par for the course?

Mark Scodie: The letters might continue, because you will always get people who feel affronted by something that has been said, and they will take a shot at framing a threat and getting the reaction out of you that they want. What matters, as the defendant, is your confidence in and your understanding of the available defences and how the available law is built.

My sense of the change in England and Wales is that it was certainly positive and it redoubled the confidence of hosts of third-party material that, just because something is negative, that does not necessarily mean that it is anywhere near actionable.

Rona Mackay: As a user of TripAdvisor, I am astonished at some of the comments that are on there. You talked about the number of defamation actions that come from England and you said that there are fewer in Scotland. What sort of percentages would that break down to?

Mark Scodie: There are the letters threatening such action and there are the things that actually turn into actions. In terms of things that become formal litigation—[*Inaudible.*]—it is absolutely negligible.

I have been with the UK subsidiary of the company for five years and I have experienced two or three things in England and perhaps one in Scotland, but that belies the number of legally—[*Inaudible*.] That is not helped by the phenomenon that everyone has heard of defamation but it is not widely understood. There are a lot of public myths—[*Inaudible.*]

That is one of the positive aspects of this bill because you are at least codifying things and putting many of the key—[*Inaudible*.]

Rona Mackay: Sure. So you believe that the serious harm test would benefit your business. Can you see Ally Tibbitt's point that large companies such as yours, with large resources, can deal with threats and letters more easily than fledgling companies that do not have those resources?

11:45

Mark Scodie: Yes—I emphatically agree with that. Someone with specialist knowledge in that area—[*Inaudible*.] Such a company could not afford to do anything like that.

Rona Mackay: Ally Tibbitt, will you give us your views on the serious harm test?

Ally Tibbitt: To reiterate what we said in our written evidence, I would say, as a non-lawyer, that anything that brings clarity to the thresholds that are being used will be helpful. It will certainly help journalists through the process of writing, researching and publishing. That is the key point, is it not? The bill will codify and help to—[*Inaudible*.]

Having listened to the witnesses on the previous panel, my concern is that the bill should genuinely raise the threshold, rather than apparently raising it, with it subsequently being interpreted in a way that remains quite generous.

Rona Mackay: How much of an impact do the letters that we are talking about have? How much does that inhibit the work that you do? It would be interesting to know what level that is at.

Ally Tibbitt: To be clear, we do not get such letters every week, but when they arrive—as I said—they have what feels like a very disproportionate impact on the business. We do not have lawyers on tap, as large organisations do. Although our staff have many decades of journalism experience between us, the issue is as much about the time and the capacity that it takes for us to deal with the letters.

In almost all circumstances, we would not move to publish something that we were not confident of. Nonetheless, as I said in my opening remarks, we were shocked and stunned to learn that the costs of defending an action—even if we won the case, and even with an element of pro bono support—could easily extend to more than a fifth of our annual turnover. That would be unsustainable.

Even if we receive one such letter per year, therefore, that essentially prohibits us from publishing a particular story, which could have a significant public interest.

Rona Mackay: Thank you—that is really interesting.

The Convener: John Finnie wants to ask about the so-called Derbyshire principle.

John Finnie: Good morning, panel. My question is for Mr Tibbitt, in the first instance. You said that you listened in on the previous session. The Derbyshire principle bans public authorities from suing for defamation. I am sure that many of those authorities are the very people that you want to inquire about. You will be aware that the profile of public sector services has altered greatly over

the years, with many multinational corporations now delivering services.

The Derbyshire principle is about freedom of expression and the protection of individual reputation. The bill creates a definition—there is an exemption for businesses and charities—that excludes from the application of the principle a body that delivers public services

"only ... from time to time."

Can you comment on the Derbyshire principle and how it is applied in the bill?

Ally Tibbitt: I echo what has been said previously. In many ways, it reminds me of the debate about extending freedom of information laws. We would strongly support any move that would essentially follow the public pound. We have been involved, for example, in investigating bodies such as the Scottish Futures Trust, which hands out a great deal of public sector money. It rapidly moves into private companies and quasi-private companies, which spend a great deal of public money but are not subject to freedom of information laws. The Derbyshire principle should follow the public pound wherever it goes, as a matter of principle.

John Finnie: The legal profession has voiced concerns that the bill broadens the scope of the application of the principle as it was previously understood, and highlights the potential implications for individuals, such as doctors or senior officials who are delivering services. Do you have a view on the application of the principle to individuals?

Ally Tibbitt: The principle that public money means public accountability is straightforward and should be applied as broadly as possible. I do not think that the committee will be surprised to hear me say that.

John Finnie: Indeed—I am not surprised. Mr Scodie, do you have a view on the Derbyshire principle and how it is applied in the bill?

Mark Scodie: I cannot think of any particular application of the principle from TripAdvisor's point of view, so I would not add anything to what Mr Tibbitt has said.

John Finnie: You will be predicting my next question, Mr Tibbitt. Your media colleagues in Scottish PEN proposed that only companies with fewer than 10 employees should be able to sue for defamation, under the so-called Australian model. Do you have any views on that?

Ally Tibbitt: I am not a legal expert, so it is difficult for us to rule on, or have an opinion on, where the threshold should be set. As I said, I would fall back on the principle of public accountability. I am not entirely clear that the size or status of an organisation really matters. The principle should be that if you receive public pounds, you should be accountable, and the Derbyshire principle should apply.

John Finnie: Do you wish to say anything on that, Mr Scodie?

Mark Scodie: I have encountered the idea in Australian law that a company needs X number of people in order to be capable—or not—of something. It has always struck me as a bit arbitrary. You can be a small company with a small number of employees and still have an enormous effect on the world and on consumers. It is hard for me to draw the line.

The Convener: That is helpful. Annabelle Ewing wants to pick up on some of the comparative notes that have already been sounded.

Annabelle Ewing: Good morning to our witnesses. If you were able to listen in to our first session this morning, you will have heard me ask a couple of procedural questions. For the first question, I will go to Mr Scodie first. There is a pre-action protocol in England, which deals with media and communications claims in general and includes defamation claims. As yet, we do not have such a protocol in Scotland.

That would be a matter not for the bill but for the Scottish Civil Justice Council. However, it would be helpful if you could comment on the principle of having a pre-action protocol and how such a protocol works in practice.

Mark Scodie: As I mentioned, I might have a bias because I am an English and Welsh lawyer by training, but I will speak about what I have learned and experienced in other contexts as well as in respect of defamation and media claims. I have seen how things play out in other jurisdictions where there are no such laws; you end up ploughing straight into litigation, sometimes with no discussion or correspondence at all.

In many of the cases that TripAdvisor sees, there can be a frank conversation in correspondence about the rights and wrongs and the appropriate way to respond to a particular view. In my view, that is healthy. It benefits both TripAdvisor and the businesses that challenge us, because what would otherwise be meritless claims that would help no one frequently stop at the correspondence level.

The benefit of a protocol is that protocols are so prescriptive on all the key elements that need to be played out in correspondence. Above all, if people do not play by those rules, there might be ramifications in terms of costs. In my experience, and that of TripAdvisor, such protocols are a good idea.

Annabelle Ewing: Okay. Mr Tibbitt?

Ally Tibbitt: This is one of those questions where I must confess that I have no experience of the matter and am probably not qualified to have an opinion, so I shall pass.

Annabelle Ewing: That was an honest response—thank you.

Another issue that has been raised with the committee is whether the whole process could benefit from a special hearing, if you like, on the defamatory meaning of the words at issue. This morning, we heard how the approach plays out in England; it seems that it risks significantly extending the process, which perhaps was not the intention. What are your views on that, Mr Scodie?

Mark Scodie: I cannot draw on the experience that TripAdvisor has had on that niche issue; it has not played out through the extensive court proceedings that you heard about more broadly from the academics—I refer you to them. I am aware from my reading that there has been a great deal of litigation in England as the legal establishment has adapted to the 2013 legislation, but I point you to others to give you more detailed evidence.

Annabelle Ewing: Do you want to say anything, Mr Tibbitt? On the basis of your previous answer, I imagine that my question might also fall into the category of being a bit too processy.

Ally Tibbitt: I can confirm that I do not have much to add; the academics' views are probably best listened to on the issue.

Annabelle Ewing: Okay. As our exchanges have been quite brief, I will ask one last question.

Last week, the committee heard concerns that some of the provisions in the bill are a bit like using a sledgehammer to crack a nut, given that in Scotland we do not have the problem of libel tourism. It was suggested that more account should be taken of the reality of the situation on the ground. Do the witnesses have any comments on that?

Mark Scodie: That relates to something that I mentioned earlier. I respectfully suggest that there is no harm in building in protections against things going wrong. If you want the rules to be built in a certain way, there is no harm in pointing them in the right direction. I have seen—and learned from my reading as I have tried to stay on top of the issue—that the centre of gravity of defamation claims that could be multijurisdictional has moved a bit away from London; some claimants are looking for other places where they could bring claims. If Scotland wishes to insulate itself against libel tourism, that is no bad thing.

Ally Tibbitt: I concur. We are primarily a digital publisher, and we write international stories. In the past, I have detected a perception—which has always seemed somewhat bizarre to me—that media policy in Scotland is not beset by the same issues as affect media policy in London and elsewhere. In the modern day, when almost any kind of media can be accessed from anywhere in the world, that seems a bit misplaced. I reiterate what other witnesses have said: if there is an opportunity to close a potential loophole that would allow people to sue or to bring in Scotland spurious cases that they would be prevented from bringing in other jurisdictions, it is probably sensible to close the loophole now. I am sure that the committee agrees.

The Convener: We turn to secondary publishers, whom the bill will exclude from liability in defamations. TripAdvisor is a secondary publisher. What practical difference will the exclusion make to your business? You have touched on the issue in general terms.

12:00

Mark Scodie: It would probably add an extra element that could be called on when facing legal challenges in Scotland. It might not necessarily change outcomes, because if the defence came in, it would not exist in a vacuum. I know that you have already taken extensive evidence on the defence in the Electronic Commerce (EC Directive) Regulations 2002, which implemented the European e-commerce directive. There is a certain amount of dovetailing and overlap. To an extent, the bill would duplicate defences, rather than create new ones.

The bill—I would say that this is a material change—explicitly spells out the position that it has taken a while to reach under European law. On a very strict reading of the original hosting defence in article 14 of the e-commerce directive, if you touch content at all—if you have any involvement beyond being a completely blind technical operator—you risk being found liable of defamation, or any other wrongdoing through any other kind of tool.

I would think that it is very healthy, practical and helpful to website operators to be so clear. It is about not adopting the content, but hosting it and perhaps moderating it into something slightly more appropriate for the public, in one manner or another, that does not get you on the hook.

I add a word of context. There is the whole business of challenges to content. It is not just about defamation—there are other laws out there and other potential causes of action.

The exclusion is definitely helpful and will definitely be a positive influence, but it will not be a

magic bullet that will change the balance of online speech.

The Convener: That is very helpful.

Ally Tibbitt, will the exclusion of secondary publishers have any impact on how *The Ferret* carries out its work?

Ally Tibbitt: It would bring clarity about who is responsible for what, which is very important. All media businesses of any scale, but particularly digital news businesses, often operate a distributed publishing model, in which they have a website—they obviously try to get people to read and consume content on their website—and they make extensive use of social media platforms.

The issue relates to the changing direction of those platforms—the committee will be familiar with the key ones. Anything that brings clarity, such as on the vexed question of who is responsible for moderating comments on YouTube videos or Facebook posts, or who is responsible for replies to tweets, is helpful. Twitter is changing its platform all the time, and now you can choose who replies to a tweet, so does that make one more liable or not? Anything in the legislation that clarifies the position on defamation will be the source of huge relief.

In my career, I have worked with various internal policies in different organisations. In one organisation, we decided that we could be held liable for anything that anybody said on any of our Facebook pages. The organisation had some of the largest Facebook pages in Scotland, so that was an absolutely terrifying prospect that almost made us reconsider whether we wanted to have Facebook pages at all.

Such decisions have an economic impact on businesses, because of the importance of those distribution channels for audiences. Any legislation that can clarify who is responsible for what, where, will be a great help.

The Convener: That is very helpful. Building on that, we know that the bill contains an additional suite of descriptions of what constitutes being an editor, for the purposes of defamation. I hear what has been said about there being other causes of action, but the bill is focused only on defamation, which is why our questions are focused on defamation.

According to the bill, moderating posts and liking or retweeting tweets does not make you liable under defamation law. I assume that you were saying in your answers that those clarifications are welcome. The question is whether there are any other aspects of online behaviour that should also be captured in the bill. That question is for Mr Tibbitt first, and I will come back to Mr Scodie in a second.

Ally Tibbitt: Speaking more broadly, I suppose that an interesting potential issue to address is the grey area between public and private that may arise online. For example, closed WhatsApp groups and private Facebook groups might have a large membership and be influential, but they are not necessarily—strictly speaking—public. In those cases, there is an interesting point to address about defamation. If, for example, *The Ferret* were to operate a private forum with 50,000 members and somebody said something defamatory in it, who would be responsible? It would probably not be us, because that would still fall under the secondary publisher rule. Nevertheless, the relationship between public, private and direct message harassment is not as black and white as people sometimes treat it.

The Convener: I was going to say that that is helpful, but I am not sure that it is, because there is a grey area that we might struggle to understand fully. However, thank you for that answer.

I put the same question to Mr Scodie.

Mark Scodie: Is it about ground that might not be covered in the definitions?

The Convener: Yes.

Mark Scodie: Nothing leaps out at me. The definitions are pretty broad and do pretty innovative and helpful things for users who share content that is not theirs but which they may redistribute and share to others using social media functions. The definitions offer wide protections for website operators, so there is nothing that I would add. In any case, there is future proofing in section 4—if some new behaviour arises because someone invents a new platform next year, section 4 has an expansion facility.

The Convener: That is helpful. In England, section 5 of the Defamation Act 2013 can be used to require secondary publishers to identify authors or to remove content. Do you have any experience of dealing with that provision? If so, what is your view of the process?

Mark Scodie: Section 5 does one clear helpful thing: it makes clear that, if the claimant is capable of serving process on the person who put out the content that has been complained about, they can take no action against the website operator. That is easy to understand, and TripAdvisor has been able to avail itself of that defence in cases in which that was true.

In other respects, section 5 has not been—[*Inaudible*.]—and has sowed more confusion than anything else. With the greatest of respect, if I have understood correctly, you have put the question in a way that does not reflect what section 5 does. Section 5 cannot compel anyone

to do anything, ever; it created a new defence. If website operators do not behave in a certain way, as defined in the 2013 act and the regulations underneath it, they can lose that defence.

However, the circumstances might well be that a host of other defences are available anyway. The guidance notes from the Law Commission for England and Wales say explicitly that the website operator loses that one new defence. However, most commonly, the European defences under the e-commerce regulations might still apply anyway. From TripAdvisor's experience and from reading academic commentary, I know that the defence in section 5 is largely being ignored by website operators and is substantially misunderstood by many claimants and, unfortunately, some claimants' lawyers.

The Convener: That is very helpful, and thank you for correcting that. You have mentioned defences, which is the topic that James Kelly wants to ask about.

James Kelly: What are your views on how the bill codifies the defences of truth, opinion and publication in the public interest? Should any additional defences be outlined?

Ally Tibbitt: I am aware that the debate about particular definitions is quite technical and legalistic, but my understanding is that we are broadly in favour of what is in the bill. I am sorry that I cannot provide a more detailed response.

James Kelly: Mark Scodie, do you have any views? Bearing in mind your answer to the previous question from Mr Tomkins, do you think that the defences that are laid out are adequate, or are additional defences needed?

Mark Scodie: In so far as the bill sets out defences, the best thing about it, arguably, is that it codifies them and puts them all in one place. In order for somebody to understand from scratch some of the key defences that are available, they would not have to read case law and buy text books because it would be codified. That is similar to the English approach, and it is a positive measure.

Should anything substantive be added? I would not add anything to the bill, or to the commentary from the academic colleagues this morning. They said that the honest opinion defence had been expanded in a helpful way, and I echo that. I note, for this conversation, that it is not an exhaustive list of all possible ways to defend a libel action. Some of those necessarily exist in other legislation, such as the European ones that I have referred to.

The Convener: Does Mr Tibbitt have anything to add?

Ally Tibbitt: No.

The Convener: Okay. I am sorry—my connection suddenly froze and has now gone very slow, so I am struggling a bit. We will move on to Liam Kerr.

Liam Kerr: I shall be brief, as always. Gentlemen, I will take you to part 2, on malicious publication, from section 21 onwards. Mr Scodie was asked about secondary publishers. The bill would exclude them from liability for defamatory material, but it appears that that may not be the case for malicious publication. Is my reading of that correct? If so, do you consider that to be a lacuna that requires to be filled?

Mark Scodie: I agree; it is a potential loophole. It echoes the other essential lacuna that you referred to in a prior discussion, which is the mismatch in thresholds of harm that need to be passed. Lawyers tend to know about defamation. Claimants' lawyers who know about defamation and have that in their toolkit will equally know about malicious publication, or malicious falsehood, which is the equivalent in the English context. Those aspects are learned about together at law school and they sit together in a lawyer's toolkit. If a lawyer's client has that problem, they are liable to reach for both.

TripAdvisor's experience in the UK context, in one jurisdiction or other, is that claimants' solicitors will try to throw both those things at you, and if there are kinks and inconsistencies those will play out. Therefore, I agree that, if there are to be improvements—reforms that promote freedom of speech—on the defamation side, those will need to be echoed in the way that you have been exploring on the malicious publication side.

Liam Kerr: That is very helpful. My next question is for both witnesses, but I will ask Mr Scodie to go first, given what he has just said. I do not know whether you saw last week's session in which I suggested that the definition of malice might have a reasonably low threshold. Mr Scodie has just suggested that there is no serious harm—[*Inaudible*.]—in the section on malicious publication. Taken in the round, is it your view that businesses could use that to bypass the freedom of expression protections in the section on defamation?

Mark Scodie: That is a real risk. There are parallels. The English experience was that defamation claims became harder to bring, at least to begin with. A great deal of case law has been playing that out. One of the first things to happen was that the number of data protection claims rose. That is because claimants' solicitors looked in the palette of available legal weapons to help their clients to get what they wanted and they started reaching for alternative causes of action.

I agree that you do not want malicious publication suddenly to become more attractive and to feature fewer hurdles for corporates who wish to make legal threats, even if they are just threats to employ the chilling effect that the committee has been hearing about in other sessions.

Liam Kerr: Does Mr Tibbitt have any comment on what we have just heard, or on my question?

Ally Tibbitt: I echo what Mr Scodie said. I think that we said in our written submission that we support equivalent provisions across the two areas, both for simplicity's sake and to prevent exactly what we have just been talking about. People will go for the approach of least resistance, especially when they are looking to fire a legal warning shot across the bows of a journalist, for example. They will use whatever tools are easiest and appear to be most applicable with the lowest threshold that they can find.

12:15

Liam Kerr: That is very helpful. I have one further question, which is exactly the same as the question that I posed earlier. Differing views have been taken on the limitation reduction to one year. Mr Scodie, in your opening statement, you said that you support the reduction. Off the top of my head, I am not sure of Mr Tibbitt's view. If you accept that the reduction to one year is right, can either of you persuade me that one year is the appropriate limitation period?

Mark Scodie: In TripAdvisor's experience, there is a constant influx of new reviews. At the beginning, I gave the committee statistics on the hundreds of millions of pieces of content that exist on the site, which have been accrued over the years. If an isolated review on its own, when weighed in its proper context of dozens or hundreds of other reviews, is said to have any material impact individually, that will be the case for only a short period of time, because it will eventually age.

Consumers are smart enough to know; they are smart enough to tell that a piece of content has got old. It might become stale with time, particularly if it has been replaced by fresher content as more people, who may have other points of view, contribute to the conversation. In that light, I wholly support moving from three years to one year, because claiming that any real damage has been caused by one review from three years ago, which has been subsumed by dozens or hundreds of other reviews, seems like an untenable position.

I echo something that the committee heard in the previous session. I understand that France's limitation period is three months. That is the shortest limitation period that I am aware of. In other countries, there is still, in effect, an infinite publication rule as long as something is online. I suggest that one year is a realistic and sensible mid-point.

Liam Kerr: That is very clear. Does Mr Tibbitt want to comment on that?

Ally Tibbitt: If we are going for a serious harm test, the broad principle should surely be that the person who is affected by that serious harm would surely know about it within 12 months. In our evidence, we reiterated the point that you may wish to provide sufficient time for an arbitration process to take its turn. There might be cases for which you may wish to extend the time. If somebody was not happy with the outcome of an arbitration process that they had initiated within 12 months, would they be able to take the matter to court? That is worth considering.

Another thing that is worth considering about digital publishing in the round is that not all publishers are scrupulous, as *The Ferret* is, and have a clarifications policy. That policy requires us to add a note to the foot of digital publications. Digital publications are not like printed publications in the sense that they are very easy for publishers to amend from the date of first publication. A section on independent regulation that requires a procedure that publicly notes when stories are updated might be worth considering. One year should possibly apply to the last time that a digital story was updated as opposed to the date of publication at the top of the story. Members may wish to consider that.

Liam Kerr: I am very grateful to both of you.

The Convener: Our final two questions are from Fulton MacGregor and Shona Robison.

Fulton MacGregor: Good afternoon to the panel. I asked the previous panel about court orders to remove material and the conflicting evidence—"opinions" is probably a better word—that we have heard on that. Section 30 of the bill would enable a court to order a third party to remove contentious material as an interim measure. Mr Tibbitt, do you have any views on that?

Ally Tibbitt: We would not support any measure that would, in essence, be a pre-emptive rule. We would want to be clear that a serious harm had occurred before anything of the sort could happen.

Fulton MacGregor: I suspected that that would be your view. Has TripAdvisor had any experience of dealing with that sort of issue? What are Mr Scobie's thoughts on section 30?

Mark Scodie: That has never happened in Scotland, but we have seen attempts to do that kind of thing in other jurisdictions. I would have in

mind that, in most cases, individual writers of content who happen to have written a negative review—even though they might fervently believe that what they wrote is fair and based on facts—will, when faced with any kind of really aggressive legal challenge in which lawyers get involved and a court process kicks off, say that they do not want any part of it. They will say, "I stand by what I said, but I don't want to get dragged into a court process; I'm backing away and I don't want to touch this or have anything to do with it."

I will not get into specifics, but one case—an aggressive lawyer's approach against a lady who had written a review—ended up in the national media a couple of years ago. What the lady had written was perfectly defensible, but she not only took down the review when she faced the threat of a court order but killed her TripAdvisor account. Multiple, perfectly valid reviews that benefited other consumers were lost.

In the example that we are speaking about, the potential to get interim orders—perhaps even wherein the other parties who are involved are not represented—is dangerous. It is frankly asking for trouble to do it at all because it is laden with problems. Were it to be done, one would want real clarity about the thresholds that one needs to pass.

Discussions have been had on the Bonnard v Perryman rule against the power of restraint—the ancient rule from the English defamation law. I have not read everything—forgive me—but I assume that the committee must have received evidence on the effects of section 12 of the Human Rights Act 1998, which specifically touches on the thresholds that one needs to pass to get an interim court order to restrain publication. It says, in essence—forgive me if you know all this backwards, but I have it here—that

"No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

The test is different from the other kinds of tests that are applied in other kinds of legal dispute: the likelihood that needs to be established is higher. Subsection 12(4) of the 1998 act talks about the special care that needs to be paid

"to the importance of the Convention right"

—the European convention on human rights' protection of freedom of speech and protection of public interest publications.

That law is there but one might at least want an explicit cross-reference to the high bar that ought to be passed before that sort of thing becomes possible. We have already had a conversation about creative claim employees who use all the tools at their disposal. Should that become a relatively easy, run-of-the-mill avenue, those people will be employed by those who want to close down on negative consumer speech.

Fulton MacGregor: There is good food for thought in that response from Mr Scodie. I think that I initially referred to you as Mr Scobie—I apologise.

The Convener: I have a follow-up question for Mr Scodie on section 12 of the 1998 act. It has been in my mind throughout this inquiry and I think that I put the question to the previous panel. I know section 12 of the HRA in theory. Has it made any difference in practice? Has the raised threshold, which you have just quoted, made any material difference to the way in which litigation has been enforced, won and lost?

Mark Scodie: Not to TripAdvisor. As someone who is here to talk about the TripAdvisor business, I have not seen it employed. However, it definitely happens, and I know from the wider background of my prior working life that it has been important in some of the case law debates around privacy injunctions. That is a different topic—a different species of publication litigation, court orders and so on.

The Convener: I apologise to Shona Robison—I got in the way of her turn to ask a question.

Shona Robison: I wish to ask about the proposals from Scottish PEN—I am sure that you are aware of them—for a new court action to provide protection from unjustified threats of defamation action. Do you have any views on those proposals? In particular, how workable might they be—or not—in practice? Could I ask Mr Tibbitt to respond first, please?

Ally Tibbitt: We would broadly support measures to prevent that kind of litigation. However, as with all formal court action, we would have concerns about the costs of accessing that kind of remedy. Although the proposal might work as a potential deterrent against people using the legislation just to deter publication, we would have questions about how accessible that would be for small publishers.

Shona Robison: I put the same question to Mr Scodie.

Mark Scodie: I confess that I have not read Scottish PEN's proposal in detail—I apologise—but I have a couple of superficial thoughts about it. First, it may not be the only means of tackling the problem that it seeks to tackle. There may also be an answer in how the law on costs works, taking into account the costs ramifications of bringing a case that has no merit and what ultimately happens to pursuers in cases that should never really have started.

I cannot offer detailed insight here, but I know that there is a rough equivalent in trademark law.

A counteraction can be brought for unjustified threats of registered trademark infringement. There may be some useful parallels there.

Shona Robison: Thank you—that was helpful.

The Convener: That was indeed helpful. The idea comes from copyright law, and the question that PEN is putting to us is whether that parallel should be drawn, lifting from the experience of copyright and intellectual property law into defamation. I think that that is entirely right.

I thank Mark Scodie and Ally Tibbitt for their very helpful and full evidence. This has been a very useful session for the committee.

That brings the public part of our meeting to a close. Our next meeting will be a week today, on Tuesday 15 September, when we will continue to take evidence on the Defamation and Malicious Publication (Scotland) Bill.

12:27

Meeting continued in private until 12:38.

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