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Scottish Parliament

Thursday 5 November 2020

[The Presiding Officer opened the meeting at 12:20]

First Minister's Question Time

The Presiding Officer (Ken Macintosh): Good afternoon, colleagues. Our first item of business is First Minister's question time. Before we turn to questions, the First Minister will update the Parliament on Covid-19 and public health.

The First Minister (Nicola Sturgeon): Thank you, Presiding Officer. I will give a short update on today's statistics. The total number of positive cases reported yesterday was 1,216, which represents 7.6 per cent of all tests reported yesterday. The total number of cases therefore now stands at 69,660. Of the new cases, 481 are in Greater Glasgow and Clyde, 236 are in Lanarkshire, 128 are in Lothian, 80 are in Tayside and 80 are in Ayrshire and Arran. The remaining cases are spread across the other mainland health board areas.

There are 1,252 people in hospital, which is a decrease of five from yesterday, and there are 95 people in intensive care, an increase of one since yesterday. Also, I regret to report that, in the past 24 hours, 39 deaths have been registered of patients who first tested positive in the previous 28 days. The total number of deaths under that measurement is now 2,966. Once again, I want to convey my deepest condolences to everyone who has lost a loved one.

We will also shortly publish the latest estimate of Scotland's R number. We expect that that will show that the R number in Scotland is now hovering around 1. That is clearly progress on the past couple of weeks but, of course, we require to continue to exercise caution around that. With some other indicators, that does suggest that the tough measures that have been in place in recent weeks and the compliance of the public with those measures is starting to have an effect, but we have to continue to be careful and cautious.

We will continue to monitor the latest data closely ahead of the first review of the new level system that will take place next Tuesday. We have seen in other countries—France and Spain, for example—a sharp rise in cases being followed by a flattening of cases and then that being followed by another rise in cases, so we have to be cautious of that here. As I have been saying this week, it is not enough for us, as we head into winter, simply to see a levelling-off or a slowing down of the number of cases, and let me be clear

that that is what an R number slightly above 1 would deliver. What we want to see going into winter, to protect the country and the national health service and to save lives, is a reduction in the number of cases. That will be a factor as we make our decisions in the next few days.

Key to all this, of course, and key to giving ourselves the best chance of avoiding further restrictions is for everybody to abide by the rules. That is having an impact and I appeal to people to continue to do that, so I will finish with a reminder of the rules.

People in level 3 areas should not travel outside their own local authority area, unless it is essential. People in other parts of Scotland should not travel into level 3 areas, unless it is essential. We are also asking people not to travel outside of Scotland right now, either to other parts of the United Kingdom or overseas.

None of us should be visiting each other's homes, except for purposes such as childcare or looking after a frail or vulnerable person. When we do meet people from other households outdoors or in indoor public places, please stick to the limits: no more than six people from no more than two households.

You should work from home if you can and everybody should remember the rules encapsulated in the FACTS advice: wear face coverings, avoid places with crowds of people, clean your hands and surfaces regularly, keep 2m distance from people in other households and self-isolate and get tested if you have any symptoms.

I thank everybody across Scotland for continuing to abide so closely by all those rules.

The Presiding Officer: We turn to questions. I remind people that we will take the supplementary questions after the last question, which is question 8.

NHS Winter Preparedness (Covid-19)

1. **Ruth Davidson (Edinburgh Central) (Con):** I quote:

"We have a significant number of cases, we have a shortage of beds and we have significant staff shortages because of illness and staff isolating."

That is the warning that was delivered this week by Professor Jackie Taylor, who is president of the Royal College of Physicians and Surgeons of Glasgow. Professor Taylor has, alongside the presidents of the Royal College of Physicians of Edinburgh and the Royal College of Surgeons of Edinburgh, spoken out about what they describe as an "impending winter storm" for our NHS. They have delivered their warning just days after the Scottish Government published its "Winter Preparedness Plan for NHS Scotland—2020/21".

How many beds are we short, how many staff are we short because of illness and isolating, and why is it that only a week after the preparedness plan was published, senior medics are already sounding the alarm?

The First Minister (Nicola Sturgeon): First of all, I say that we listen very carefully to, and liaise very carefully with, the royal colleges. That is true of the Cabinet Secretary for Health and Sport, the chief medical officer and others in the Scottish Government.

We are not short of beds or staff right now, but we face a very challenging winter—that is true of Scotland and of England, Wales, Northern Ireland and much of Europe and the world. That is exactly why I am asking people to continue to exercise the utmost caution as we try to ensure that cases of Covid do not rise, and that any rise does not accelerate but we stabilise the situation and then see cases decline. That is why we monitor the data so carefully.

The positive news—I caveat this with all the warnings about there being no room for complacency—is that in the past week hospital and intensive care unit admissions from Covid have been slightly lower than they were in the previous week. That is one of the indicators that is giving us very tentative and cautious grounds for optimism.

However, there is no room for complacency, which is why all of us should continue to abide by the rules—I ask all people across Scotland to abide by the rules—and why we will carefully consider whether we need to take further steps, either next week, when we review the allocation of levels, or in the weeks after that. That is driven by our desire to save lives, to stop people becoming ill with Covid and to stop the damage that that would do to our economy. It is also driven by the central objective of protecting, as we need to do, our national health service.

Ruth Davidson: If, as the First Minister says, we are not short of beds and staff, why would Professor Taylor directly state that we are? It is not only the presidents of the royal colleges who have joint concerns; this week we have also heard concerns from clinicians at Glasgow royal infirmary. In a joint letter to health board management, they said that the Victorian hospital is

“unsuitable for preventing the spread of the virus.”

Their intervention came after a GRI patient, who was thought to have caught Covid, died after being placed on a ward with patients who had tested positive. The patient’s son believes that his dad’s death could have been avoided.

Given what we know about the spread of Covid in confined spaces such as wards, can the First Minister set out exactly what her Government is doing to prevent mixing of non-Covid patients with patients who are known to be infected?

The First Minister: We have in our hospitals a system of red zones and green zones, so patients are streamed depending on their status associated with Covid. We are also working hard to ensure that the capacity of our national health service is managed so that it can cope with whatever Covid throws at us over the winter, and so that it can, as far as possible, continue to treat patients without cancellation of elective or planned operations—the interventions for people who do not have Covid.

I am not sure whether Ruth Davidson is misunderstanding me. Apart from people who work in our health service, I am probably the last person who would stand here and say anything other than that our health service is under intense pressure. The health secretary and I look closely at bed capacity and ICU capacity literally daily, and not only across Scotland but across each health board, as we make judgments to ensure that we give the health service the best possible chance of coping through the winter, and to ensure that we are doing everything that we can do to save lives from Covid. We will continue to take those decisions.

Over recent weeks I have faced—this is not a complaint, because it is an entirely legitimate part of the scrutiny process—questions about why we have put restrictions on hospitality, and questions about why we have put restrictions on people mixing in one another’s houses, and I have faced calls to ease some of those restrictions. They are difficult decisions, which none of us takes lightly. However, we are being so cautious and careful right now in order to ensure that we do everything that we can to protect the capacity of our national health service.

Today, England is in full lockdown; I cannot rule out that happening in all or part of Scotland. However, right now—as of now—we are in a better position. That is down partly to the decisions that we have been taking, but it is much more to do with compliance of people the length and breadth of the country.

However, we have no room at all for complacency. That is why, when we review, on Tuesday, the allocation of levels, we will continue to take a very cautious and precautionary stance. When we do that, members across the chamber should remember that if we are pressed to go further in opening things up, we might not do so—for exactly the reasons that have been mentioned in my exchange with Ruth Davidson right now.

Ruth Davidson: The First Minister can, however, look at the regulation that allows non-Covid patients to be placed on wards with patients who are known to have the virus.

All parties recognise the importance of testing as a crucial tool in suppressing coronavirus. We have all fought hard for regular testing of groups including NHS workers and care home staff. Last week, the Scottish Government rightly reinstated regular testing of hospital patients aged over 70, after a whistleblower pointed out that such tests had been quietly dropped.

However, another group who are often in contact with vulnerable patients, and who regularly go in and out of care homes, are ambulance staff. Three weeks ago, the First Minister received correspondence that I also got, from a concerned paramedic who highlighted the high risk of spreading the infection and asked for regular testing of Scottish Ambulance Service personnel. I know that the First Minister will have responded to that paramedic, as have I. What action has the First Minister taken, and have regular tests for ambulance crew members now been initiated?

The First Minister: Before I come on to testing—in particular, testing of ambulance workers—I will complete my responses to some of Ruth Davidson's earlier points.

First, it is absolutely the case that we expect hospitals to separate Covid and non-Covid patients according to the red and green zones plan that I mentioned earlier. Obviously, we expect and trust the people who work in our health service to manage demand and capacity in a clinically appropriate way. We consider capacity very carefully each day.

Furthermore—because, earlier in the year, we ensured that we had such contingency in place—we can, should it be required, use the NHS Louisa Jordan hospital for Covid capacity. It is currently helping with non-Covid procedures and consultations within the NHS.

Ruth Davidson is not being entirely accurate on the position on testing the over-70s. We have never stopped testing such patients when they are admitted to hospitals. The change has been around regularly testing over-70s every few days. There was a sense that that was not the most effective approach and that for older people it can also be invasive. Previously, regular testing was being carried out, I think, every four days. Now, whether it is carried out is down to clinical judgment of whether it is appropriate. However, it is important to stress that the practice of testing of every patient aged over 70 on their admission to hospital has never changed.

I turn to the question about ambulance workers. I understand clearly and very well the desire of

people—particularly those who work in our health service, but also people more generally—who feel that they should be tested regularly because they work in capacities in which they have a higher risk of exposure to Covid.

We are building our testing capacity all the time, and are doing so rapidly. We are doing so faster and have more ambitious plans for NHS Scotland's capacity than even the capacity that we will see being built through the UK-wide Lighthouse laboratory network. However, we must base our decisions about use of capacity on clinical advice and prioritisation.

In answer to the question about what we have done about that, I say that, two weeks ago or thereabouts, we published our updated testing strategy, which set out the clinical groups to which we will next expand testing. That is based on the advice of the Scottish Government's clinical advisers. We will continue to consider other groups, when it is possible for us to do so. Ambulance workers and paramedics will very much be part of that consideration.

Ruth Davidson: Over the coming months, bed capacity will be absolutely critical, as will the availability of front-line health workers in our hospitals. In the first wave of the pandemic, we were able to rely on the superb efforts of nursing and medical students to help the NHS through those difficult months. Nearly 2,500 student nurses and more than 500 trainee doctors joined through the Covid accelerated recruitment programme.

However, as the winter preparedness plan makes clear, ministers believe that it would not be appropriate to mobilise that group of students in the same way this time around, because they are not as far through their training. That is entirely understandable, but it will leave a substantial gap, numbering some 3,000 people who will not be available to help in our hospitals during the second wave.

From the stark intervention of the heads of the royal colleges, we know of their grave reservations about how prepared we are for the pressures of winter. The winter preparedness plan gives no detail of how we will find or recruit extra staff in the absence of student mobilisation. Doctors and nurses are already under pressure and they need reinforcements. Will the First Minister give details of where recruitment will come from?

The First Minister: We of course continue to have access to the General Medical Council emergency register, and we can draw on the pool of returners. A winter workforce plan is currently being finalised and will be published shortly by the Cabinet Secretary for Health and Sport. We continue to contingency plan across all aspects of what is required to ensure the response from the

national health service that people—with and without Covid—have a right to expect.

Given what I and other ministers are dealing with every day right now, I will never stand here and minimise or underplay the severity of the challenge that we face over the winter months. I am extremely concerned about it—I do not think that there is anybody in my position in any country in Europe who is not similarly concerned. I do not have a shred of complacency about the challenge.

However, because of the decisions that we have taken in recent weeks, which the Parliament has collectively been part of, and primarily because of the compliance and sacrifices of people around the country, we are in a relatively—I stress that word—better position as we go into winter than some other parts of the UK, which I do not mean in a pejorative sense, and some other countries in Europe. I accept that that could change quickly, but we are planning, taking careful decisions and looking across all aspects every single day. I take full responsibility for my part in that, as we go through the winter.

I make this point again to people around the country. If we are to get through the winter, keeping Covid under control and therefore protecting the NHS from that particular winter pressure—our NHS is always confronted with other winter pressures—each and every one of us must continue to comply with the restrictions that are in place. The evidence right now is that that is having a positive impact, which should give us all some cautious hope. That progress will continue only if we all continue to abide by the restrictions. That is my appeal, which I deliver with a lot of gratitude to people around Scotland as we go into the next phase of Covid and into the winter.

National Health Service Pressures

2. Richard Leonard (Central Scotland) (Lab):

We are now firmly in the second wave of Covid-19, and with that comes a second wave of pressure. I go back to what Professor Jackie Taylor of the Royal College of Physicians and Surgeons of Glasgow told the BBC this week. She said that the NHS was facing “a perfect storm”, and that the rising number of cases, the lack of hospital beds and “significant staff shortages” pose huge challenges for front-line staff, especially as we approach winter.

However, that storm has been brewing for some time. Long before the pandemic, long waits and limited capacity were already the reality for thousands of patients, and workforce shortages were already having a profound impact on staff and their workloads. What action will the First Minister take in response to the stark warnings from the front-line staff of our NHS?

The First Minister (Nicola Sturgeon): I do not need to minimise the challenge. I hope that, whatever they think about the decisions that I take, people listening to me—not just today but almost every day for the past seven months—do not get the sense that I am underplaying the severity of the challenge that we face. I know the severity of the challenge that we face, and nobody knows it more than those who are working on the front line of our NHS.

Going into Covid, our national health service faced pressures, but we have record staffing numbers in our health service and more staff per head of population than in other parts of the United Kingdom. That does not take away the pressures. Throughout Covid, we have worked with health boards to ensure that we have plans in place to deal with the pressures. For example, on acute capacity, that means the ability to repurpose approximately 3,000 acute beds nationally as part of our contingency planning, and it includes the ability to double intensive care unit capacity within one week, to treble it within two weeks and, if required, to take it to over 700 beds.

Mutual aid arrangements are in place between NHS boards to ensure that there is enough capacity to deal with peak levels of demand. When we have a situation, as we do now, in which some parts of the country have a relatively higher prevalence of Covid than others, those mutual aid arrangements might well become important. In addition, as I said earlier, we have the NHS Louisa Jordan standing ready to help if demand from Covid necessitates that.

Those are the plans that we have put in place and that we will continue to ensure are in place, but nobody should be in any doubt, not just here in Scotland but globally, that, as we go into the winter, we face acute challenges, which might be greater than any of us has ever lived through, because we are living through a global pandemic. That means that Governments have a responsibility—the Government and I take that responsibility very seriously indeed—as does every single one of us.

What happens with Covid over the winter is not inevitable; it may be inescapable, but it is not inevitable, because, over the next few weeks, each of us has the ability to try to limit the spread of Covid, and in doing that we will limit and decrease the pressure on our national health service. All of us across the chamber and the country care deeply about our national health service and all who work in it. As never before, we are in a time when all of us in our everyday behaviour have to put that into practice and behave in a way that will protect the national health service.

Richard Leonard: We simply want the First Minister to listen to the views that are coming from staff on the front line of our national health service. NHS staff have risen to the challenge of the pandemic, and we cannot ignore the toll that the Covid-19 pandemic has taken on them. Recent freedom of information inquiries by Scottish Labour revealed that, in the first wave of Covid, more than a third of all NHS staff absences were caused by stress and poor mental health. Covid is just the tip of the iceberg. Mental health-related absences have been rising every year for the past three years. This week is international stress awareness week, so what action is the Government taking to ensure that the second wave of the pandemic does not bring a second wave of stress and anxiety for NHS workers?

The First Minister: I will treat those who work in our NHS and in social care with the respect that I think we all agree they deserve, so I will not stand here and pretend to anybody in our NHS or across the country generally that the second wave of a global pandemic will not bring stress and anxiety. It will bring stress and anxiety to us all, and particularly to people working in our national health service.

I am by no means alone in this but, as I have said before, my sister works on the front line of our national health service. Over the past few weeks, I have seen that pressure build on her in the job that she does as more Covid patients have been admitted to the hospital that she works in. All of us are aware of that situation and, as First Minister as well as the sister of somebody in that position, I worry deeply about it. I take very seriously my responsibility to do whatever we can to help to ensure that that pressure is minimised. That is why we have taken the steps that I have set out.

In addition, we have our mental health transition and recovery plan, to recognise the mental health and stress impacts not just on those working in health and social care but more generally.

I say to members across the chamber and to people across the country that people will agree or disagree with decisions that I take—that is perfectly understandable—and they will think about and question whether we are doing enough on X, Y and Z issue, but nobody should be under any illusion for a single second that we do not fully comprehend the severity of what we face and that we are not literally spending every moment trying to prepare the country for what might lie ahead.

However, I keep coming back to the point that it “might” lie ahead. The winter will be challenging—that is a certainty. How challenging it will be as a result of Covid comes down to all of us, and all of us must remember that point and continue to help to communicate it to people the length and breadth of the country.

Richard Leonard: But we should not accept the inevitability of staff facing heightened stress any more than we should accept the inevitability of the spread of the pandemic rising.

Today, NHS workers are demonstrating outside Parliament for fair pay. They deserve more than the First Minister’s gratitude and applause. Last night, Wilma Brown, a Unison NHS representative in Fife, told a meeting that I took part in

“that all staff are vital to keep the NHS running ... There has been no let-up ... but everything is a fight.”

NHS workers such as Wilma want to prioritise the fight against Covid, but the Government is making them fight to prove their own worth.

This year of all years, the First Minister’s Government is prepared to talk about NHS pay only when it is tied to reforms and cuts to other terms and conditions of employment. It is the Cabinet Secretary for Health and Sport’s view that pay and reform go hand in hand. Is that the First Minister’s view, or will she deliver fair pay for our NHS workers—no ifs, no buts, no strings?

The First Minister: We are absolutely committed to delivering a fair pay deal for staff in the next financial year. In the present context, “fairness” will mean something different from what it meant pre-Covid. I am absolutely committed to that.

I am also committed to providing a fair pay deal—I would have thought that a trade unionist would be, too—through negotiation with health service unions. A negotiation is under way—talks are actively under way with all parties through the Scottish Terms and Conditions Committee, which has been meeting frequently; it met most recently on 2 November. The representatives on the STAC secretariat side include Unison. I think that the health secretary will meet them shortly to discuss the issue. If we can, we want to expedite those negotiations and, if possible, to bring forward the agreed pay settlement so that we can conclude the matter before the start of the financial year.

Of course, going into Covid, NHS Scotland staff were—and they remain—the best-paid NHS staff anywhere in the United Kingdom, and rightly so. We all recognise—I particularly recognise—the debt of gratitude that we owe to people in the NHS and social care, and we intend that that debt of gratitude will be repaid not just in words, but in practice, too.

My final point to Richard Leonard is that I do not accept the inevitability of any of this, which is why we are taking the toughest possible decisions about the restrictions that we are asking people to comply with. They are not easy and they are not always popular, but they are necessary if we are to ensure that a Covid wave that overwhelms our

NHS over the winter is not inevitable. We took really difficult decisions to put limits on hospitality so that it would not be inevitable that we had a second wave. I gently remind Richard Leonard that, at First Minister's question time just a couple of weeks ago, he accused me of treating hospitality like Sodom and Gomorrah because I had taken those tough decisions. He cannot have it both ways—he cannot ask us to take the action that ensures that a second wave of Covid is not inevitable and then criticise that action when we take it.

Covid Testing (NHS Workers)

3. Alison Johnstone (Lothian) (Green): Our national health service workers deserve a pay rise, but they also all deserve the protection of testing. We have heard about Professor Jackie Taylor's concerns about staff shortages and a lack of beds, but she has also called for a coherent strategy for testing staff and hospital patients.

The Scottish Greens wrote to the Scottish Government on 25 April to call for weekly testing for those who work in our care homes and hospitals. Testing for care home staff was announced on 25 May. It is now 5 November, and someone could still be working in a Scottish hospital with Covid and not even know it. The nosocomial review group has approved a new strategy for regular hospital testing, and the Scottish Government's own testing review established that weekly testing was a priority for Scotland. Can the First Minister give us a date? When will routine weekly testing for all hospital staff begin?

The First Minister (Nicola Sturgeon): We already test groups of hospital and healthcare staff; all asymptomatic healthcare staff are tested for Covid if there is an outbreak in a previously Covid-free ward. In the summer, that was extended to include staff in the highest-risk areas: specialist oncology wards, long-term care of the elderly wards and long-term psychiatry wards. Healthcare workers are already also offered testing if they are working on non-Covid wards where there is a cluster. Local infection prevention and control teams are also advised to consider testing staff when a single unexpected case of Covid is identified in a ward.

We continue to move forward with the recommendations and the priorities that are set out in our testing strategy, which will extend routine testing in the national health service and across social care. We have to do that in line with building up the capacity for it. As we have previously set out, the top priority for our testing capacity right now is people with symptoms, because that is how we best break chains of transmission. Beyond that, the priority that we

have set—and this has been happening for some time now—is weekly testing of staff in care homes, given their vulnerability.

I have talked about the groups of NHS staff that are already being tested. As we build capacity between now and the end of the year, that will progressively include more groups of health service staff, and we will continue to keep the Parliament updated on that progress.

Alison Johnstone: The city of Liverpool is seeking to test all who live there. Slovakia is testing its entire population. However, we are still not committed to testing everyone who works in our hospitals, where there are many vulnerable people.

I understand that the Chancellor of the Exchequer has just announced that the furlough scheme is to be extended until March. It is vital that he confirms that no worker will be forced to live below the minimum wage. Greens, unions and others have been calling for that for months, and it is welcome, but, for many, it comes too late. The United Kingdom Government's hard deadline on Saturday meant that thousands of people lost their jobs before the Prime Minister's last-minute U-turn. What engagement is the Scottish Government having with businesses to enable and support them to rehire and furlough staff who have been let go at this very challenging time?

The First Minister: Before I come on to furlough, I will finish on testing. Alison Johnstone asks very legitimate questions and takes the issue very seriously, as she should. That is important, but it is also very important that we all understand the things that are said in this chamber.

Slovakia is doing antibody testing of its population. We do not yet know what antibody testing tells people. Slovakia is not population testing on a diagnostic basis. It is important to understand those distinctions. The chief medical officer set that out to Alison Johnstone's colleague in the COVID-19 Committee meeting yesterday.

We are looking closely at Liverpool. We are involved UK-wide in discussions about pilot projects, but we do not yet know how that Liverpool pilot will go.

We are also looking at how we ourselves have been doing on rapid point-of-care testing over the past few weeks, for which we await the clinical validation. We are enthusiastic about taking the developments in technology as far as we can, but we are also focusing on the here and now of making sure that our current testing system works effectively and efficiently, and we will continue to do that.

On furlough, I have not had the opportunity to see the detail of the chancellor's announcement,

although I hope that it will be one that we can unreservedly welcome—if it is about extension of furlough on 80 per cent terms, we will do so. The acid test, and the detail that I am looking for, will be whether someone in Scotland, England, Wales or Northern Ireland who is on 80 per cent furlough now, just because England is on a full national lockdown, will continue to be on 80 per cent furlough once England is out of it.

Unfortunately, because many businesses and workers expected the existing furlough scheme to end at the end of October—we all know people who are in that circumstance—people have been made redundant. I know people who put businesses into liquidation because they did not think that furlough was going to be extended. I think that that is deeply regrettable. We should have had all along from the chancellor the on-going assurance of 80 per cent furlough.

We will work with trade unions, workers and businesses to try to help, as much as we can, everybody who is eligible for furlough—on the terms on which I hope that it is now being extended—to access it as effectively as possible.

Covid-19 Testing

4. Willie Rennie (North East Fife) (LD): I want to return to testing. The First Minister has been behind the curve on much of testing, but it is not too late to catch up.

I want to understand why all the innovations are happening in other parts of the country and other parts of Europe. Eight months into this crisis, we should have the capacity to do more than what we are doing. If Slovakia is looking at more testing and has tried that over the weekend and if Liverpool is going to test half a million people, why are we not looking at those innovations here in Scotland, too? We could start in Lanarkshire, or with testing students before Christmas, which I know that the First Minister is looking at. All we seem to do, however, is keep all options under review. We need to be doing more than that.

Can the First Minister give us some kind of timetable for when that kind of innovation will happen?

The First Minister (Nicola Sturgeon): Willie Rennie is wrong about that in many respects. For example, over recent weeks, we have been testing a technology called LumiraDx testing. We have been doing the clinical validation and we are waiting on the outcome of that, so that we can get that in broad use across our national health service. We cannot just start using new technology without going through the proper validation.

I am clearly not an expert on the Slovakian approach to Covid, but if I am right, as I understand that I am, it is doing antibody testing.

Frankly, the judgment of my clinical advisers right now is that doing population-wide antibody testing is not effective, because nobody can yet tell a person what it means if they test positive for antibodies. Does it mean that they are immune for a day, a week, a month, a year or not at all? That is not something that we would consider to be sensible to do right now.

We are co-operating with other UK countries on other technological developments. Scotland actually has a good reputation of not being behind the curve on rolling out new technology, but being ahead of the curve.

Maybe I am being cynical, but often we hear about things such as the Liverpool pilot—which I am not knocking; we will be looking with interest at that—when the testing system more generally is coming under a lot of pressure in England. Let us focus, as we are doing, on building our testing capacity, which we have done dramatically and which we will do even more by the end of the year, and then using that capacity, in the best possible way, to limit the spread of Covid.

I say that with all the caveats about not having a shred of complacency. I recognise readily, Prime Minister—I mean Presiding Officer. I have inadvertently promoted the Presiding Officer, or demoted him—whichever way you want to look at it. *[Laughter.]*

I could be standing here next week in a completely different position, but right now, Scotland is in a relatively strong position, because of the decisions that we are taking and the compliance of the public. Part of that will be the way in which we are using testing tactically.

Let us keep focusing on the things that we need to do to maintain that strong Covid position and stop it deteriorating. That is what I spend every waking moment doing and it is what the health secretary and my colleagues spend every morning doing, and that will continue right throughout the winter.

Willie Rennie: We all think about that. We all think about how we can get on top of this virus. It is not the exclusive preserve of front-bench ministers.

The First Minister will understand my concerns and my frustrations about all of this. She has only recently been persuaded of the merits of the widespread use of asymptomatic testing. The scale of this is insufficient; we need to move much faster than we have done so far.

Last week, 854 children and young people tested positive, and 404 people employed in education and childcare tested positive the week before that. Schools are now taking extra precautions, with senior pupils wearing face

coverings, and there are new ventilation systems and CO₂ monitors. However, teachers who were shielding earlier this year are still being told that they cannot work from home. Why is the Government taking such a risk with that vulnerable group of people?

The First Minister: Before I come to shielding, I will finish off responding to Willie Rennie's testing point. Another example of us looking at new and developing technology is that we are establishing regional testing hubs, which will be operational before the end of the year. One thing that they are trialling is the pooling of testing, which would allow us to do more than we can at the moment. We are not behind the curve on new technology; we are pushing ahead on that.

With the greatest respect to Willie Rennie, I listened carefully to what he said—I hope that he genuinely believes that, because I mean it—but, when it comes to decisions about who to test for a virus, I have to listen more to what my clinical advisers say about the efficacy of asymptomatic testing versus prioritising symptomatic testing. Views on that have changed as the knowledge of and evidence on the virus have changed, but I will continue to be driven and guided by the advice of people with expert knowledge about those things, and we will continue to push ahead with that.

On schools generally, it is important that we keep schools open if we possibly can. If that means putting in place more mitigations, such as the use of face coverings for senior pupils, that is important. We recognise across the chamber that, in the consideration of the balance of harms, having young people not at school full time does a lot of harm to them, and we must avoid that as far as possible.

On shielding, I want to be very clear to employers—whether they are local authority, private sector or other public sector employers—that they must exercise extreme caution with those in the shielding category and facilitate their working from home if that is for their safety. I cannot take all those individual decisions between employers and workers, but I am very clear that the safety of people who have been in the shielding category is paramount.

The Presiding Officer: James Dornan is joining us remotely for question 5.

Mental Health Services

5. James Dornan (Glasgow Cathcart) (SNP): To ask the First Minister what additional support the Scottish Government has made available for mental health services to help cope with the long-term effects that lockdown and on-going restrictions have had on people's mental wellbeing. (S5F-04532)

The First Minister (Nicola Sturgeon): As a Government, we strive to find the best possible balance between our responsibility to protect lives and mitigating the other harmful impacts of the measures that are needed, which include the impact on mental health. Our mental health transition and recovery plan outlines our response to the mental health impacts of Covid and includes the actions that we are currently taking.

On Monday, the Cabinet Secretary for Health and Sport announced funding of £15 million to respond to the mental health issues of children and young people. We have also significantly invested in additional support, including more than £1 billion for national health service boards and integration authorities to meet the costs of responding to the pandemic. Funding for additional mental health costs is included in that, and we expect it to be used to meet those pressures.

We have also provided dedicated funding to provide additional telephone and online support services. Some of that funding was to expand the work of the NHS 24 mental health hub and the breathing space helpline.

James Dornan: Are any specific actions being taken to address the dangers to the mental health of elderly people of a lack of interaction with others, primarily at home but also in care homes or hospital settings, against the ever-present dangers of Covid?

The First Minister: That is a really important question that is always at the forefront of our minds. Decisions on restrictions around care homes have been among the most difficult decisions that have had to be taken through the pandemic. The latest care homes visiting guidance recognises the importance of ensuring that older people are able to maintain connections as safely as possible, and it looks to ease restrictions on visiting where it is safe to do so.

Guidance has also been produced to assist care homes with strategies for promoting the wellbeing of residents and to provide advice on therapeutic interventions to help to manage increased stress and distress for residents resulting from any Covid restrictions.

Covid-19 Restrictions (Tier System)

6. Jamie Greene (West Scotland) (Con): To ask the First Minister what advice has been offered to local authorities regarding which measurements would trigger a move through the new tiered system of Covid-19 restrictions. (S5F-04524)

The First Minister (Nicola Sturgeon): The new strategic framework, in supporting assessments, sets out the criteria that are used to determine the

allocation of levels, including the indicators that are used to inform those decisions. The framework also makes clear our commitment to engage with local authority partners prior to making decisions. We recognise that their support is vital to the success of the approach and, of course, we rely on them to implement and oversee the measures.

We engaged with local authorities through the Convention of Scottish Local Authorities and the Society of Local Authority Chief Executives and Senior Managers in advance of the publication of the framework, and local authorities were consulted prior to the setting of the current levels. They will continue to be involved through their representation on the national incident management team and directly in advance of future allocations of levels.

Jamie Greene: The First Minister will be aware that Inverclyde has been placed into tier 3 despite meeting many of the indicators that would imply otherwise. A group representing 16 local businesses, alongside their local MSP, has written to the First Minister, asking simply to be treated fairly in comparison with other parts of Scotland. Up to 1,000 local jobs are at stake, which is a lot of jobs in an area that is struggling economically. The members of that group accept, like everyone does, that the need to protect the national health service is at the forefront of decision making, and I know that they want to do the right thing, but they are right to ask whether or how they can move tier when the final determination is based on factors outside their control and on which health board area they happen to be in.

What hope is there for areas such as Inverclyde? A clear road map and clear milestones that people can all work towards would offer them some hope. Would the First Minister be willing to meet those local business representatives and hear their plight?

The First Minister: We talk to the business community, and we are always happy for either me or the Cabinet Secretary for Economy, Fair Work and Culture to engage with businesses at a local level.

As I set out last week—we will all get more used to the application of levels and the decisions that drive that—the indicators guide that process. There is not a simple algorithm for feeding certain data into a computer and getting the answer out; we have to apply judgment.

Wherever in Scotland people live, they are reliant on certain hospitals. The issue of Inverclyde and its place in the NHS Greater Glasgow and Clyde health framework is not incidental. Pressure on Glasgow hospitals means that, if we eased up in Inverclyde, even to the point at which there was a slight increase in demand for services, that could

be difficult for people in Inverclyde as well as for the whole network. Such decisions are carefully balanced.

We have to consider not just where a particular local authority is in relation to the indicators; we also have to consider its direction of travel and how sustainable we feel its position is. We will be looking at the issue carefully, but, over the past couple of days, there has actually been an increase in the number of cases in Inverclyde, which perhaps suggests that the decision not to put the area down to a lower level was the right one.

There are two things that we must remember. First, as I have been trying to set out this week, it is not enough to have an allocation of levels that just holds things steady, because, if we go into the winter period with a level of infection such as we have now, even if it is a steady level of infection, it is too high, and that would carry enormous risks. We must have an allocation of levels that gets the level of infection to come down. That is really important.

Turning to my second point, we must also recognise that taking an area down a level is not a neutral act. All areas will want that to happen, but going down a level means opening up things that are currently not open, and that will increase the transmission of the virus. There is a really important judgment to make before doing that, so as to be as certain as we can ever be in these situations that the increase in transmission that will inevitably be caused can be coped with. That is why the sustainability of the position is important, too. Those are really finely balanced judgments.

Returning to my earlier exchanges with Ruth Davidson and Richard Leonard, let us not forget that the reason we need to be extra cautious is to do with saving lives and protecting people from Covid while also ensuring that we do not allow our NHS to be overwhelmed. I ask members, when they are asking these questions on behalf of businesses—which I totally understand—to bear in mind the exchanges that I had with the leaders of the Opposition parties earlier.

Dental Health (Poverty)

7. **Pauline McNeill (Glasgow) (Lab):** To ask the First Minister what action the Scottish Government will take to prevent a dental health crisis for people living in poverty in the coming months and years. (S5F-04525)

The First Minister (Nicola Sturgeon): Good oral health is essential for people's general health and wellbeing, and we are absolutely committed to ensuring that it is a priority as we go through the pandemic. We are working to resume the wide range of improvement programmes for children

and adults in key priority groups. That includes the oral health community challenge fund, childsmile, caring for smiles and smile for life. Toothbrushing in nursery and school settings should resume as soon as establishments are able to provide it. The aim is to fully implement that by January.

From 1 November, patients have been able to access the full range of NHS care and treatment through dental services, and we will continue to support the dental profession as it goes through the challenges of this situation.

Pauline McNeill: I acknowledge the progress that had been made in dental healthcare before the pandemic. However, some dentists have raised concerns that we are heading for a two-tier dental system in which those who can afford it can access private dental care but those who cannot will wait in long queues for NHS treatment. I believe that that is because of differences in the restrictive practices.

The chief dental officer said recently that he did not think that patients

“should be told to go private. I think that’s an invidious position to put a patient into.”

That is exactly what is happening across Scotland, and it has been happening for months. People are being told to seek quicker treatment by going to private practice. That will affect adults and children in the most deprived areas; in fact, it will probably affect quite a large part of Scotland’s population if it is not addressed. As we know, children in deprived areas are more likely to have higher levels of tooth decay.

Will the First Minister consider putting forward an urgent dental plan to prevent a two-tier system developing and to assess what Government support NHS dentists might need? Many of them have struggled to survive during the pandemic.

The First Minister: Yes, we will continue to consider all those issues, and the chief dental officer will certainly be doing that.

We have increased the range of dental treatments that are available within the NHS with each phase of remobilisation. We have made that possible by the provision of appropriate personal protective equipment to NHS dental contractors at no financial cost to them. We have also been working to understand in greater detail the risk of transmission in dental settings.

I would make the key point that, from 1 November—just a few days ago—we have had the position whereby NHS dental services are able to provide a full range of treatment options to all NHS patients in NHS dental practices. We know that there will be a backlog of cases, which will have an effect on waiting times, and we must continue to work to address that. We will do that,

with dentists, and as effectively as we possibly can.

Remembrance Sunday

8. Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): To ask the First Minister what guidance the Scottish Government has issued for marking remembrance Sunday. (S5F-04516)

The First Minister (Nicola Sturgeon): We have started to work closely with local authorities and third sector partners to ensure that they have the most up-to-date Covid guidance and to help them understand any impact that it has on remembrance events.

Updated advice was issued to all local authorities last week, advising that no outdoor events or gatherings are permitted in areas that are placed in levels 2, 3 or 4 under the strategic framework. Services in places of worship can proceed at all levels, although there are restrictions on numbers of attendees. Such decisions are not easy, but we must prioritise suppressing the virus to save lives.

We encourage everyone who wants to pay their respects to do so safely in other ways. I take this opportunity to encourage people across the country, if they can, to join the two-minute silence on Sunday at 11 am, from their own doorsteps, as we collectively as a nation convey our respect and appreciation.

I will lay a wreath on Sunday, on behalf of the nation, at the Scottish national war memorial at Edinburgh castle, and I will be deeply privileged to do so.

Rachael Hamilton: Members across the chamber will share my disappointment that commemorations this year are being scaled back, understandably, to prevent the spread of coronavirus. Despite the pandemic, we must commemorate the valour of our veterans and remember those, including family and friends, who have made the ultimate sacrifice fighting for freedom for our country and across the world.

The First Minister has quite rightly pointed out that we should encourage Scots to mark remembrance Sunday at home with a doorstep two-minute silence, or by downloading and displaying a poppy in the window. In the absence of traditional fund-raising opportunities, will she encourage everyone to support the online Scottish poppy appeal, which raises vital, life-changing funds for our armed forces community in Scotland?

The First Minister: I strongly encourage people to support the Scottish poppy appeal in any and every way they can. I would encourage that every

year, but I particularly encourage it this year given the difficult circumstances that we face. The Scottish poppy appeal does excellent work that is so valuable to so many people. Let me take the opportunity to put on record again my deep appreciation for them.

I encourage people, as I already have done, to show their respect for those who have made the ultimate sacrifice and for all those who have served, or continue to serve, in our armed forces, through a two-minute silence on the doorstep on Sunday or in the many other ways in which that can be done safely.

Many things have hurt people deeply during the pandemic. There have been things that we all value highly that we have not been able to do, but I know that many people across the country will feel particularly acutely the inability to mark remembrance Sunday in the way that it is traditionally done. That does not mean that we do not mark it. That does not mean that we do not show our respect. There are ways in which we can do that, and I am sure that the whole country will join together to do exactly that.

Covid-19 Testing (Oil and Gas Workers)

Maureen Watt (Aberdeen South and North Kincardine) (SNP): What discussions has the Scottish Government had with the oil and gas industry about the provision of Covid testing for workers prior to their travelling to oilfield installations and returning onshore?

The First Minister (Nicola Sturgeon): Testing is available at onshore testing facilities under the UK-wide testing programme for workers in the oil and gas sector, and for family members who display symptoms. That provision is the same as is available for other key workers. The current test for Covid is highly effective at detecting the virus in individuals who have symptoms, but less effective—not completely ineffective—for asymptomatic individuals. There are other areas where we carry out more routine asymptomatic testing when the evidence tells us to do so.

In addition, I know that the chief medical officer met representatives of Oil and Gas UK in August to understand directly the sector's request for asymptomatic testing and how it could support the industry through the oncoming winter period. We will continue to engage with the sector.

Covid-19 (Care Homes Public Inquiry)

Donald Cameron (Highlands and Islands) (Con): In light of last night's vote by the Parliament to set up an immediate public inquiry into the tragedy of deaths in our care homes during the pandemic, what steps is the Scottish

Government taking to set up such an inquiry in order to respect the will of the Parliament?

The First Minister (Nicola Sturgeon): We have long been clear that we will instigate a public inquiry into all aspects of the response to and impact of Covid, including care homes. Of course, we take note of the Parliament's view and, because of that, this morning the health secretary has written to her counterparts in the Northern Irish, Welsh and UK Governments to seek early discussions on whether and how such an inquiry could be established on a four-nation basis. Next week, the health secretary will also invite Opposition spokespeople to discussions about the next step in establishing any inquiry. We intend to take that forward.

As all members know, establishing a statutory public inquiry requires certain steps and it cannot simply be done overnight. However, our commitment to doing that as quickly as possible, while ensuring that those on the front line in any capacity can continue to focus on getting the country through the second wave of Covid, is absolute.

National Health Service Pressures

Monica Lennon (Central Scotland) (Lab): I express my solidarity with the Unison NHS Lothian members who are demonstrating outside the Parliament on behalf of their colleagues from across Scotland. Their message is clear: clapping is cheap and broken promises are an insult. When will the Government deliver fair pay for our healthcare workers?

Speaking of heroes, I also want to pay tribute to University Hospital Hairmyres staff for their brave response to a serious fire on a Covid ward last week.

From her daily review of bed capacity, the First Minister will know that Hairmyres and other Lanarkshire hospitals are at breaking point and that staff and patients are anxious. Will the First Minister give an update on current bed availability in Lanarkshire? What is the forecast for the week ahead?

The First Minister (Nicola Sturgeon): I will ask the health secretary to provide the member with the detailed information about NHS Lanarkshire, as I do not have that in front of me. We do look at all these things regularly.

The capacity of the health service is under pressure and nobody should be in any doubt about that. That is why we are taking the decisions that we are to try to suppress Covid, and I ask everybody who is very legitimately asking questions about pressure on the health service to remember that when we are also scrutinising and

making decisions about the necessary, albeit unwelcome, restrictions that require to be in place.

I take the opportunity to thank staff at Hairmyres. Investigations into what happened last week and the cause of the fire are on-going. It was a very frightening incident for those who were involved and, from the reports that I have been given, I know that staff acted above and beyond the call of duty in the interests of patient safety, and they have my grateful thanks for that.

We are determined to ensure a fair pay increase for NHS staff next year. I have set out the process that is under way, and that process is important. If I was to stand here right now and say what the pay agreement was to be, without proper negotiation with trade unions, I am pretty sure that Labour members in particular would criticise me for imposing a pay deal without proper negotiation. We will negotiate in the proper way, in good faith, because that is the right thing to do. We will deliver fairness for NHS staff because, as everybody agrees, they deserve it.

College Nursing Students (Covid-19 Insurance)

Gillian Martin (Aberdeenshire East) (SNP): I have been contacted by students from North East Scotland College who are undertaking a higher national certificate in care and administrative practice, which is part of a programme with Robert Gordon University working towards a nursing degree. A large component of their overall grade is gained from a practical placement. Those college students have not been given the same Covid-19 insurance as university students, meaning that they might not be able to take up their placements. According to Colleges Scotland, that is affecting 1,200 students across Scotland. Will the First Minister urgently look into the situation and ensure that those students have the necessary insurance, which has already been given to university nursing courses?

The First Minister (Nicola Sturgeon): I am aware of that. It has been drawn to my attention and the chief nursing officer is urgently looking into it. We want to resolve that situation in a satisfactory way, as quickly as possible. I will ensure that I or the Cabinet Secretary for Health and Sport write to Gillian Martin when we have reached a conclusion.

Community Sentences (Proposed Changes)

Liam Kerr (North East Scotland) (Con): Recently, various newspapers reported on a Convention of Scottish Local Authorities document that contained proposals from Community Justice Scotland to slash community sentence hours, apply a legislative cap on the prison population and increase the use of suspended sentences and

sentence discounts. Will the First Minister rule out every one of those proposals?

The First Minister (Nicola Sturgeon): I always think that it is better not to rule out things on criminal justice when invited to do so by the Conservatives, not because they do not often raise very serious and legitimate issues but because I think that it is important that we have an approach to criminal justice that is, yes, focused on appropriate punishment but also on prevention and early intervention. Community sentences are an important part of that, reducing short-term prison sentences is an important part of it and making sure that we have a justice system that is focused on reducing reoffending in the most effective way is what I think is the important thing to do. Therefore, we will continue to take forward proposals that we think contribute to that.

Taxi Drivers (Coronavirus Support Fund)

Colin Smyth (South Scotland) (Lab): Across Scotland, our taxi drivers are facing financial ruin with business decimated by Covid restrictions. For many, their cab is their office so they are not eligible for the coronavirus restrictions fund, which pays out only to businesses that are registered for non-domestic rates. However, they are viable businesses if they can get through the next few months. We have seen support for rail firms, ferry firms and bus companies, so may I ask the First Minister to urgently consider specific support for our forgotten taxi drivers before more of them are forced to join the ranks of Scotland's rising unemployed? Our taxi drivers were there when we needed them at the height of lockdown; they need their Government to be there for them now.

The First Minister (Nicola Sturgeon): We have sought to provide as much support to as many groups as possible. I recognise the point about non-domestic rates and the difficulties that that causes for some groups of workers and businesses. We will continue to look at what more we can do. I make the obvious point that our resources are finite and we cannot continue to stretch them. That is why our discussions with the United Kingdom Government are also a really important part of that. However, I recognise the difficulties that taxi drivers face and we will continue to look at what we can do to help them and other groups who are finding the situation so difficult.

Furlough Scheme (Extension)

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): I understand that the Chancellor of the Exchequer has just made an announcement elsewhere about furlough. In a week of chaos and confusion from the Tories, he U-turned on abolishing furlough only apparently to U-turn on

whether it would apply to Scotland after 2 December, then to U-turn again when the Treasury said no; finally, perhaps, today he will have completed yet another U-turn and belatedly conceded that Scotland must have fair access to the scheme. Does all that not show, on bonfire night, that Tory credibility on the Scottish economy has gone up in smoke?

The First Minister (Nicola Sturgeon): It is perhaps hard to disagree with that, but I am going to try to avoid temptation. Alasdair Allan is right to raise the issue, but, as I said earlier, I have not yet seen the detail of the chancellor's announcement because, obviously, I have been in the chamber. I look forward to seeing that detail as soon as I can. I hope that it is everything that we are expecting. As I said, the acid test will be if somebody who is able to get 80 per cent furlough right now while England is in lockdown can still get it after 2 December. If the answer is yes, I will certainly warmly welcome that.

Beyond that, there is a real question here. All of us—I have said this all along, and it has applied to the Scottish Government at times—must, when we get things wrong, reflect on that and try to learn the lessons. On furlough, the UK Government is definitely in that situation. Jobs will have been lost last week and in the past couple of weeks because of the failure to guarantee earlier what has now apparently been guaranteed. The UK Government should take a long, hard look at that and ensure that it does not allow itself—and, more important, allow businesses and workers—to be in that position again.

Travel (Covid-19)

Mike Rumbles (North East Scotland) (LD): Does the First Minister understand that threatening to impose an unenforceable legal ban on people travelling outside their council area, with all the problems that would result from that, risks undermining not only policing by consent but much-needed public support for the very measures that we should all be supporting?

The First Minister (Nicola Sturgeon): I am interested in Mike Rumbles's views; I do not know whether or not they reflect the views of his party. Last night, there was a vote in the House of Commons on regulations that not only stop people moving between different parts of England, but stop people leaving their house. I am interested in that, because all four Scottish Liberal Democrat MPs voted for that English measure in the House of Commons last night.

These are serious issues. I recognise that there is a difference of opinion, and I think that it is really good to air these views. England is in lockdown today, and I cannot guarantee that we will not, in all parts of Scotland, follow suit at some point, but

right now we are not there. We are in a better position, partly because we acted earlier with some restrictions, and largely because people have complied with those restrictions. Nevertheless, we must be under no illusion about what we are required to do if we are to stay in that better position and—we would hope—avoid the country going into a similar lockdown to that in England.

First, we have to encourage people to continue to comply. Secondly—this is hard for everybody—we absolutely must stop the virus spreading from high-prevalence areas of the country to low-prevalence areas. We cannot have a targeted, proportionate, regional approach to Covid restrictions unless we have travel restrictions as part of that. I do not like that, and I am sure that not many people across the country like it, but that is the reality of the situation in which we are living right now.

There are trade-offs in this. If we want to have the greater normality that not being in lockdown gives us, we must accept the other restrictions that make that possible. The Scottish Government will continue to take those decisions, and we will set them out clearly to people. Even if they are not popular, if they are about keeping the country safe and protecting as much normality as possible, we will not shy away from taking them.

Children (Covid-19)

Stuart McMillan (Greenock and Inverclyde) (SNP): Can the First Minister clarify the rationale for why children under 12 are included in the total number of permitted attendees at a wedding when in all other settings children under 12 are not included in the total?

The First Minister (Nicola Sturgeon): Weddings are an exception to the general rule on gatherings, which reflects their importance in people's lives. The number of people who can attend a wedding is higher than the number of people who are generally allowed to meet in one place. Regrettably, at the moment, the judgment is that children should be included in the limits at the different protection levels. Otherwise, children from up to 20 households could attend a wedding, and the numbers and the risk of transmission that that would result in would be significantly greater.

Under the current rules on meeting others inside, children under 12 are excluded from the numbers, but they must belong to one of the households meeting, which reflects the additional risks that arise when mixing inside. The current position takes account of public health advice and is there for the purpose of keeping people safe.

I recognise—it is one of the most difficult things about this—that it is possible to look at these rules

and see inconsistencies, but we have to try to limit the risks of transmission overall. That is sometimes about the volume of people meeting together as well as the particular settings in which they are meeting.

I ask people to question those decisions, because it helps us to make sure that we are getting it right as far as possible, but I also ask them to understand that sometimes those apparent inconsistencies are just the trade-offs that we require to make in order to have some more freedom without increasing to a dangerous level the risks of transmission.

Legal Advice (Publication)

Margaret Mitchell (Central Scotland) (Con): Last night, the Scottish Parliament expressed its will that the Scottish Government release all legal advice in relation to the judicial review of its handling of complaints against Alex Salmond. Will the First Minister please confirm that the Government will comply with that instruction, and further confirm on what date the legal advice will be published?

The First Minister (Nicola Sturgeon): Last night, the Deputy First Minister made clear in a point of order that we will now consider the implications of the motion that the Parliament passed. However, if I was to do what Margaret Mitchell has just asked of me, I would be blatantly breaching the ministerial code—perhaps that is what she wants me to do. I will point out why.

Paragraph 2.38 of the ministerial code says that ministers must not—must not—divulge the contents of legal advice.

Paragraph 2.40 recognises that, in exceptional circumstances, ministers may decide that the balance of public interest favours disclosure. If so, ministers must—again, I repeat, must—obtain the prior consent of law officers. That consent will be given only if there are compelling reasons.

Ministers now have to consider last night's vote. The Deputy First Minister made clear that ministers will do so. Rightly, I have recused myself from that decision. As John Swinney said, he will advise the Parliament in due course of our response.

The Presiding Officer: I have let the session run on for an extra 10 minutes, but I am afraid that we must conclude there.

13:31

Meeting suspended.

14:30

On resuming—

Portfolio Question Time

Social Security and Older People

The Deputy Presiding Officer (Lewis Macdonald): I remind members that social distancing measures are in place in the chamber and across the Holyrood campus. I ask members please to take care to observe those measures over the course of this afternoon's business, including when entering and exiting the chamber.

The next item of business is portfolio questions on social security and older people. In order to get as many members and questions in as possible, I encourage short and succinct questions and answers where possible. I remind members to seek to ask supplementary questions in the usual way.

Social Isolation (Older People)

1. Alexander Stewart (Mid Scotland and Fife) (Con): To ask the Scottish Government what steps it is taking to support older people experiencing social isolation ahead of winter. (S5O-04721)

The Minister for Older People and Equalities (Christina McKelvie): The past eight months have been very difficult for everyone in society, and I know that the toll on older people has been particularly hard. A number of services are available for older people, including the Age Scotland helpline, which we have provided with £870,000 of funding. That is part of £1.16 million of funding to support older people's organisations at a national and a local level that directly support the needs of older people during the pandemic, including through work to mitigate loneliness and to keep people connected.

Our £43 million connecting Scotland programme, which supports people to get online, is another source of keeping people connected by getting them online and is also supporting people. Initial data from the first phase shows that more than 40 per cent of people who are accessing the service are over 60. In addition, we have provided £6 million of dedicated funding to provide additional telephone and online support services, £2.6 million of which is to expand the work of the NHS 24 mental health hub and the breathing space helpline.

Alexander Stewart: Many older people are experiencing extreme loneliness after months of isolation from family and friends, and further restrictions have been a real blow to older people's mental health, happiness and hopes. As

we approach the festive period, we must ensure that processes are in place to support vulnerable individuals. Therefore, will the minister back the calls from the Scottish Conservatives for a Christmas isolation strategy?

Christina McKelvie: We are considering in detail the Christmas plan that Alexander Stewart is speaking about. We have a national strategy on loneliness, and we are due to report on it in December, around Christmas time. We previously launched the strategy at that time because we realise the impact that Christmas has on people. We believe that social isolation has great physical and mental health impacts on older people, and, as a Government, we aim to find the best possible balance between the responsibility to protect lives and mitigating the harmful effects of social isolation and loneliness. Alexander Stewart might be interested to know that, just this morning, I spent a few hours with our national implementation group, talking about exactly those issues and how we can tackle them.

Kenneth Gibson (Cunninghame North) (SNP): Can the minister advise what the physical and mental health impacts are, in terms of morbidity and mortality, that social isolation will have on older people who live alone or in care homes?

Christina McKelvie: That is a great question. We know that the effects of social isolation and loneliness can include, among other things, poor sleep, weight gain and even cognitive decline. It is a serious concern, which is why in “A Connected Scotland: our strategy for tackling social isolation and loneliness and building stronger social connections” it is recognised as a public health issue. The pandemic has exacerbated those feelings for many older people who live alone or are in care homes, and our updated guidance recognises the importance of maintaining safe connections. There is no substitute for face-to-face contact or that human connection that we all need, but conversations through other mediums can help, and we are striving to get the right balance between risk and safety.

For anyone who is struggling, the right help and support must be in place, and we are working towards that. That is why we have provided an additional £2.6 million to increase the capacity of telephone and online services via the NHS 24 mental health hub, breathing space, the clearyourhead.scot website and organisations such as Age Scotland and Befriending Networks.

Supporting Older People

2. Daniel Johnson (Edinburgh Southern) (Lab): To ask the Scottish Government what action it is taking to support older people, including those resident in care homes. (S5O-04722)

The Minister for Older People and Equalities (Christina McKelvie): Ministers are, of course, very aware of the profound impact that coronavirus has had on people, including older people, families who have loved ones in care homes and residents themselves.

In my earlier responses, Daniel Johnson will have heard about some of the help that we are providing to older people. In addition, we have provided more than £1.16 million to local and national organisations that are supporting older people.

A wide range of support is in place to support care homes, including support to expand and strengthen supplies of personal protective equipment, regular testing for care home staff, ensuring local oversight arrangements and equipping the Care Inspectorate to carry out an enhanced assurance role.

The winter plan that was published on Tuesday set out actions and support to ensure that the adult social care sector, which includes care homes, can safely deliver services through the winter.

Daniel Johnson: I thank the minister for that answer, but there are real on-going concerns regarding access to basic healthcare for people in care homes. I was recently contacted by the daughters of constituents of mine who, during the lockdown, had no access to a doctor in person by videolink or by phone, who received no temperature checks and who did not even receive paracetamol, despite being symptomatic. Tragically, one of those parents died, with Covid as the presumed cause.

That was an appalling situation, and my surviving constituent and their daughters deserve an apology. More importantly, what steps are being taken to ensure that access to basic, fundamental care is provided in care homes as restrictions are reimposed?

Christina McKelvie: I convey my condolences and my heartfelt best wishes to the families who have contacted Daniel Johnson. There has been a huge impact on all residents, staff and families who, sadly, have lost loved ones during the pandemic.

Over the past eight months, across the world, no part of society has been more tragically hit by Covid-19 than our care homes. As Daniel Johnson will be aware, the portfolio responsibility for care homes rests with my colleague Jeane Freeman, and it is right and proper that she answers any queries that Daniel Johnson has. I am aware that he has written to the First Minister and Ms Freeman on the matter, and it is fair that Ms Freeman responds to him. I will alert her to the

fact that Mr Johnson is looking to receive a response sooner rather than later.

Disabled People (Covid-19)

3. Donald Cameron (Highlands and Islands) (Con): To ask the Scottish Government what analysis it has undertaken of the impact of Covid-19 on disabled people. (S5O-04723)

The Minister for Older People and Equalities (Christina McKelvie): We know that the impact of Covid has been particularly hard on disabled people. As the member will know, the term “disability” covers a spectrum of health conditions and data. A wide range of analysis of the impact of Covid-19 has been published on the Scottish Government’s website. We have also published a range of equality impact assessments, including evidence to support the route map.

We are working closely with key disabled persons organisations to understand the impacts of Covid-19 and develop appropriate action. The co-production of that work is key to getting it right for those people. We have also established the social renewal advisory board, which we have tasked with developing at pace new policy proposals to renew Scotland. One policy circle that feeds into the board is looking specifically at the issues that older people and disabled people have experienced over the current period. It met yesterday, and its members are feeding some of their ideas in to the board as we speak.

Donald Cameron: A study of 80,000 people that was carried out by the Social Metrics Commission showed that disabled workers are at a higher risk of being made redundant or having their hours reduced as a result of the economic impact of Covid-19. What further steps can the Scottish Government take to protect and support disabled people who are at risk in that way?

Christina McKelvie: Disabled workers have been particularly at risk during the pandemic. Many of them have been isolated at home, where they have perhaps been working without the right equipment, which gives rise to a number of issues. I hope that Mr Cameron will have a look at our home working guidance, which includes a risk assessment tool that supports employers and employees to ensure that the right environment has been provided for disabled people.

In addition, through our fairer Scotland for disabled people strategy, I am working with my colleague Jamie Hepburn and his fairer work team to address some of the issues that disabled people have experienced not only during the pandemic but in the long term. I will endeavour to take Mr Cameron’s question away and consider the impact of the pandemic in that context.

The disabled persons organisations that we are working with have some great ideas of their own on how to tackle the issues around disabled people in the workplace, and we are taking all of those into account in our plans for the future.

The Deputy Presiding Officer: Rona Mackay has a supplementary question.

Rona Mackay (Strathkelvin and Bearsden) (SNP): As the minister has said, wearing a face covering may cause difficulty or distress for some people who have disabilities. For that reason, I very much welcome the launch of the face covering exemption card, which will help disabled people to feel more comfortable and confident that they can go about their daily lives free from the fear of harassment or abuse. Will she advise my constituents in Strathkelvin and Bearsden on how the card can be requested?

Christina McKelvie: We undertook work on the exemption card for disabled people, which was launched this week by my colleague the Cabinet Secretary for Social Security and Older People, along with Disability Equality Scotland. It has those exemption cards on its website, and they are also available on the Scottish Government website. I encourage anyone who needs the exemption card to download it or to keep it as a digital image on their phone, to ensure that they do not face some of the challenges of being exempt from wearing a face covering.

Maurice Corry (West Scotland) (Con): What analysis has the Scottish Government undertaken of the impact of Covid-19 on our disabled veterans in Scotland?

Christina McKelvie: That is another smashing question, and I thank Maurice Corry for it. I think that he asked me something similar the last time, and he will know that the Scottish Veterans Commissioner is working very closely with the Minister for Parliamentary Business and Veterans.

This is remembrance week, when we remember the people who have given everything that they have got, especially as some are struggling with the effects of that. One of the key issues in our work to support organisations that support disabled veterans is looking at what they need. Our disability organisations, such as Poppyscotland and the Unforgotten Forces partnership, are all looking at how we can tackle some of the issues, and I will encourage the minister for veterans to give Maurice Corry a fuller update on the detail of that work.

School Children (Holiday Support)

4. Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): To ask the Scottish Government how the social security system will support families with

school-age children during the school holidays. (S5O-04724)

The Cabinet Secretary for Social Security and Older People (Shirley-Anne Somerville): The United Kingdom social security system, which has responsibility for income-related benefits, provides the majority of support to households. That is why we have continually urged much-needed changes to it so that it meets the needs of the people of Scotland.

Here in Scotland, I am pleased that our new Scottish child payment for low-income families with a child under 6 will open for applications from Monday next week, and will provide £10 per week, with the first payments being made from the end of February.

Alongside our best start grant and best start foods, that means that we will provide more than £5,200 of financial support for families by the time their first child turns six. For second and subsequent children, the amount will be more than £4,900.

Dr Allan: Although one might think that free school meals would command the support of all parties in the Scottish Parliament, over the past few weeks we have seen the farce of Scottish Tory MPs voting against it at Westminster, while Tory MSPs claim to support it—a move that the Tory education spokesperson has admitted makes his party and his party's leader hypocrites. Does the cabinet secretary agree with that assessment?

Shirley-Anne Somerville: Yes. While the Scottish Government has, through an initial £350 million funding package, been at the forefront of supporting people and communities since the outbreak of the pandemic, it often seems that the UK Government has to be dragged into doing the right thing. That is exemplified by its stance on free school meals, and now by the delay in clarifying the furlough scheme that will be available to Scottish businesses in a future Scottish lockdown, if that is required.

I urge UK ministers to take further action on a raft of measures that are still outstanding—for example, by giving people reassurance that the £20 uplift to universal credit will, right now, be made permanent and be extended to legacy benefits. The UK Government needs to show, as the Scottish Government has shown, that it will do everything that it can do to protect households with low incomes.

Covid-19 (Welfare Funding)

5. **Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** To ask the Scottish Government what welfare funding is being made available to support people facing financial hardship as a result of Covid-19. (S5O-04725)

The Cabinet Secretary for Social Security and Older People (Shirley-Anne Somerville):

We have provided a £350 million funding package to ensure support for people and communities that are most in need. We have significantly increased the Scottish welfare fund and we have targeted help with housing costs, including through increasing our discretionary housing payment fund and introducing a tenant hardship fund.

In recognition of the additional pressures that unpaid carers have been under, we made an additional carer's allowance supplement payment in June, which means that over the financial year, eligible carers can get £690 more than carers in the rest of the United Kingdom.

In addition, we have introduced the £500 self-isolation support grant for workers on low-income benefits who risk losing income because they have to self-isolate.

Stewart Stevenson: The cabinet secretary referred to the United Kingdom Government's universal credit uplift—but, of course, that ends in April. Does the cabinet secretary agree that the hardship of families who are affected by its ending should lead to a pile on the doorstep of the Westminster Government for it to deal with, while the Scottish Government does what it can to help struggling families?

Shirley-Anne Somerville: I completely agree with Stewart Stevenson's assessment. As I said in my earlier remarks, we have urged the United Kingdom Government to make that £20 uplift permanent and, which is important, to extend it to legacy benefits. That was needed before the pandemic and is, certainly, needed more urgently now. We need an immediate announcement, so that people do not face uncertainty about whether that vital money will be removed from them in a few months.

Modelling by the Joseph Rowntree Foundation indicates that failure to make the uplift permanent will result in 700,000 more people across the UK being pushed into poverty, so the UK Government must do the right thing and ensure that social security support is sufficient to support people during and beyond the pandemic.

The Deputy Presiding Officer: Rachael Hamilton has a supplementary question.

We appear not to be connecting with Rachael Hamilton, so we will move on.

Older People (Needs and Rights)

6. **Neil Bibby (West Scotland) (Lab):** To ask the Scottish Government what action it is taking to ensure that public services meet the needs of older people and that their rights are respected. (S5O-04726)

The Minister for Older People and Equalities (Christina McKelvie): The Scottish Government is committed to protecting, respecting and realising human rights, and we are guided by the United Nations principles for older persons.

Although older people are not a homogeneous group, they have been disproportionately affected by Covid restrictions and shielding measures. We have provided around £1.16 million to organisations that are directly supporting the needs of older people, including funding for helplines and food distribution. That has included more than £870,000 for Age Scotland's helpline and more than £110,000 for older minority ethnic people's meal services.

I meet the older people's strategic action forum regularly to hear emerging issues, in order to ensure that our response reflects the priorities that have been identified, and that the standards and the principles of human rights are integrated across our policy making.

Neil Bibby: The tragedy of care home deaths in Scotland has been described as a "crisis within a crisis". It is a crisis that shames the Government and is the worst of its kind since devolution: 2,000 older people have died. The Government was slow to act on personal protective equipment, slow on testing and slow to respond to the concerns of front-line workers. It must not be slow to learn lessons, now.

Regardless of discussions with the other Governments of the four nations, does the minister for older people accept that, in order to protect older people in Scotland and to safeguard their rights, there must be an urgent independent inquiry, in line with the democratic will of the Parliament?

Christina McKelvie: The Scottish Government has always placed upholding human rights at the heart of our approach. Since the start of the pandemic, our priority has been to save life, regardless of where a person lives. A framework of legislation protects the rights of individuals who are receiving care, and throughout the pandemic we have worked closely with our colleagues in the national health service, local government and the voluntary and independent sectors to ensure that the needs and rights of residents of care homes are met.

Mr Bibby will have heard the First Minister responding to a similar question earlier today. Her comments reflect my feelings about a full public inquiry, which will come in the fullness of time. The First Minister detailed today what actions she will take to ensure that Parliament knows about that as soon as possible.

Digital Access and Skills (Older People)

7. John Scott (Ayr) (Con): To ask the Scottish Government what support is in place to improve digital access, skills and confidence for older people. (S5O-04727)

The Minister for Older People and Equalities (Christina McKelvie): The Scottish Government has worked in partnership with the Scottish Council for Voluntary Organisations to support digital participation for all. So far, funding totalling around £1.5 million has supported 189 projects, 77 of which self-identify as supporting older people.

In addition, in direct response to the Covid-19 pandemic, the connecting Scotland programme was established with the aim of reducing digital exclusion for digitally excluded low-income people. Phase 1 provides up to 9,000 digitally excluded people who are at high clinical risk with access not just to a device, but to internet connection and data, and to online training and support, for up to a year. Many households in that group comprise older people, and initial estimates are that about 40 per cent to 50 per cent of the people who are accessing the service are over 60.

John Scott: Online platforms have provided a vital source of connection for people across the country and the world during the Covid-19 pandemic. However, the Scottish household survey found that, in 2019, 57 per cent of over-75s did not use the internet. Age Scotland has said that about 100,000 older people in Scotland ate Christmas dinner alone last year. Many more might be alone this year, with community lunches and festivities being unable to go ahead. As winter approaches, what is the Scottish Government doing to ensure that older people do not face a socially and digitally isolated Christmas?

Christina McKelvie: As our colleague Alexander Stewart, whose question I answered at the beginning of questions did, John Scott has made excellent points. We are taking forward all the issues that came up this morning at our national implementation group on social isolation and loneliness, and we are looking at what more we can do at Christmas.

Maybe it is still a wee bit early to think about what we need to do at Christmas, but John Scott made a good point about 57 per cent of the over-75s not being digitally connected. I wonder how many of them no longer get a free television licence. Maybe a lovely Christmas present from the United Kingdom Government would be the restoration of free TV licences for the over-75s.

The Deputy Presiding Officer: We appear not to have a connection to Alex Rowley for question 8. Does Rachael Hamilton have a supplementary question to the previous question?

Rachael Hamilton (Etrick, Roxburgh and Berwickshire) (Con): My question is a supplementary to Stewart Stevenson's question 5, for the Cabinet Secretary for Social Security and Older People, Shirley-Anne Somerville.

Throughout the pandemic, universal credit has been a vital safety net for nearly half a million people in Scotland. The Scottish Conservatives believe that the universal credit uplift should continue for the foreseeable future. Will the cabinet secretary double down on her comments and work with me and my Conservative colleagues to urge the United Kingdom Government to make that commitment now, in order to provide the reassurance that many people across Scotland are looking for? After all, when both Scotland's Governments work together, they serve the people of Scotland best.

The Cabinet Secretary for Social Security and Older People (Shirley-Anne Somerville): I am quite happy to work with anyone in the chamber who wants to further the cause of people who are struggling with low incomes. With the greatest respect to Rachael Hamilton, I say that the issue is how her colleagues down in Westminster will vote on the issue, and what the Westminster Government's action will be. We do not want continuously to have to have discussions that go on for months. They cause fear and uncertainty for people, although sometimes the UK Government eventually gets round to doing the right thing.

I am more than happy to work with Rachael Hamilton and others. However, perhaps the UK Government could have recognised the issue long before now—as we certainly did—and put the plan into action.

The Deputy Presiding Officer: That concludes portfolio questions. I am grateful to the cabinet secretary for her flexibility in dealing with the last question.

Young Persons Guarantee

The Deputy Presiding Officer (Linda Fabiani): The next item of business is a statement by Fiona Hyslop on the young persons guarantee.

14:54

The Cabinet Secretary for Economy, Fair Work and Culture (Fiona Hyslop): I am pleased to announce the launch of the young persons guarantee today. The pandemic has created unprecedented challenges for young people in how they go about their daily lives. We know that they have been among the hardest hit by the economic harms resulting from the virus—*[Interruption.]*

The Deputy Presiding Officer: Take a few seconds, cabinet secretary.

Fiona Hyslop: Sorry about that, Presiding Officer.

As I was saying, the pandemic has clearly hit young people particularly hard through the economic harms resulting from the virus. The impact of the pandemic varies across different parts of the economy, and evidence suggests that it is exacerbating the inequalities that have existed across the labour market for some time. Those on low incomes and insecure contracts, which have been more prevalent among young people, have been the worst affected. We will continue to ensure that fair work principles remain embedded within our approach to delivering the guarantee through our promotion of the living wage and fair work first.

At its heart, the guarantee is about connecting young people with employers and with a range of learning and training opportunities to support them and to help them to progress towards employment. Our intention is that the guarantee should be shaped and led by employers and driven by the needs of young people, and we must deliver it by working in partnership.

I am pleased that, following the publication of his report, Sandy Begbie agreed to continue to work with us on the implementation of his plan for the guarantee. Over the past two months, he has been leading an implementation group, which has now agreed a high-level action plan to deliver the guarantee in a way that addresses the scale and immediacy of the challenge ahead. We will publish that plan today, and work will continue quickly to put it into action. From the beginning, I have been clear that young people must be at the front and centre of this work, and I asked Young Scot to take forward work on how young people could help design the guarantee.

I want all our young people to benefit from the opportunities that are on offer from the guarantee, which will embed an equality and human rights approach into its delivery. Tackling inequalities must be the defining hallmark of the guarantee. Working closely with Close the Gap, Barnardo's and Enable, we have been engaging with young people to ensure that the guarantee is inclusive by design and is focused on how it will meet their needs. As part of that work, Intercultural Youth Scotland has produced a report on the barriers that young minority ethnic people face in getting access to opportunities. Again, the initial reports from those pieces of work will be published today. The work that Young Scot is developing with us will ensure that a wide and diverse range of young people across the country will have a genuine voice and will be able to contribute directly to how the guarantee evolves over the coming months.

In launching the guarantee today, I want to set out how we intend to support new opportunities. We have committed £60 million this year to deliver the guarantee, and our discussions with delivery partners are being finalised now to ensure that we get the maximum impact. That is additional support on top of the significant investment that is already available for key areas including the apprenticeships and the colleges that will deliver the guarantee.

We will begin by recognising the pivotal role that local government has to play as a key partner, and I am pleased to inform Parliament that we have now agreed the allocation and distribution of the £30 million to fund local partnership activity, which will support around 8,000 young people. A significant part of the funding will be for recruitment incentives, and that will include supporting small and medium-sized enterprises and third sector employers to create more jobs, including apprenticeships. Other priorities will include providing additional support to wrap around kick-start placements, increasing supported employment, skills training and mental health support. The guarantee will also provide key workers for those who need more support.

We are strengthening the network of 21 industry-led developing the young workforce groups by funding school co-ordinators. Building on successful pilots in Glasgow and Fife, that will increase the capacity of schools to support young people in continuing to engage with the DYW programme to make choices that are informed by input from employers. Funding will be made available to support additional opportunities delivered by the third sector, including formal volunteering, with new funding for in-school mentoring offered by MCR Pathways and more career inspiration activity through the Founders4Schools programme. There will also be

support for work to incentivise graduate internships.

In recognition of the challenges that are faced by those who might have otherwise gone into apprenticeships, we have set out £10 million to support pathways to apprenticeships, which are aimed at providing education-based opportunities. We continue to work with colleges to support industry-focused further education opportunities for young people. That builds on the funding that we have already agreed to provide to universities to create additional places following this year's exam results, and recognises the critical role that our universities and colleges have to play in supporting young people.

Overall, that funding will provide a range of opportunities that will make a difference to young people's lives. However, we have to make connections to employers, so I also announce that we are launching a new web portal, developed with Skills Development Scotland, that will act as the first point of contact for information on the guarantee. The site will put in one place the wide range of opportunities that are being created under the guarantee. It will be an important step forward in providing coherence and signposting young people to jobs and other opportunities, as well as to relevant advice and guidance, which will continue to be offered by local authorities, jobcentres and third sector partners.

We know that we still face significant economic challenges. I understand that many businesses and sectors are under real pressure, but it is clear that many employers want to stand behind and help deliver the guarantee now. As part of our launch activity, this morning I met Capgemini, SSE and NHS Lothian, all of which have signed up as early adopters to the guarantee. They, and many others, are already beginning to create good, fair, sustainable opportunities, and they clearly recognise the value that young people can bring to their organisations.

We have been working closely with businesses on developing a set of asks that are challenging and proportionate to the current situation. The intention is to demonstrate clearly the commitments that employers can make to support young people. I am happy to report that a number of organisations have already set out their intention to become early adopters of the guarantee. From the public sector, it is right that the Scottish Government has committed to the guarantee and is leading the way. I will be working with all public sector bodies to encourage them to stand behind the guarantee. From the private sector, as well as Capgemini and SSE, Scottish Power and Standard Life Aberdeen have given their backing. We will be working hard to encourage many more to follow in the weeks and

months ahead. I thank those businesses for their commitment. I assure them that the Scottish Government will work closely with them so that, collectively, we get this right for young people.

The unprecedented scale of the economic challenge has necessitated new approaches. Since the start of the pandemic, I have been clear in my support for some of the actions that the United Kingdom Government has taken. The recent extension of furlough is welcome, even if the manner in which it came about left some questions. However, the scale of the unemployment challenge that we now face is equally important. I urge the UK Government to work in partnership with us to deliver the guarantee, and to go beyond the kick-start scheme to provide a clearer commitment to supporting those whose jobs and livelihoods have been affected by the pandemic.

I have set out the next steps that we will take to deliver a young persons guarantee. I look forward to working with colleagues across Parliament to continue our support for young people throughout the pandemic. I do not underestimate the scale of the challenge, but if we work together as a country, we can deliver for our young people. My message to Scotland's young people is simple: we are right behind you, we want you to be successful and we will do everything that we can to give you the opportunities that you need.

I will write to all members with more details on the guarantee, including information on the new web platform. I would welcome your support in promoting the guarantee to as many young people and employers as possible.

I am very pleased to come to the chamber today to launch the young persons guarantee. By working in partnership across parties, across the country and across organisations, and by working with employers, the third sector and our great education system, we in Scotland can make sure that, however difficult this year has been, there is a platform and a future for our young people.

The Deputy Presiding Officer: The cabinet secretary will now take questions on the issues that were raised in her statement, for which I will allow around 20 minutes. Members who wish to ask a question should press their request-to-speak button.

Maurice Golden (West Scotland) (Con): I thank the cabinet secretary for advance sight of her statement. I welcome the launch of the youth guarantee scheme and I am pleased to hear that a number of organisations are looking to become early adopters. Scottish Conservatives will lend whatever support we can to ensure that the scheme helps as many young people as possible. One way of doing that, as Sandy Begbie

recommends, and as the cabinet secretary recognises, is to ensure that it complements the United Kingdom Government's kickstart scheme. Just last week, it was announced that a 200-strong digital army of young people will be established at HALO Kilmarnock following £1.5 million of funding under the kickstart scheme, and it will be useful to see how the Scottish Government can complement that.

Another, far more direct way to boost the scheme is to ensure that we increase funding. The Minister for Business, Fair Work and Skills has said that the youth guarantee scheme budget of £60 million is not enough to reach everyone. The chancellor has today provided an opportunity to do just that, with the announcement of an extra £1 billion of funding for Scotland to tackle the crisis, thanks to Douglas Ross and the Scottish Conservatives. Will the cabinet secretary commit to using some of that funding to ensure that the youth guarantee scheme can help as many young Scots as possible to start their careers?

Fiona Hyslop: First, I warmly welcome the support of the Scottish Conservatives for the young persons guarantee. It is essential that we work together in partnership on this to make sure that we can deliver for young people. That is what they will expect, and that is what employers will expect.

Maurice Golden's point was about wrapping around the kickstart programme, and we are very keen to do so. Sandy Begbie and I will seek to make further contact with the UK Government to ensure that it understands our proposal. The kickstart programme is quite time limited and we want to make sure that we have a longer period of support for young people so that they can develop and, importantly, have a route to permanent employment. We think that the longer period of support that we are providing will help to deliver that.

On the point about additional resources, we made a bold decision very early on because we were concerned about the level of youth unemployment that we were going to be facing. We made a decision when we did not have the further support from the UK Government because we knew that it was the right thing to do and we knew that we would need to marshal whatever resources we had in order to deliver. I am pleased that we have managed to make an early commitment.

Clearly, the additional funding that is Scotland's share of contributions that are needed to manage the economy going forward is welcome, but it is not just about the economy; it is about transport, public health and a whole variety of other issues. I will certainly want to make sure that we have the strongest financial platform possible for the youth

guarantee, but we should remember that everybody needs to put their shoulder to the wheel. It will be about mobilising financial support from employers, as well as the existing range of employability skills and education resources. Yes, I will take every penny that I can get, but I will have those discussions with the finance secretary at the appropriate time.

Iain Gray (East Lothian) (Lab): I thank the cabinet secretary for early sight of her statement. The young persons guarantee certainly has our support, and we welcome the launch of the portal and the action plan. However, the measure of success in this will be in the delivery of high-quality job opportunities. Can the cabinet secretary assure us that the guarantee will not just promote the real living wage but will insist on it?

Secondly, with youth unemployment being predicted by some to peak at 100,000, the 8,000 partnership opportunities will not be enough. Is the cabinet secretary sure that the proposed scale is really equal to the challenge?

Finally, the cabinet secretary referred to the funding of additional student places at university. Are those now confirmed as fully funded places at £7,500 per student per annum?

Fiona Hyslop: I also welcome the support for the young persons guarantee scheme from the Scottish Labour Party. The scale of the challenge is, quite rightly, a focus of attention. Currently, the figures for June to August show 44,000 young people unemployed. That is too many, and that is why we need to move swiftly and at scale. The current unemployment rates in Scotland are 12.5 per cent of young people, and the UK-wide figure is 15.4 per cent, which is significantly higher, but we know and understand especially the precarious and serious experience of many young people and the issues that they will face in terms of redundancy.

We also want to make sure that there are new opportunities for young people leaving school, because the opportunities that might have been there previously will not necessarily still be there. I will come back on the question of the funding of university places. I will speak to our education colleagues to confirm the information that Iain Gray requested.

I do not underestimate the scale of this at all. That is why we moved very swiftly. Remember that the recommendation came out of the advisory group on economic recovery, which reported some months ago. It was one of the highlights of its proposals and we have moved swiftly on it. We have set out a plan and worked and co-operated with others; one arm of that, as I said, was working with local government. Quite often it will benefit specifically young people who are needing extra

support. I talked about additional support around key workers. That will not be the only avenue for support, but it can make a difference. Mobilising the sum of the parts will mean that we can grow the impact of the resources that we have.

The Deputy Presiding Officer: We move to open questions. We have been a wee bit overlong with front-bench questions, so please bear that in mind.

Clare Adamson (Motherwell and Wishaw) (SNP): It has been estimated that youth unemployment could rise to 20 per cent as a result of Covid-19. However, care leaver charity staff have highlighted the fact that 46 per cent of care leavers were known not to be in education, employment or training before the pandemic hit. How will the Scottish Government's young persons guarantee support care leavers to sustain employment?

Fiona Hyslop: Following on from the answer that I gave to Iain Gray, the £30 million of funding for local partnerships will ensure that a person-centred approach is taken. That will include care leavers as a priority group. As part of the guarantee, we are currently funding the young persons consortium, which includes representation from Barnardo's, the Prince's Trust and Action for Children, to deliver the discover your potential programme, an employability programme that is specifically funded to support care leavers.

We are working with those groups to increase the funding that is available this year. We will also engage with Scotland's corporate parents to identify how they can help to plan delivery of the young persons guarantee by providing support and opportunities for young people who have had experience of care. I hope that that reassures Clare Adamson that we want to ensure that it will be an inclusive young persons guarantee and care leavers will be a priority.

Jamie Greene (West Scotland) (Con): The cabinet secretary will be aware that it is the retail, hospitality, tourism and leisure industries that employ the lion's share of Scotland's young people, but those are the sectors that have been hardest hit by Covid. We should all be gravely concerned about the prospects for our young people. How do we get those people back into jobs in companies that simply do not exist anymore or will not survive Covid, and what plans does the Government have to boost business start-ups, which will ultimately create jobs to replace those that have disappeared during the pandemic?

Fiona Hyslop: Just yesterday, we announced the 90 companies that will benefit from the start-up funding of £25 million, which was announced early in the pandemic period in order to ensure that we

are growing the companies and jobs of the future. We will align with sectors of growth for the future, particularly on the tech side in information technology and with a focus on green jobs. That focus of our alignment, working with the 21 developing the young workforce partnerships, will help us to ensure that the package on offer and the jobs available meet the market for the future.

I gently point out that fewer young people would be facing difficulty and redundancy had the UK Government maintained the furlough scheme from the summer period. A significant number of young people will have been made redundant in previous months pending the cut-off of furlough. I welcome today's decision that they can be taken back on and receive furlough going forward. However, I recognise the need to align the young persons guarantee and job opportunities with the industries that have that capacity and need. Let us try to ensure that we prevent young people from becoming unemployed in the first place, but also create opportunities in new and developing sectors.

The Deputy Presiding Officer: I repeat the need for people to be a wee bit more succinct.

Annabelle Ewing (Cowdenbeath) (SNP): I welcome the launch of the young persons guarantee today, and I commend the cabinet secretary and all those who have been involved for the hard work that will have gone on behind the scenes to get the scheme up and running so quickly.

Can the cabinet secretary provide a bit more detail about the arrangements that will be in place to ensure that the young people involved will have the possibility of not simply training and apprenticeships but real job progression? That will surely be the key measure of success for this excellent initiative.

Fiona Hyslop: I agree with the member, in view of our experience with the Edinburgh guarantee, with which Sandy Begbie was previously involved. The focus there was on ensuring that sustainable employment was part of the scheme, and that is what we are working towards with the young persons guarantee. That is really important—it is what we need and what we want to see.

We need continuity across the UK, which is why, if the kickstart scheme is used, wraparound support is important. We are looking at the permanency of the employment and at how we can work on the apprenticeship side with Skills Development Scotland and the third sector to ensure that young people have good-quality, work-based learning opportunities, with a view to that becoming an important part of their journey towards securing a job.

I am aware from talking to companies such as Cag Gemini and SSE, and to NHS Lothian, this morning that they know that young people will be an asset to them. The experience that they have already had of supporting young people into employment is proof that young people, if they are part of the scheme, can secure employment and will make a welcome contribution.

Johann Lamont (Glasgow) (Lab): At present, a young person who leaves school and goes into a job on a zero-hours contract is counted by the Scottish Government—unacceptably, in my view—as going to a positive destination. Would the young persons guarantee scheme place someone on a zero-hours contract? If so, would that be regarded as fulfilling the job guarantee?

The cabinet secretary will be aware that young people are currently in work that is highly and increasingly insecure. Will those young people be able to access the job guarantee scheme, and will the funding reflect the scale of the challenge that they represent?

Fiona Hyslop: I answered the question on funding in a previous response.

With regard to the type of work that young people should be able to go into and receive support for, we are quite clear on our commitment to the fair work principles, and that that should involve high-quality experience and not—as I said previously—the exploitation that we have seen so many young people at the front end of.

I am not sure whether Johann Lamont is welcoming the young persons guarantee; I am pleased that her front-bench colleague has done so. With regard to support, we have made it clear—as she will know if she has read the reports—that the scheme is about high-quality experiences for young people, with a view to ensuring that they can get a good-quality job as part of that. As part of that journey, they can get training, support and mentorship. That is all part of trying to do the best by our young people, and it does not relate to the way that Johann Lamont put her question in relation to zero-hours contracts.

Andy Wightman (Lothian) (Green): I thank the cabinet secretary for advance sight of her statement. Scottish Greens, too, will commit to work with the Government to ensure that the scheme is a success.

In her statement, the cabinet secretary said that Young Scot is working with the Government to ensure that young people “will have a genuine voice” and can “contribute directly” as the guarantee requires. I welcome that. Can she say more about the governance in that regard and the extent to which that contribution will be on-going, meaningful and significant?

Fiona Hyslop: I refer the member to the report that was published today with regard to Young Scot's involvement to date and how it has been involved in shaping the scheme. On how that involvement will proceed, I heard this morning from a number of the organisations about young people on boards, and how they can sit on shadow boards and influence the experience of other young people as part of their employment.

On the governance issue, the developing the young workforce scheme is employer led and localised, with 21 different organisations involved, and we want to ensure that there are connections with the young person's voice as well. The member raises an important point, and I give him a commitment that Young Scot's work is on-going; it did not take place only at the start of the process.

Willie Rennie (North East Fife) (LD): I want to thank Sandy Begbie for his work on this; I found his engagement very constructive.

I support the partnership approach, especially considering the myriad of schemes and funders, and different priorities. It is a good approach. I particularly welcome the mental health support, including today's announcement.

I may have been hard of hearing, but I do not think that the economy secretary answered Iain Gray's question about the living wage for all the jobs.

Finally, an awful lot of employers find it difficult to take on young people. How will the measures make it easier for them?

Fiona Hyslop: We know that companies, as of now, can commit to and support the young persons guarantee. There are also businesses that may not be able to do that now, but will in future. Part of why we want to make sure that the 21 developing the young workforce partnerships across the country are the bedrock of the initiative is so that they can support other businesses that may struggle to do that. Financial support may be available in some areas for SMEs in particular to help provide job supplements, which is also important.

We have committed to the living wage, but we know that some businesses will struggle with that. Sandy Begbie's report makes it clear that anybody who wants to be part of the job guarantee should commit over a set period of time to ensure that they can deliver the living wage for those young people. That is one of the requirements that Young Scot expressed in its discussions with us.

I welcome the Scottish Liberal Democrats' support for the young persons guarantee.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I welcome the announcement of such a

broad range of early adopters. Their involvement will give young people the chance to succeed despite the economic impact of coronavirus, which has hit them so hard.

Can the cabinet secretary expand on how the Scottish Government will seek to increase the number of employers who have signed up, and encourage as many as possible to do so?

Fiona Hyslop: That is everybody's job, not just mine. I hope that it is also the job of Rona Mackay and every MSP to speak to their local employers and encourage people and organisations to join the youth guarantee.

We want to ensure that we can work with as many organisations as possible. I mentioned that public sector organisations and a range of other agencies are close to becoming adopters, and those include Social Security Scotland, Forestry and Land Scotland and Scottish Forestry. I know that my cabinet colleagues and ministerial team will be championing the initiative at every opportunity. Perhaps the Scottish Parliament would also want to consider supporting the young persons guarantee, because that would be a strong leadership role for it to take.

Jamie Halcro Johnston (Highlands and Islands) (Con): I join colleagues in welcoming the young persons guarantee.

What constitutes a positive outcome for a participant in the scheme, and how and when will positive outcomes be monitored and reported to Parliament? What are the Scottish Government's full targets for participation in the scheme?

Fiona Hyslop: Clearly, we want to ensure that every young person has the guarantee, which is the first commitment. That is ambitious and it will be a challenge for us. However, if we do not set firm ambitions—as we heard from Sandy Begbie's experience in Edinburgh—we have no hope of realising them. Committing to deliver that target is important.

On what success will look like, it will be to make sure that people are in sustainable employment. We have done that previously: during the financial crash period, Scotland had one of the lowest levels of youth unemployment across Europe. Suppressing youth unemployment then has meant that there is now a 3 per cent difference between Scotland and the rest of the UK.

Making sure that young people are in employment and have experience in the voluntary sector that is good and meaningful, and trying to make sure that this generation of young people is not discriminated against compared with previous generations, will also be important. Obviously, we monitor figures regularly for those who are not in education, employment and training. We have

managed previously to get record levels of young people into education, employment or training. We want to make sure that we can get back to those levels as quickly as possible. The young persons guarantee at least gives us a fighting chance to do that.

Ruth Maguire (Cunninghame South) (SNP): I was pleased to hear the cabinet secretary say that the young persons guarantee embeds an equality and human rights approach in its delivery. With that in mind, how will the Scottish Government ensure that Scotland's diversity is reflected, that every young person—regardless of background—will have the same opportunities and that any structural barriers in their way are removed?

Fiona Hyslop: It is clear that that will be a challenge. However, we want to ensure that Scotland's long-standing inequalities in the labour market are tackled and that will be a hallmark of the guarantee. We have seen how Covid has exacerbated the inequalities that currently exist

Work on the development of the living wage and the fair work first approach, and with organisations such as Glasgow Disability Alliance, Young Scot, Close the Gap, Barnardo's Scotland, Enable and Intercultural Youth Scotland will help us with that. The report from Intercultural Youth Scotland, which was published today, is also worth considering because the charity is quite clear on the support that it needs to ensure that those barriers are overcome.

Colin Smyth (South Scotland) (Lab): As someone who introduced a youth guarantee—including the 50 per cent wage support—in Dumfries and Galloway, where 90 per cent of businesses employ 10 or fewer people, I note that the big challenge is obviously with SMEs.

Does the cabinet secretary accept that, for those businesses, survival in the next few months will probably be even more important than their trying to expand? Unless we get wider financial support to them, they will not be here in a few months in order to create the jobs that our young people desperately need.

Fiona Hyslop: As the member will know from my work over a number of months, our focus has absolutely been to ensure support for SMEs in particular. Some of our unique schemes in Scotland, such as the pivotal enterprise resilience fund and the tourism, creative and hospitality enterprises hardship fund, which do not exist anywhere else, have helped people survive.

The member is right to say that this is a difficult time for businesses to do something else and take on young people, so the combination of the kick-start scheme and the potential for top-up and support of wages is an opportunity—particularly for SMEs.

Our approach with that work is to have anchor companies that can help support other businesses, which is why, for example, some of the early adopters will help support their supply chain and encourage the supply chain to do the same.

The situation is very challenging. That is why we have considered the support that we wanted to give to organisations and set out grant support early—through the framework and the levels—to run throughout the next period.

Stuart McMillan (Greenock and Inverclyde) (SNP): How is the Scottish Government ensuring that the voices of young people are, and will continue to be, heard in the implementation of the guarantee, bearing in mind how Covid-19 will affect young people?

Fiona Hyslop: I refer the member to an answer that I gave to a previous question on the issue. We want to start with young people and want their voice to inform and help design the guarantee. They will be engaged throughout the process and that partnership, to which everybody referred, is not just about organisations or businesses, but about intergeneration.

Together we can ensure that Scotland can do its best to stand by our young people, ensure that they can have jobs, and that this difficult period that we are all going through does not harm their opportunities over the longer term.

The Deputy Presiding Officer: That concludes questions on the cabinet secretary's statement on the young persons guarantee. I remind members who are entering or leaving the chamber to please observe social distancing measures.

Defamation and Malicious Publication (Scotland) Bill: Stage 1

The Deputy Presiding Officer (Linda Fabiani): The next item of business is a stage 1 debate on motion S5M-23243, in the name of Ash Denham, on the Defamation and Malicious Publication (Scotland) Bill. I ask members who wish to speak in the debate to press their request-to-speak buttons, and I call Ash Denham to speak to and move the motion.

15:28

The Minister for Community Safety (Ash Denham): It is now just over 11 months since the Defamation and Malicious Publication (Scotland) Bill was introduced to Parliament. The circumstances that were forced on us due to Covid-19 greatly impacted its normal legislative process. I thank the Justice Committee and its clerks for their patient and hard work, which has allowed the bill to progress. I am pleased to note that the committee recommends that the bill's general principles be agreed to.

The bill is different from those that the Justice Committee usually considers, as it is largely the product of the Scottish Law Commission, which considered possible reforms to the Scots law of defamation. The bill takes forward every substantive recommendation that was made, and I thank the Scottish Law Commission for the work that it has put into this reform project.

Given the rights that are affected by the bill, I want to make sure that, as far as possible, the provisions are something that we, as a Parliament, can all agree on.

The law of defamation has to strike the right balance between two values that sometimes pull in opposite directions: freedom of expression and protection of reputation. Both are fundamental human rights, and both are vitally important in modern democracy. The widespread use of social media means that we are all capable of creating content that can be easily shared and viewed. The bill aims to make sure that our law of defamation is fit for 21st century Scotland, with a clear and accessible framework that balances those two rights. It brings defamation law up to date, and simplifies it in some key areas by replacing and restating the existing law.

I will speak about some of the bill's key measures, beginning with the statutory definition of a "defamatory statement". Other provisions in the bill set out what defamation is not, so it is important that we define what a defamatory statement is. The common-law definition that is

most often referred to by the courts was set out in 1936, so this is a chance for this legislature to consider and debate the definition.

The bill takes the common-law definition and expresses it in modern language that is already familiar to the courts. The committee has heard evidence from those who are content, but also from some who have concerns. It is normal for our courts to consider previous case law as a matter of course, and I would expect them to do that, where appropriate, when interpreting the new statutory definition. I will make that view clear in the explanatory notes to the bill. I believe that that is the most appropriate way to signal to the courts and users of the legislation that the statutory definition should be interpreted in line with the common-law definition that we have today, and, importantly, that the definition will evolve as and when case law develops. I hope that that will allay some of the concerns in that regard.

The threshold test of serious harm that is introduced by the bill is another important provision. When a court finds a statement to have been defamatory, the law presumes that damage has been done. I do not believe that that approach appropriately balances protection of reputation and freedom of expression. I am clear that, if a person says that their reputation has been unfairly damaged by a defamatory statement, they should have to prove, at least to a minimum standard, how it has been damaged.

Some who are opposed to the test have referred to it as

"an English solution to an English problem."—[*Official Report, Justice Committee*, 1 September 2020; c 12.]

I disagree strongly with that viewpoint. The Scottish Law Commission took a broad look at the Scots law of defamation and recommended that the threshold test of serious harm be introduced. I do not believe that the commission would have made the recommendation if it did not think that it was appropriate. I welcome the committee's view that the test should be retained.

In England and Wales, public bodies are prohibited from raising a defamation action, but there has been no decided case in Scotland that affirms the so-called Derbyshire principle. The bill codifies the principle, and I believe that it is of the highest public importance that a democratically elected governmental body should be open to uninhibited public criticism. I have tried to come up with a sensible and flexible definition for the Derbyshire principle that, crucially, does not expand the common law. The drafting borrows from section 6 of the Human Rights Act 1998. The issue has been discussed by the courts for more than 20 years, and the bill will give practitioners a good base from which to advise their clients.

I have listened to a range of views on the matter and to the committee's recommendation, and I am willing to work with members to ensure that we get a provision that codifies the Derbyshire principle as it exists at the moment—one that is clear, but also flexible.

The bill restricts liability for a defamatory statement to those who are primarily responsible for its publication. Currently, secondary publishers, such as library—

Liam Kerr (North East Scotland) (Con): On the previous point about liability with regard to public bodies, what is the minister's thinking on private companies that provide services to a public body and whether the principle should be extended to them?

Ash Denham: That is exactly what I mean by the use of the word "flexible". Public-private provision has clearly moved on quite a lot in the past 30 years, so it is important that we retain flexibility to allow us to settle some hard cases that might present themselves in the future.

Currently, secondary publishers, such as a bookseller or a website operator, can be held liable for content that they are not actively responsible for. Private companies face a choice: remove potentially legitimate content, or be held liable for damages. In my view, it should be for the court to decide whether a statement is defamatory, not private companies.

I welcome the committee's view that secondary publishers should be excluded from liability in the circumstances that are outlined in the bill. I know that committee members are concerned about online defamation. I have set out in my response to the committee's report the process and potential costs of removing such material, which I hope eases any concern.

The bill brings together the main defences to a defamation action, reforming existing statute and, in the case of the public interest defence, codifying the common law. The committee recommends that the court should have the ability to refer to previous case law when interpreting those statutory defences. I will ensure that the explanatory notes clearly state our expectation that the court, when interpreting the new statutory defences, will take into account case law on the common-law defences, where appropriate.

The bill largely restates the offer of amends procedure, which is a useful process by which those who admit that they have defamed someone can avoid legal proceedings. As part of the offer of amends, an offer of compensation is made, together with an apology and correction. Where the amount of compensation cannot be agreed between the parties, the court is asked to decide that instead. The committee has heard conflicting

views on whether the bill still allows an offer of compensation to be discounted by the court. In light of that, I am pleased to commit to lodging an amendment at stage 2 to clarify the position.

The bill reforms the law on malicious publication. In order to succeed, the pursuer must show that the statement complained of was made with malice. The definition in the bill reflects the common law on similar types of action, but the committee has concerns. I am happy to lodge an amendment at stage 2 to reflect the committee's recommendation.

Two other matters regarding malicious publication have also been raised: available defences and the liability of secondary publishers. In order to make the issues clear, I will amend the explanatory notes to state my view that a malicious publication action cannot be raised against a secondary publisher, and I will set out clearly that the defences of truth, absolute privilege and honest opinion are intended to apply.

I will conclude on the matter of limitation. A principal aim of limitation is that litigation should proceed promptly. I believe that, where someone suffers damage to their reputation, they are usually aware of that at an early stage. That is why I agree with the commission that one year is sufficient to assess any damage and prepare for litigation. The court has the discretion to allow litigation to proceed outwith the one-year period, where it considers that it is equitable to do so. I suggest that a statement that comes to the attention of an individual after one year but which causes serious harm would likely be allowed to proceed by the court.

The bill also makes an important allowance for those occasions when someone publishes a statement that has previously been published and there is a material difference between each. The flexible approach that we have taken is capable of taking into account a material difference between each subsequent publication.

I move,

That the Parliament agrees to the general principles of the Defamation and Malicious Publication (Scotland) Bill.

The Deputy Presiding Officer: We now go to Adam Tomkins, speaking on behalf of the Justice Committee. You have up to seven minutes, Mr Tomkins.

15:38

Adam Tomkins (Glasgow) (Con): In its report on the Defamation and Malicious Publication (Scotland) Bill, published last month, the Justice Committee reached the unanimous conclusion that the Parliament should support the bill's general principles. I thank all the witnesses who

gave evidence to the committee, the clerks and Parliament officials who give so much help to the committee on a daily basis and all the committee members for the thoughtful and measured way in which they approached the bill.

As we have just heard from the minister, the bill originates in the work of the Scottish Law Commission, and it seeks to put the Scots law of defamation on a statutory footing fit for the 21st century.

In doing so, it must address and balance two competing rights: on the one hand, freedom of expression; on the other, the right to protect one's reputation, which some see as an aspect of the right to privacy. Neither of those rights should be allowed lightly to give way to the other, and any law of defamation should strive to get the balance between them right.

The committee considers that, taken as a whole, the bill achieves that aim. I do not think that there should be any doubt that it does so by shifting the balance—albeit perhaps only subtly—that we have in the current law. The bill shifts the balance in favour of freedom of speech. It says that, for example, for a defamation action to succeed, a pursuer will have to show not merely harm, but serious harm to their reputation. It also says that defamation actions will have to be commenced within one year, rather than within the current three-year period of the harm occurring.

Some witnesses appearing before the Justice Committee were concerned about the shift in favour of greater freedom of speech, but most welcomed it. In particular, and unsurprisingly, media organisations welcomed it strongly. They told us that that would address the chilling effect that the current law of defamation can sometimes cast over journalists, publishers and writers when actions are brought or, indeed, even threatened by pursuers who have—to use a phrase that was memorably cited in evidence—

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

Raising the threshold for defamation actions from harm to serious harm is probably the most contentious change that the bill makes. In doing so, the bill will bring Scots law into line with the position already in force in England and Wales. Some of the committee's witnesses, as the minister referred to, wondered whether that is

“an English solution to an English problem.”—[*Official Report, Justice Committee*, 1 September 2020; c 12.]

Others strongly disagreed, including Andrew Tickell, who was representing Scottish PEN, Nick McGowan-Lowe of the National Union of Journalists, and Peter Geoghegan.

In her response to the committee's report—for which I thank her—the minister backs the new higher test of serious harm, and cites the work of the Scottish Law Commission in doing so. Speaking personally, I think that she is right to do so. Indeed, the committee's view is that, on balance, it favoured retention of the serious harm test in the bill.

I will move on to two aspects of the bill on which the committee considers that further work is required at stage 2 to ensure that the legislation is properly drafted to meet its objectives. The first aspect is the Derbyshire principle, which is named after an English case decided by the House of Lords in the early 1990s. As the minister said, that is the principle that local authorities may not sue for defamation. The place where an elected official seeks to protect their reputation is at the ballot box, not in the defamation courts.

The bill seeks to put the principle, which is a judge-made rule of the common law, on a statutory footing. The committee welcomes that, but it is concerned about the scope of the principle as drafted. In particular, the question is: should private bodies that are carrying out functions of a public nature also be barred, as local authorities are, from suing for defamation? If so, what about universities or housing associations?

In her response to the committee, the minister recorded that she is opposed to extending the Derbyshire principle to all private bodies carrying out public functions. That is a commendably clear steer, but I suspect that the matter will be revisited when the committee considers amendments to the bill at stage 2.

The second aspect of concern highlighted by the committee relates to malicious publication. That is a separate delict from defamation, albeit that the two are closely related—and, of course, the bill deals with them both. Because it is a separate delict, it has its own ingredients, which overlap with but are not identical to those of defamation. On the one hand, for example, harm has to be caused, but not serious harm; on the other hand, to sue for malicious publication, the pursuer must show that they have suffered or are likely to suffer financial loss, whereas that is not always a requirement in defamation cases.

There is one striking omission in how the bill deals with malicious publication: it says nothing about defences. One of the most attractive aspects of the bill is the way it modernises defences in the law of defamation in sections 5 to 7. However, in stark contrast, the bill is silent on defences in the law of malicious publication. That needs to be rectified.

I raise the issue now, because the minister seems to have overlooked the committee's view

on the matter in her response to our report. She referred to it in her remarks a few moments ago, but I gently say to her that the matter needs to be dealt with in the bill and not in the explanatory notes accompanying it. However, I say, too, that, between now and stage 2, if the minister would find it helpful I would be happy to work with her and her officials on both the scope of the Derbyshire principle and defences to malicious publication.

Throughout the committee's deliberations it was anxious that placing the modern law of defamation on a statutory footing should aid the accessibility of the law, but should in no sense freeze its ongoing development in the case law of the courts. The single most important and liberalising reform to the law of defamation in recent years—the creation of the new defence of publication in the public interest in the Reynolds case—came in case law, not statute.

The committee welcomes the bill and supports its general principles. It does so in the hope and expectation that it will assist the courts as the law of defamation and malicious publication continues to be developed by them, even after the bill is enacted.

15:45

Liam Kerr (North East Scotland) (Con): I remind members that I am a practising solicitor and hold practising certificates from both the Law Society of Scotland and the Law Society of England and Wales.

It seems that, at the moment, large parts of my week are set aside for reading, questioning and commenting on matters of freedom of speech—and rightly so, as it is one of our most important fundamental rights. In these times, when technological developments and social media have allowed pretty much anyone to be a creator or a publisher, it is imperative both that free speech is protected and that any threats to it caused by laws are challenged.

However, it is also key that individual reputation and the right to privacy should be protected. The bill seeks to strike a balance between those two rights. The Scottish Conservatives consider that the principles of the Defamation and Malicious Publication (Scotland) Bill broadly achieve that balance, and we will vote in favour of it at decision time tonight.

Several areas will merit further consideration as the bill progresses. Adam Tomkins, the committee's convener, has just encapsulated my thoughts on the Derbyshire principle in his comments, so I will confine my remarks to three other areas: the serious harm test, malicious publication, and a brief comment on limitation.

If the bill is passed, the right to bring defamation proceedings in respect of a defamatory statement will accrue only if publication has caused or is likely to cause "serious harm" to the subject's reputation. According to the bill's policy memorandum, which refers to the Scottish Law Commission's work on the subject, that test is required because of the

"lack of authority in Scots common law and the inability of Scottish courts to dispose of trivial claims at an early stage".

I find that interesting, because, if there is a lack of authority, one wonders whether the Law Society of Scotland has a point when it says that the existence of such an extra hurdle could "deter legitimate claims", leading to even less such authority developing.

Although ensuring the ability to dispose of trivial claims feels right to me, the Faculty of Advocates has suggested that

"There is no reason to think that the Scottish courts have" hitherto

"been troubled by trivial claims".

That having been said, I listened carefully to the media respondents who told the committee that a serious harm test adds clarity, prevents cases without merit from proceeding and helps to prevent a chilling effect in their investigations. The evidence of Dr Andrew Tickell was particularly powerful. He said:

"we are not just talking here about journalists"

but about

"writers, bloggers and anyone who engages in the public sphere"

asking

"Can I afford to defend myself?"—[*Official Report, Justice Committee, 25 August 2020; c 6.*]

The Society of Editors noted that, in England, the reduction in the chilling effect benefits academics, scientists and others. It is that final point that I found particularly persuasive. Although I see merit in both views and feel that the committee's report articulates the debate well, on balance, I align with the committee's view, which it expressed in its report, to

"favour retention of the serious harm test".

However, that internal dialogue informs my view that the committee was right to recommend that the Scottish Government set out clearly why the serious harm test is still required. I have read the minister's letter of 29 October, and I have listened to her opening remarks today, but I am not sure that she has demonstrated such a requirement. I will be interested to hear the views of other members who contribute to the debate. I

respectfully invite the minister to consider setting out, before stage 2, why such a test is required.

Mention of serious harm is notably absent from the bill's sections on malicious publication. I focused on that area during the committee's evidence sessions, because I was concerned that it might not have been such a priority while the bill was being drafted. Even the policy memorandum says that the purpose of the bill is to

"simplify the law of defamation (and the related action of malicious publication) in Scotland".

The nature of part 2 as almost an afterthought has been explored by the committee, which has several concerns. One is that the bill sets a low threshold for showing malicious publication, as what is required to show that a statement is "malicious" is knowledge of, or indifference to, the fact that a statement is false; thus a pursuer can show malice merely by adducing indifference to the truth.

Other concerns are that, in the definition of malice, the pursuer must show indifference "or"—not "and"—malicious intention; there is no concept of serious harm, only a degree of financial loss, which does not have to be caused, with no de minimis; and there is a lack of clarity as to whether secondary publishers are immune from part 2. On that note, as articulated by the convener, there is also no clarity over defences applying in this area.

The logical progression of such drafting, according to the likes of Professor Elspeth Reid and Professor John Blackie, is that malicious publication might become a preferable action to a defamation action. They suggest amending the definition to require both falsehood and malicious intention, or at least "reckless" indifference to the truth.

Dr Andrew Tickell was clear in his view that, if one is persuaded by the need for a serious harm test at the outset, it would make sense to consider it for part 2 of the bill as well.

I note the minister's intention to amend, which I am grateful for, and, with regard to the defences, I note the convener's remarks and the minister's letter committing to look carefully at the issue if an amendment is lodged. However, I encourage the minister to look at it carefully of her own volition as soon as possible. Further, I associate myself with the convener's remarks on the explanatory notes.

I will say a brief word on limitation, as it is another area of particularly interesting debate. The bill reduces the limitation period within which an action must be brought from three years to one year from first publication. I understand the rationale, including that a longer limitation can discourage publishers' investigation, and I accept the argument that it is difficult to believe that,

nowadays, someone would not be aware of material that caused serious harm to their reputation within the period of a year. However, one can envisage a situation in which cumulative statements do serious harm in the aggregate rather than at the publication of the initial statement.

In her opening remarks, the minister argued that the court has discretion to allow a claim to go through that would otherwise be out of time. She is, of course, right, as there is a general power to override time limits in the Prescription and Limitation (Scotland) Act 1973. However, that does not specifically refer to defamation actions in the same way as the Limitation Act 1980 does in England and Wales, so there is at least an argument that we have weaker protection in Scotland. For the sake of clarity, an amendment in that regard is worth exploring.

Furthermore, section 33 of the bill makes provision for a limitation interruption when there is mediation, which is helpful. However, one wonders whether that might be extended to take account of other forms of alternative dispute resolution such as arbitration, expert determination and press complaints or ombudsman bodies.

Further reflection is needed in those areas, but, at this stage, I confirm that the Scottish Conservatives agree with the principles of the Defamation and Malicious Publication (Scotland) Bill and will vote for them at decision time.

15:53

Rhoda Grant (Highlands and Islands) (Lab):

There is always a balance to be struck between the right to freedom of speech and the right of an individual not to be defamed. We need to ensure that legislation strikes the right balance between those rights.

People must be held to account, especially when that is in the public interest. That is true of Government and elected politicians. We are here to represent the public interest and the public, and the media must be able to question and scrutinise our actions without fear of litigation.

On the other hand, people should not face damaging and untrue accusations without recourse. When people's very livelihoods are at stake because of unjustified damage to their reputation, there must be a method of correcting the record. As with everything, where there are rights, there are also responsibilities.

Scottish Labour supports the general principles of the bill. We hope that, where there are concerns, they can be dealt with as the bill proceeds.

It is worth pointing out that the bill comes from a recommendation from the Scottish Law Commission, which reviewed defamation law back in 2017, as the minister said. The Scottish Law Commission does valuable work in consolidating and reforming law, and it is good to see that work coming through the Parliament.

Several concerns have been expressed about how the bill translates case law into statutory law. There are concerns about the way in which case law has been interpreted and about the ability to refine the law by case law when it is codified. That evolution is required, because the way in which we communicate changes with time. Twenty years ago, social media was almost unheard of, but now people use it to follow the news and gain information. We are all publishers, although some of us are not very great editors.

We cannot foresee how methods of communication will change and whether the bill that we are considering will be fit for purpose in, say, 10 years' time. We always need to allow case law to develop how the law is interpreted in order to follow changes in how we communicate.

The bill is very technical. As it is trying to codify case law, the definitions in it have to capture the nuance in that case law. That occurs in several places throughout the bill but, crucially, it occurs in the definition of "defamation", which has been the subject of concern. Some people believe that there is no need for a definition, as case law provides guidance that is widely understood. There are also concerns that defining "defamation" in legislation at all will prevent case law from developing the definition in the future. The committee came down on the side of a statutory definition but wants to ensure that the definition can be codified in the future by case law. I am not sure whether that will be possible, but I understand that the minister is going to consider how it can be achieved.

There are concerns about language and the translation of case law and common law into statutory law in other parts of the bill. An example of that relates to the rule that is known as the Derbyshire principle, which has been mentioned. In England and Wales, public bodies are prevented from bringing defamation claims under that rule. The bill creates a statutory version of the rule but includes an exemption for charities and businesses that deliver public services "from time to time".

There has been concern about the impact of that, and the committee recommended that clarity is needed in the bill on the application of the principle and the exemption. Scottish Labour supports the Derbyshire principle—that public bodies and agencies should not be permitted to sue for defamation in relation to public activities—

and believes that the bill needs to clarify how the principle extends to private contractors that are involved in public service delivery.

Those issues need to be dealt with to ensure that there are no unintended consequences as a result of modernising the law. The minister has indicated to the committee that she will consider the issues regarding the translation of case law into statutory law to ensure that the bill strikes the right balance.

The bill introduces a serious harm test that is similar to, but not the same as, the one in the Defamation Act 2013, which is for England and Wales. That is one of the more controversial changes to the existing law. It is welcomed by some people as a method of preventing vexatious cases or litigation threats from those with sufficient resources, which, as the committee heard, can have a chilling effect on important media scrutiny and freedom of speech. The threat of being sued can have the effect that information that it is in the public interest to publicise is suppressed.

A number of defences are to be placed on a statutory footing, and a new defence of being in the public interest will be created. We hope that that will ensure that those with deep pockets cannot simply suppress information and prevent it from being shared with the public when it is in the public interest to know about it. That is a common law defence that exists in England and Wales.

The law surrounding malicious publication is also to be clarified. As we have heard, there are concerns that the bill will allow a loophole for those who wish to bypass the public interest defences. There are also concerns that the bar is set too low. Professor Blackie said that he interprets the bill as defining "malice" as requiring knowledge

"that the statement was false or you were indifferent to the truth, or that it was motivated by a malicious intention to cause financial loss".—[*Official Report, Justice Committee*, 15 September 2020; c 18.]

He believes that the current definition of "malice" requires there to be "a design to injure". He suggested that the definition in the bill be amended to require knowledge of a falsehood and malice. I am glad to hear that the minister is considering that.

The bill is welcome but, given the sensitivities of the issue, it is important to get it right. Therefore, I am heartened that the minister appears to have heard the concerns and is willing to listen to the committee and amend the bill accordingly. We will support that process.

16:00

John Finnie (Highlands and Islands) (Green): I, too, commend the work of the Scottish Law Commission, which provided the foundation for the

bill, and I thank all those who provided evidence and briefings, and the staff who have helped us throughout the process of considering the bill.

The bill covers an important part of civil justice—defamation. As has been said, as we examined the bill the Justice Committee focused on two important competing elements that required to be considered: freedom of expression, which the committee has heard a lot about in relation to not just the Defamation and Malicious Publication (Scotland) Bill, but other proposed legislation that we are considering; and protection of reputation. On whether the appropriate balance has been struck, I agree with the convener that the proposed shift favours freedom of speech, but, broadly speaking, the Scottish Greens consider that the bill strikes the correct balance, subject to our comments on “serious harm”, which my colleague Andy Wightman will touch on.

The Scottish Government says that defamation law should be as clear and accessible as possible. There is an argument to be made that putting that on a statutory footing will bring some clarity; accessibility in the context of defamation law has been referred to in correspondence as “mythical”. Access to justice is important, and not just in the present context. Reference has been made to the term “ordinary persons”, but I remain to be persuaded that the bill will be accessible to ordinary people.

I have concentrated my scrutiny mainly on the Derbyshire principle, which has been touched on. It is important to say that the law lords’ decision that gave rise to that principle said that public bodies should be

“open to ‘uninhibited public criticism’ and that reputation should be protected by political rather than legal means.”

The bill creates a statutory version of that principle, which exempts businesses and charities that provide public services only from “time to time”. With regard to the principle that must be followed, the convener accurately reflected the content of our stage 1 report, to which I am a signatory, but the issue is one on which I would go beyond many members, because we must have effective scrutiny of outsourced public services.

I will give an example. It is clear that my constituents in the Western Isles have more freedom to talk about the quality of their publicly provided ferry services than my constituents in the northern isles do, whose service is provided by Serco, the website of which tells us that the company provides services in health, transport, justice, immigration, defence and so on. Only yesterday, Serco was the subject of public criticism when a prison officer in one of its private prisons in England revealed that prison staff were

required to clean cells without appropriate equipment.

There is a balance to be struck. As with all legislation, the most important factor in achieving that balance is that right rather than might is the principle that applies. There is still a way to go with the bill, but the Scottish Green Party will support its general principles at decision time.

16:03

Liam McArthur (Orkney Islands) (LD): I, too, thank all those who gave evidence to the Justice Committee, our clerks, the Scottish Parliament information centre and others who have helped in our scrutiny to date. I also thank, of course, the Scottish Law Commission, the work of which laid the foundations for the bill.

The Law Society of Scotland has pointed out that modernising and codifying the law of defamation is overdue and should help to enhance accessibility. However, as others have said, achieving a proper balance between protection of reputation and freedom of speech is not easy, although it is obviously essential. I believe that the bill achieves that balance, in the main—albeit that changes will be needed at stages 2 and 3.

Broadly speaking, that reflects what the committee heard in evidence, although important concerns were raised, particularly by the Faculty of Advocates, which believes that the bill goes too far in trying to address a problem that, in its view, does not really exist in Scotland. As the minister said, Duncan Hamilton talked about

“an English solution to an English problem.”—[*Official Report, Justice Committee*, 1 September 2020; c 12.]

By contrast, Scottish PEN and media witnesses felt that the scales could safely be tipped a little further and highlighted what they see as the “chilling effect” of the ability of those with “thin skins and thick wallets” to silence fair comment through threats of legal action. Reference was made to the more precarious media environment, in which savaged budgets and high levels of freelancing mean that the risk of even pursuing, far less publishing, certain stories is one that editors, journalists and publishers are increasingly wary of taking.

Overall, however, the committee was generally satisfied that the bill is pitched about right. I very much share that view.

I welcome, as did witnesses, the inclusion of a statutory definition of defamation, although, as in other areas such as defences, there is a concern, as the convener said, to ensure flexibility in order to allow adaptation over time and the ability to draw on case law. The minister has expressed

sympathy with that, but it might still require amendment to the bill.

Perhaps the key area in which debate over competing rights and freedoms emerged was in relation to thresholds—specifically, the inclusion of a test of serious harm. The minister has defended that change, suggesting that

“The current law simply presumes that damage has been done.”

I am not sure that that is true. Damage still needs to be proved, with any award being contingent on the seriousness of the harm that has been caused. Having initially been a firm supporter of the serious-harm threshold, I confess that I now have some misgivings. The committee did not really form a clear view on the matter, so it is one that we will need to return to and resolve at stage 2. I look forward to hearing what Andy Wightman has to say.

Also, more clarity is needed around the way in which the Derbyshire principle is expressed in the bill and the codification of defences. The minister seems to be reluctant to concede on either point. Although I support the direction of travel in both areas, I think that it is regrettable that the minister has not responded more positively to the clear concerns that were raised with the committee.

Similarly, on the welcome exclusion from liability of secondary publishers, the minister appears to be unwilling to accept that anything more needs to be done to help those who wish to request removal of material. She referred to simple-procedure rules in the sheriff court and to £19 actions, but that picture was not necessarily reflected in the evidence that we heard. Whether it is dealt with in the bill or through other means, I think that the matter merits further attention.

Finally, on limitation, I welcome the reduction to one year for bringing a case. In a digital age, that seems not to be an unreasonable timeframe, and it could help to address some of the “chilling” about which the committee heard. That said, there might still be legitimate reasons why such a timeframe could prove to be problematic, whether that is due to genuine lack of awareness about material or to the cumulative impact of repeated references. The minister insists that allowances are made in the general law of limitation, but we also need to return to that at stage 2.

As I have said, I believe, in the main, that the bill broadly achieves an appropriate balance between the rights of protection of reputation and freedom of expression. It is also encouraging to hear of the work that is being done to promote greater use of mediation and other forms of dispute resolution.

I look forward to continued work with committee colleagues and the minister to improve the bill,

where necessary. For now, I confirm that Scottish Liberal Democrats will support its general principles at decision time.

The Deputy Presiding Officer (Christine Grahame): Quite a few members are joining remotely. I have been thinking about how to let them know when there is a minute to go. I have another thing in my repertoire to try out, on this Thursday afternoon: I will tap my microphone when there is one minute to go. Can you hear that?

Members indicated agreement.

The Deputy Presiding Officer: That is what I will be doing. Thank you very much. I just thought that we could try that for a change, so that all members have equal status—whether they are in the chamber or contributing remotely, members do not get any longer just because they cannot tell the time.

I do not know what signals the minister is giving me, but I am ignoring them.

16:08

Rona Mackay (Strathkelvin and Bearsden) (SNP): I am pleased to be able to speak in the stage 1 debate on the Defamation and Malicious Publication (Scotland) Bill and will be happy to vote at decision time in favour of the general principles of the bill.

It is generally accepted that the existing law on defamation in Scotland is piecemeal and out of date. Put simply, it is no longer fit for modern-day purposes. The last substantive change was made 24 years ago.

The bill aims to clarify and strengthen the statutory underpinning of defamation in Scots law, in order to protect freedom of expression and the reputation of individuals. Those considerations are at the heart of the bill, encouraging access to justice for those who believe that they have been defamed, through clarifying the law and protecting freedom of expression.

It is a technical bill, consisting of no fewer than 40 sections in three parts, and one schedule. As deputy convener of the Justice Committee, I put on record my thanks to the clerks and the bill team for all their hard work in setting it out for us in a comprehensive and logical way.

I have to confess that, at the outset of the bill, I had a preconceived notion that it would be dry and intensely legalistic, but I was wrong. I think that I speak for everyone on the committee when I say that the many witnesses from legal, media or creative backgrounds gave evidence in a way that made each session fascinating, informative and real, and I thank them for that.

The bill places certain key elements of Scots common law on defamation on a statutory basis, in addition to replacing and restating elements of the existing statutory provisions in Scots law. It is impossible to cover all its aspects in a short speech, but I will try to cover some of them.

Part 1 provides a new definition of defamation and introduces the threshold test of serious harm. It is possibly the most contentious element of the bill and I will expand on it later. Part 1 also covers defamation actions relating to public authorities and business interests.

Part 2 makes a number of provisions to replace common-law verbal injuries with three new statutory delicts relating to malicious publication.

Part 3 seeks to reduce the time period for bringing a defamation action from three years to one year and introduces the rule that the clock starts running from the first occasion that a statement is published. I believe that that is a sensible provision, as in most cases a person would know almost immediately when they believe that they have been defamed. However, it does not take into account the cumulative, straw-that-breaks-the-camel's-back effect of being defamed over time, which came up in the evidence sessions, so I am pleased that flexibility could be used on a case-by-case basis.

A lot of discussion and evidence related to the so-called “chilling effect”. Many organisations argue that defamation law in Scotland and England is having a chilling effect on freedom of expression. The argument is that those who can afford it can use the threat of legal action to quash stories and silence criticism, often by way of legal warning letters. *[Interruption.]* The law on defamation is uncertain and relies heavily on decisions in previous cases, which makes it difficult to judge the prospects of success, so defenders might be too scared to meet the significant costs of court actions. The National Union of Journalists has highlighted that traditional media organisations are struggling to maintain their financial viability, and they might simply drop a story. That is the chilling effect. In addition, today's freelance culture means that many more journalists do not have the backing of a major news organisation.

As I said earlier, the threshold test of serious harm was a divisive issue during evidence sessions. As the minister said, some referred to it as

“an English solution to an English problem.”—*[Official Report, Justice Committee, 1 September 2020; c 12.]*

However, the Scottish Law Commission firmly believes—as does the Scottish Government—that it would achieve the right balance between freedom of expression and protection of

reputation. It would discourage frivolous action and reduce time and money costs for the individual and the civil courts. If a person says that their reputation has been unfairly damaged by defamatory statements, surely it is only right that they should show how it has been damaged. *[Interruption.]*

The digital revolution in online publishing and social media during the past—

The Deputy Presiding Officer: I am sorry, Ms Mackay. I have rattled and banged my little microphone here to no avail. You are running over—could you conclude?

Rona Mackay: Oh!

The Deputy Presiding Officer: What did you think I was doing?

Rona Mackay: That experiment did not work. *[Laughter.]*

The minister has listened to the evidence that the committee took and has committed to consider and act on most of our recommendations. This is our opportunity to make the law of defamation fit for purpose, and I will be pleased to vote for the general principles of the bill at decision time.

The Deputy Presiding Officer: I have just been told that you could not hear what I was doing over BlueJeans, but you indicated that you could, Ms Mackay. *[Interruption.]* You could not hear it? Well, I will maybe try something else. I do not know. I will let that experiment die a quiet death.

16:13

Gordon Lindhurst (Lothian) (Con): Presiding Officer,

“Do not spread false reports.”

Is that statement something new? No. It is just a current translation from the Hebrew of Moses's words in Exodus 23, verse 1. It chimes with the right to freedom of expression in both public and private, which is at the heart of western democracy.

Individuals must be entitled to protection from provable untruths, which are, in other words—forgive me for using the word in this place, but it is apposite—lies, slander and malicious publications that would materially affect livelihoods and reputation. It is a pillar of any system that is based on the rule of law that truth should triumph over fiction and, in particular, triumph over deliberate or malicious fiction that is directed against individuals. Veritas vincit—which is pronounced “vinkit” or “vinchit”, depending on whether one believes the hardly credible suggestion that the ancient Romans pronounced their Cs as soft Cs.

Therefore, I generally welcome the bill, which should clarify several matters.

The common-law action of verbal injury is given a new statutory basis for malicious publication. However, who knows how the serious harm threshold test, which the bill sets out, will develop?

I note with interest the submission from the Faculty of Advocates, which has raised questions about the secondary publication rules in the proposed legislation and the regulation of internet publication. Clarity is indeed needed on that issue.

We must all deal with—and the law must at least establish a sensible framework to deal with—ever-changing methods of information distribution on social media and the internet. Obviously, such things were not regulated by even recent statutory or common law prior to this century, far less in the ancient Rome of Pliny the Elder’s time. However, as I said at the outset of my speech, the basic principles abide, and our law, which implements those principles, must be kept up to date, relevant, applicable and accessible.

The question whether the threshold test has been set too high for the bringing of claims, as some in the legal profession say, must be addressed at stage 2. However, there should always be at least the criterion that a claim should be of ostensible merit and worthy of the court’s time—in other words, there must be a statable case. Rigorous scrutiny of the bill is therefore required at stage 2.

I close with a question: is the Parliament up to the task? We shall see.

16:16

Annabelle Ewing (Cowdenbeath) (SNP): I must apologise. I lost connectivity for about 10 minutes at the beginning of the debate, so I missed part of the minister’s comments and part of the convener’s comments.

I refer members to my entry in the register of members’ interests, wherein they will see that I am a member of the Law Society of Scotland and that I hold a current practising certificate, albeit that I am not currently practising.

I want to make a few comments in the time available, which has gone from six minutes to four minutes in the flash of a second.

On the definition issue, the definition of defamation, as proposed for the first time in statute in Scotland, would involve circumstances in which a statement is deemed to be defamatory

“if it causes harm to the person’s reputation”.

Although the Scottish Law Commission did not propose an express definition, I understand that

the Government felt that that would be helpful on the ground of improving clarity. Indeed, I think that that is the balance of the evidence that the committee received, and I agree with that.

The other issue that I want to address briefly is the serious harm test, which we have already heard a lot about this afternoon. In effect, that test would make it a requirement to aver not simply that one’s reputation had been harmed but that it had been seriously harmed. If that cannot be established, a pursuer will not be permitted to proceed with their civil action.

That has indeed caused controversy. We have heard about the concern of Duncan Hamilton of the Faculty of Advocates, who said:

“What we are dealing with here is an English solution to an English problem.”

He was referring to the problem of unmeritorious or frivolous claims having been brought forward south of the border. He said that, in Scotland, that

“has simply not been the case”.—[Official Report, Justice Committee, 1 September 2020; c 12.]

Mr Campbell Deane, who is a practising defamation solicitor, said:

“by introducing that extra barrier, you would be putting a hurdle in the way of a litigant who may well have a perfectly good right of action.”—[Official Report, Justice Committee, 15 September 2020; c 5.]

Dr Scott of the London School of Economics felt that the introduction of such a test would add to the complexity of the law, with possibly a substantive hearing having to be held and significant evidence requiring to be led to determine whether the threshold had been met, which would add to cost and complexity.

I think that we can see that the legal profession and some academics have certain concerns.

It is fair to say that the press, media organisations, writers in general and other academics felt that the approach was reasonable in the context of striking the right balance between the competing interests of freedom of expression and the right to protection of privacy.

The helpful briefing that the Law Society produced this week should be reflected on, and I feel that the issue merits further reflection. I think it was John Finnie who said that we should be dealing with right rather than might, but it is important to remember in these debates and in important debates with the media that not all people who allege that they have been defamed are the big guys—some are the small guys. Surely we as a Parliament are very much here to protect the small guys.

I urge a bit of reflection on the issue. The Law Society has suggested that we could perhaps

consider finding language to the effect that we could seek to exclude vexatious actions, to the extent that the provisions are apparently destined to deal with that problem in Scotland. There are then procedural issues—questions such as “At what point?” and “By way of what procedure?”—but they will presumably be easier to iron out.

We need to protect the wee guys, and I think that there should be a wee bit of further reflection. Keeping the spirit of what the minister and officials are trying to do, we should nonetheless ensure that we get this right, such that people have the ability to protect their rights. I think it was Duncan Hamilton who said that one person’s “chilling effect” is another person’s ability to assert their rights in society. I think that the issue merits a further look.

Thank you, Presiding Officer—I have no idea what time it is now.

The Deputy Presiding Officer: I know—I have given up. I have not really; don’t think that I have. I call James Kelly.

16:21

James Kelly (Glasgow) (Lab): Thank you, Presiding Officer. This is the first time that I have spoken virtually in a debate in the Scottish Parliament, so you will be glad to know that I have set my stopwatch running so as not to fall foul of your time restrictions.

I support the general principles of the bill. As a member of the Justice Committee, I thank the clerks and all those who gave evidence on a bill that covers an extensive number of areas. As other members have said, it is important to ensure that the bill strikes the correct balance between protecting freedom of speech and ensuring that those who are unfairly and sometimes viciously defamed have protections in place in order that they may take corrective action.

A number of issues have been touched on in the evidence taken by the committee and in today’s debate. There has been quite a bit of discussion around the Derbyshire principle, and I agree with other members that we need further clarity around the definitions, particularly on what is actually covered by a “public authority” and on the issue of how private organisations that partially carry out work in the public domain are covered by the bill.

I welcome the work on the defences that are set out in the bill to ensure that the appropriate defence is codified so that, for example, people who are expressing an honest opinion or acting in the public interest have appropriate cover. There needs to be some further work regarding the offer to amend procedure where there are disputes and where, in an attempt to avoid such disputes

officially coming to court, a settlement is reached. Previously there was recognition that, if a defender made some apology, there would be a deduction, and there has been some confusion as to whether that arrangement is still in place. That needs to be clarified.

A couple of other issues are worth touching on. The Law Society’s briefing covered the issue of internet publication, which is not specifically covered by the bill. The society made the good suggestion that it would be useful for the law commissions across the UK to do some work in that area.

The substantial growth in the internet and social media, and the platform that that can, unfortunately, provide for people to be defamed, is an area that is worth further investigation and maybe further legislation.

Another area that is worth highlighting is access to justice. It could be the case that people are being unfairly defamed but do not have access to resources such as legal aid to enable them to take a proper court action.

Similarly, the committee heard evidence about the growth in online journalism, or people writing their own publications online. They might come under the scope of the bill if they become involved in cases and do not have appropriate access to legal aid. That area is worth revisiting.

I think that the bill is welcome and I will certainly be supporting its general principles at decision time.

The Deputy Presiding Officer: Thank you, Mr Kelly. I am told that some members are unaware that they are to make four-minute speeches, unless they are summing up. I thought that everyone knew.

16:25

Fulton MacGregor (Coatbridge and Chryston) (SNP): As a member of the Justice Committee, which has taken the bill through stage 1, I put on record my thanks to colleagues and particularly to the clerks. It is a complex and at times technical bill, and although not always headline grabbing, it is nonetheless an important bill and one that is needed in the 21st century.

As others have pointed out, freedom of expression remains important, but we must also consider what safeguards we can put in place to ensure that an individual’s reputation is not unjustly tarnished. We have ascertained that the Scots law definitions of defamation and verbal injury are no longer fit for purpose. They are not concise, they do not strike the right balance and, importantly, they are simply not modern enough to deal with issues such as online publications.

The bill's provisions will enable us to improve the accessibility of the common law by making it more straightforward for individuals to use. Crucially, we can ensure that the relationship between freedom of expression and individual reputation is considered with balance.

The bill also proposes raising the threshold for bringing defamation actions. Various proposals, including a serious harm test, a single publication rule and a one-year time limit for raising a court action, will create a higher threshold for taking court action, which will ultimately help to balance the law protecting freedom of expression.

In truth, the law of defamation has been amended in a disjointed fashion, with legislative changes occurring most recently in 2013 and, before that, 1996. As online publications are now commonplace, the world has become very different, and we must make sure that the law reflects that.

It is not just publications that are affected by that new aspect—for example, social media and messaging apps have opened up a whole new world. Any individual in the chamber with access to a smartphone can become a content creator in the click of a few buttons. Most of us have some kind of social media account, and we can voice our opinions and views on any given subject within seconds. Although I encourage its responsible use, social media does not have the safeguards in place that can be seen in print media. That is why we must update the legislation: it is not fit for purpose in a world that goes beyond print publications. The bill makes provision for the courts to require websites to remove content and to require people or bodies to stop distributing or showing material.

The main issue that the bill is designed to address is the current law's "chilling effect" on freedom of speech, with people feeling that they cannot publish something for fear of legal action. The complexity of the law makes the situation worse, because it can add to the costs of defending court proceedings. Publishers can feel silenced when there can be consequences for publications that mention an individual. The bill, in effect, clarifies that cases can be brought only where real harm has been done to an individual's reputation. I note the minister's point on the serious harm threshold, which was one of the most widely discussed issues during the committee's evidence sessions.

I will move on to other areas that the committee looked into. I know that previous speakers have already covered them—mainly because there were only a few areas of contention.

Others have talked about the Derbyshire principle. For the record, my colleague John Finnie

undertook the legwork on that issue for the committee at stage 1. As has been said, we recommended in our report that the section on that be redrafted to make the Scottish Government's intention clearer on which bodies are covered and to provide examples of those that are exempt. I fully welcome the minister's offer to work with members to ensure that we get a provision that codifies the Derbyshire principle as it exists now in a way that alleviates stakeholders' concerns and is as clear and as flexible as possible.

We have also heard about secondary publishers and malicious publication.

I see that my four minutes are almost up. The minister's approach throughout has been one of willingness to work with the committee going into stage 2—that reflects her overall approach to the previous bill that she brought to the Justice Committee. I look forward to stage 2, and I support the general principles of the bill at this stage.

16:30

Graham Simpson (Central Scotland) (Con): I come to the debate as someone who used to have to think very carefully about defamation on a daily basis. As a newspaper reporter and then a sub-editor for local papers and latterly for *The Scottish Sun*, I had to have some knowledge of the law in this area, both in England, where I first worked, and then in Scotland. Although at *The Sun* we had lawyers who came in every night, we had to make quite a lot of judgment calls about how to phrase things.

None of my employers was ever sued over anything that I wrote, although there were one or two apologies over the years—that goes with the territory. It was therefore with great interest that I read the bill, the committee's report and the Scottish Law Commission's report.

Having worked in newspapers, I have that perspective, but now that I am in politics, I have to be careful of what I say through other mediums. It is all too easy for people to tarnish someone's reputation online, on social media, and for that to be done multiple times by multiple people. I have also learned that the threshold of what people can say about me as a politician is different from what can be said about others. In essence, we have to be able to take some flak, whether it is true or fair, or not.

Overall, I think that the bill is sensible and I am happy to back it at this stage. It will mean that, if I email Gordon Lindhurst, for example, with some defamatory remarks about him, he cannot sue me, but if I foolishly copy in Liam Kerr, I will be in trouble. Bizarrely, that is not the case at the moment, so I agree with that reform.

At the heart of the issue is the need to balance the right to freedom of expression and the freedom of the press with the protection of reputation.

Then there is the so-called chilling effect, whereby media outlets will not publish because of the very fear of being sued. I have seen many accurate stories either not being run or being toned down heavily, much to the annoyance of writers. The NUJ mentioned that in evidence, and it benefits those with deep pockets.

The bill sets a useful threshold. The Law Commission recommended that

“It should be competent to bring defamation proceedings in respect of a statement only where the publication of the statement has caused, or is likely to cause, serious harm to the reputation of the person who is the subject of the statement.”

That is entirely sensible and should cut out frivolous claims.

Section 2 places on a statutory footing the principle laid down by the case of *Derbyshire County Council v Times Newspapers Ltd* that a public authority has no right at common law to bring proceedings for defamation—quite right, too.

The presumption against a jury trial in defamation actions is a good idea. As the Newspaper Society said:

“It has long been the view of news organisations that there is an inherent bias against journalists, especially when it comes to trials involving prominent individuals, and judicial direction to set aside preconceptions is often not sufficient to even this out.”

The change in the limitation period from three years to one is also welcome.

Finally, various bits of the bill deal with defences, and they appear to be sensible.

The committee has pointed out parts that can be tidied up, as we would expect. However, that can be sorted out by the fine minds of those on the Justice Committee—and that is not defamatory.

16:34

Shona Robison (Dundee City East) (SNP): I am pleased to be speaking in the debate, and I support the general principles of the bill.

In its very positive stage 1 report, the Justice Committee makes a number of recommendations. As others have done, I thank the Scottish Law Commission and the clerks, who have worked hard to get us to this stage. I welcome the minister’s positive response to the committee’s report and the commitment to reflect further on the committee’s recommendations.

In essence, at the heart of the bill is an attempt to strike a balance between protection of reputation and freedom of expression. The

committee recognises the strength of feeling behind the views that were expressed both in support of freedom of expression and in relation to the importance of protecting individual reputation. It agrees with the Scottish Government’s view that the bill represents a package of measures that creates an overall balance and makes no single overarching recommendation to fundamentally alter the overall balance in the bill.

I want to focus the rest of my speech on a couple of specific areas. The inclusion of a serious harm test was one of the main provisions where the evidence was divided between those who welcomed that and those who regarded it as a step too far in limiting a pursuer’s right to protect reputation.

For some, the serious harm test is a necessary threshold that will ensure that only relevant cases where serious harm may have been done to someone’s reputation go ahead, and that frivolous or vexatious cases are discouraged. In the view of some of our witnesses, the serious harm threshold would give people who were subject to threats and menaces of defamation action greater security.

The so-called chilling effect was a concern for many media organisations, with reference made to people with “deep pockets” and “thin skins”. They expressed strong support for the serious harm test. The committee also heard evidence to the contrary: that that level of threshold tilts the balance too far away from the right of an individual to protect their reputation, and that, by introducing that extra barrier, we would be putting a hurdle in the way of a litigant who may well have a perfectly good right to protect their reputation and take matters further.

I recognise that both views have merit and that, on balance, at this stage and in light of the overall set of provisions that the bill sets out, it is right to retain the serious harm test in the bill, although I agree with colleagues that it would be helpful for the minister to set out a clear statement on why the serious harm test is required.

Concerns were expressed by some witnesses that the changes to the time limit for bringing defamation action may operate unfairly in some circumstances, particularly where it takes time to find out that a defamatory statement has been made and where the effects of that statement are cumulative over a period of time. The minister’s evidence was helpful in setting out that the courts have discretion in certain circumstances to allow cases outwith the time limit to proceed. That is welcome.

During evidence taking, the committee received helpful views on how access to justice in the area of defamation can be improved. Those include looking at the provision of legal aid in the area and

whether some form of pre-action protocol could be put in place. The committee also recommends that “an accessible guide to the law in this area is produced”,

which I strongly support. I am pleased that, in her response, the minister has said that she has sympathy with that and can

“see the value of having a protocol in place, especially in ensuring that preliminary matters can be dealt with.”

She also said that she will write to the Scottish Civil Justice Council, asking it to consider that, which is a welcome step.

I am pleased to support the general principles of the bill.

16:38

Andy Wightman (Lothian) (Green): I will focus my remarks on the serious harm threshold, because it is a significant change. It exists in England and Wales, defined in section 1(1) of the Defamation Act 2013, which states:

“A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.”

The bill that is before us, by stark contrast, does not follow that straightforward formulation but instead defines a statement as defamatory if it causes “harm” and then, in addition, states that for it to be actionable that harm must be “serious”. In that respect, I disagree with Adam Tomkins that Scots law is being brought into line with the law England and Wales. I will return to that point.

Following the Supreme Court ruling in the *Lachaux* case, liability in defamation cannot be established by reference to the

“inherent tendency of the words”

alone; the court must have regard to the “facts” and “circumstances”. Thus, the court will need to hear evidence on whether the words that were allegedly written or spoken were, indeed, ever written or spoken, whether they bear the meaning that is alleged by the pursuer and the reasons why, if defamatory, serious harm is or is likely to be caused. That requires an evidential hearing, and there will need to be significant procedural rule changes to Scottish civil procedure to accommodate any pre-proof evidential hearing.

I have four arguments against the serious harm test. First, as matter of principle, we should not be shutting down civil law remedies for people without good reason. Someone who is defamed, for example, but who suffers only harm is now to be denied redress, as is someone who suffers repeated harms, perhaps over a long period of time, but without the “serious” harm threshold ever being met in any one instance.

Secondly, I note, as a caution to those who think that the test may act as some kind of procedural hurdle, that it will, as I said, involve an evidential hearing and associated expense. In my recent £750,000 action, I would still have been in court for six days, trying to thrash out whether, in fact, serious harm had ever been caused to the pursuer.

Thirdly, a serious harm threshold will not deter a litigant who is determined to damage someone. In my case, it took full proof to reach the conclusion that no harm at all had been caused and that no financial loss had accrued to the pursuer.

Fourthly—this is very important—we should ponder what Parliament is being invited to do. As I said, section 1(4)(a) of the bill states:

“a statement about a person is defamatory if it causes harm to the ... reputation”.

Incidentally, that wording was not in the Scottish Law Commission’s bill, and the Scottish Government has never published an analysis of the responses that it got to its own consultation.

Under the bill, however, any such statement is actionable only if the harm is serious. We are defining a civil wrong in statute and then saying, “There’s nothing you can do about it.” We are now seeking to deny civil justice to our constituents whose reputation has been harmed. Is that even compatible with article 6 of the European convention on human rights?

The threshold does little for defenders, as full proof will still be required. On the other hand, it does a lot for pursuers, but in a wholly negative way and without justification. The bill risks denying legitimate pursuers their human right to a civil remedy for a wrong that we are defining as harm, but about which they can do nothing unless they can prove that that harm is serious. Why?

16:42

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): We live in a society that is built on free speech and the exchange of ideas and information. By the same token, however, we live in a society in which there are increasing levels of harmful, false information.

In addition, people around the world can express their thoughts on a scale that is unparalleled in human history. There are more and more platforms that people can use to publish their thoughts, and views that are expressed are almost instantly subject to the court of public opinion. A random thought can be seen by millions of people in almost no more than an instant, and the mechanisms for expressing our observations and critiques continue to grow.

In stating that, I hope that I have conveyed specifically that the world of communication continues to become more complex and diverse. That carries with it significant challenges. I believe that there are two important principles to which we should adhere: the first is simplicity and the second is balance. The general public will not generally read legislation, but, when they do, they should be able to understand it.

The bill encourages both simplicity and balance. One way in which it encourages simplicity is through the increased clarity of the situation in law. The ambiguity in our current legislation and case law can further complicate an already complex landscape. By stating clearly that any statement must be communicated to a third party and must cause serious harm to someone's reputation, the bill will reduce the burden of interpretation on all parties. I do not seek to bring Mr Wightman's personal experience to the chamber in saying that, but, although I will read his words carefully, I probably disagree with them.

In the ever-evolving global communications landscape, all of that is essential. Removing needless complexity will ensure that energy and resources are focused on the elements that cannot be pared down so easily.

Furthermore, I highlight the importance of improving the defence for secondary publishers. I published my first website 27 years ago, so I have a particular interest in that area. Platforms, and the way in which information travels, have changed drastically over the 20-plus years since I first engaged with them. Thirty years ago, far fewer of us on this planet had access to powerful tools, and someone had to own a newspaper to have the kind of power that is at almost everyone's fingertips today, although our understanding of how to engage with the new platforms has moved on more slowly than the evolution of the platforms themselves. Nevertheless, we have an improvement in the defence for secondary publishers. It provides clarity and places responsibility with those who actually write the words and have creative control, which is where it should lie.

In relation to balance, the bill also makes an important movement towards free speech. Specifically, it does that through the single publication rule and the one-year limit. Together, those provisions ensure that people do not have to fear legal consequences for statements that did no significant harm at the time of publishing but may be less well received in a future context. We need to protect the soil for honest social discourse, and the bill tips the balance towards free speech in an important way. Therefore, I suggest that it is a positive evolution in how defamation and malicious publication are dealt with.

The bill does not place inhibition on anyone criticising politicians. It has been said that the reputation of a politician cannot be damaged because they have none to lose. Perhaps we can raise ourselves off the floor with the bill.

16:46

Rhoda Grant: The bill seeks to protect freedom of speech and to protect people from harm. Today, we have heard arguments about where the balance needs to fall between freedom and protection. The bill sets a higher bar in that defamation needs to cause serious harm, which means that people cannot sue spuriously. Annabelle Ewing spoke about the difficulty of proving serious harm and noted that the legal profession has expressed concern on that point.

Andy Wightman used his personal experience to talk about the bar that would be set perhaps being too high for many people to reach. He also spoke about human rights legislation, in which context the bill needs to be looked at carefully, because we need to make sure that people have access to justice when they require it.

On the other hand, members have spoken about the chilling effect that the law as it stands has on any threat to sue. The phrases "deep pockets" and "thin skins" have been used by a number of members throughout the debate—a balance needs to be struck. As I said in my opening speech, with rights come responsibilities. We need to make sure that both are allowed for.

James Kelly mentioned that the law is just one part of the justice system. Access to it is another. The need for people to have access to legal aid, so that they can have recourse to justice through the courts to protect themselves, is an important point that the committee's report also made.

Liam Kerr spoke about how welcome mediation is as a way of getting people together to reach an agreement, and he talked about the limitations in the bill being paused to allow that to happen.

James Kelly spoke about apologies and retraction and about how the process for those currently takes place. Perhaps that is missing from the bill. There needs to be a degree of clarity so that those actions can be encouraged.

In his contribution, Graham Simpson talked about how apologies were offered during his time as a journalist. The time limits in the bill need to be paused to allow that alternative resolution to take place.

A number of members talked about the Derbyshire principle whereby public bodies cannot sue for defamation. There should be a balance when private companies are carrying out public services—that needs close scrutiny as well.

John Finnie brought that to mind tangibly when he spoke about ferry companies in the Highlands and Islands. CalMac, the publicly owned ferry company, is being held to a totally different standard compared with Serco, which is a private company. However, both companies are delivering public services, and both are ferry operators that are publicly subsidised. There must be a balance whereby companies that are doing the same kind of work are subject to the same scrutiny and protections.

Members have talked about malicious publication, and concerns have been expressed that the lower threshold for defences in respect of malicious publication could create a loophole in the law whereby people would be allowed to sue under malicious publication legislation as opposed to under defamation law. There was a debate about whether “serious harm” should also be part of the threshold for malicious publication, so that people could not use that loophole. I think that it was Liam Kerr who made the point that the threshold for malicious publication is extremely low and needs to be tightened up.

We must try to strike the right balance with this bill. I think that it was Annabelle Ewing who said that we need to look after right rather than might, while James Kelly said that the issue is also one of freedom of speech versus people being viciously and maliciously damaged. We need to strike a balance in ensuring that the right protections are set down in law and that they cannot be used spuriously to shut down freedom of speech and the publication of things that are in the public interest. We are on our way to getting that, but the minister and the committee will need to work together at stage 2 to strike that balance.

16:51

Margaret Mitchell (Central Scotland) (Con): Defamation law was reformed in England and Wales in 2013. In Scotland, the last time that defamation law was considered was 1996.

Given concerns about the restrictions on investigative journalism and the advances in technology, the internet and social media, the Justice Committee decided in 2017 to include evidence sessions on Scotland’s law on defamation in its work programme, in an effort to ensure that it was fit for the 21st century.

In January 2018, the committee received a briefing from the Scottish Law Commission. Following that session with Lord Pentland, it was clear to the Justice Committee that defamation law in Scotland was decidedly in need of reform and the committee actively considered using its powers to introduce the necessary legislation. However, the process for committees to introduce

legislation is complex; consequently, few bills are committee initiated and I believe that that area would benefit from review in the sixth session of the Scottish Parliament.

The committee therefore continued to press the Scottish Government on the need for defamation reform at the Conveners Group question session with the First Minister, and when it took evidence from the Cabinet Secretary for Justice.

Consequently, on 12 June 2018, when the then committee members held a round-table discussion with key stakeholders that included representatives from the BBC, the LSS, academia and Scottish PEN, we were able to discuss not just the SLC proposals for a bill but—even more welcome—the Scottish Government’s commitment and confirmation that it would introduce a defamation bill that would be based on those proposals.

The aims of the bill are to strike an appropriate balance between freedom of expression and protection of reputation, to clarify defamation law and to make it more easily accessible and understood. More specifically, the serious harm test states that in order to bring forward defamation proceedings,

“the publication of the statement”

must “have caused”, or be

“likely to cause serious harm to ... reputation.”

The test seeks to prevent powerful interests from using defamation law as a tactic or weapon to try to silence unwelcome criticism; to discourage frivolous or vexatious actions; and to allow time for the court to dismiss actions earlier in the process, therefore freeing up valuable court time.

Andy Wightman: I know the interest that Margaret Mitchell took in the matter as convener of the Justice Committee, but does she just accept that the reasons that she has outlined for the serious harm test are justified? There is no evidence at all that the test would disinhibit or dissuade committed and determined litigants and pursuers, and no evidence that it would save any court time.

Margaret Mitchell: I will come on to that, Mr Wightman. Although that has been asserted, in my view it happens frequently. Constituents are often sent defamation letters when there is no case to answer, and it is those people whom the bill will protect.

Concerns were raised about a potential chilling effect, which has been mentioned by a number of members, with the onus being placed on the pursuer to prove that the statement was not only defamatory, but also caused serious harm. Some argue that the threshold places an additional

barrier not only to those who might bring forward vexatious claims, as intended, but to those who may have a perfectly valid case.

Although I note that the Faculty of Advocates considers its introduction to be inappropriate, I support the inclusion of the serious harm test. Despite the Law Society of Scotland's practice rules, solicitor letters threatening individuals with defamation proceedings are being issued when there is no valid case to pursue. Given the opposing views, including Andy Wightman's, the Justice Committee, in supporting the inclusion of the serious harm test, is right to ask the Scottish Government to set out why it considers that the test is required.

The committee's key recommendations include support for a statutory definition of defamation; the codification of defences; the exclusion of secondary publishers from liability; and the reduction of the time limit from three years to one year, with confirmation that there will be discretion available to courts to extend the time limit. That would allow individuals to pursue a legitimate case after one year if, for example, a defamatory statement in a job reference was not discovered for a period of time.

On a personal note, I welcome the inclusion of section 33, which states that the time taken to pursue any mediation will be "disregarded". That provision will ensure that parties are not discouraged from, or penalised for, seeking to resolve the dispute out of court. However, I hope that Liam Kerr's concern that, despite the stated policy aim of the section, other forms of alternative dispute resolution in addition to mediation do not appear to be provided for in the bill as drafted will be addressed.

Further details will be required at stage 2, such as in relation to clarification of the Derbyshire principle, legal aid provision for pre-action protocols, and removal of defamatory material from social media and the internet. Nonetheless, I am delighted that this long-overdue legislation is likely to pass its stage 1 hurdle this evening, and that we are a step nearer to ensuring that defamation issues in the 21st century Scotland in which we live are properly addressed.

16:57

Ash Denham: I thank members for their contribution to this afternoon's helpful debate. I am pleased that there is support across the chamber for the general principles of the bill.

The Scottish Law Commission's reform project was the first significant look at defamation law here in Scotland in a generation. The way in which we communicate and live our lives has changed beyond recognition in that time. The commission

made its recommendations, and the Scottish Government agrees with them. Given the fundamental rights that the bill will affect, I would like to achieve as wide a consensus as possible across the chamber. In answer to the question that Gordon Lindhurst posed earlier, the answer is yes, the Parliament is up to the job.

I have listened carefully to the views of members, and I assure everyone that I will reflect carefully on what has been discussed today.

Serious harm was discussed extensively by a number of members. Before I remark on that point, given the particular experience that he has to bring to the issue—he made a passionate speech during the debate—I offer Andy Wightman the opportunity to meet me and my officials so that we can discuss it further.

The Scottish Law Commission took a wide-ranging look at the Scots law of defamation, and made a number of recommendations for reform. Among the recommendations is that there should be a threshold test of serious harm. I understand the view of a number of stakeholders that the test was introduced to address the perceived problem of vexatious litigation, which is not really a problem in Scotland. Although I recognise the view that there are few reported cases of defamation here, and that vexatious litigation is not a problem, I also consider that it is right that if a person says that their reputation has been damaged by a statement, they should show how it has been damaged.

I do not think that the current presumption that damage has been done achieves the appropriate balance that the bill aims to achieve overall. Why should we continue to allow legal action to be raised in cases where no real harm has been done? That is a question for members to reflect on. We have heard in the debate about the chilling effect of defamation law on freedom of expression, which was described particularly well by Rona Mackay. The threshold test will give confidence to those who have received a letter, as mentioned by Margaret Mitchell, about possible defamation proceedings against them.

I take on board the message that came through loud and clear from Liam Kerr and a number of members that the Scottish Government should say why the test is required. One argument for that is that failure to provide a statutory test would fail to take fully into account the implications of section 1(1) of the bill, on communication of a "defamatory statement" to a third party.

We have heard that, because of the change in the bill, it is open to courts to develop the common law threshold test and that it is likely that they would go on to do so. However, using the test that we have, we can take advantage of English

jurisprudence on the issue, which would provide us with more certainty. The number of relevant cases in Scotland is quite low, so if we did not use that alternative, there could be a prolonged period of uncertainty. I will reflect on what has been said in the debate, however, and write to the committee in the next few weeks.

Rhoda Grant and Liam Kerr referred to the provision on the Derbyshire principle. The aim of the provision is to place on a statutory footing in Scotland the common law principle of England and Wales that public authorities cannot raise defamation proceedings. Public authorities have a reputation, but they need to protect it using political means, not defamation law. A public interest is served by allowing unrestrained comment on the actions of democratically elected bodies. That is the fundamental rationale behind the Derbyshire principle. As far as I am aware, no similar case has yet been decided in Scotland.

I want to be clear on one point: the bill will protect those who criticise public service delivery, even if the service is delivered by a private body. The defences of honest opinion and publication on a matter of public interest are powerful defences that will protect speech on the issue. We should not forget that a private body delivering such services will have to prove that a defamatory statement has caused serious financial loss. Those who criticise public services provided by private companies will be sufficiently protected by the bill's provisions. On the drafting of the Derbyshire provision, a sensible and flexible definition has been used that does not seek to expand the common law boundaries of the principle. The bill captures the obvious public authorities, such as local authorities, the Scottish Parliament, the Scottish ministers and agencies of the Scottish Government.

That flexible approach will also allow courts to deal with more complex and nuanced cases. The drafting borrows from section 6 of the Human Rights Act 1998, which has been discussed by courts for over 20 years, and it will provide practitioners with a good base from which to advise their clients. Here in Scotland, the Lord Justice Clerk, Lady Dorrian, recently discussed section 6 in the case of *Ali v Serco Ltd*, providing guidance on how it should be interpreted. However, I recognise that a range of concerns about the drafting approach have been expressed, so I am happy to reiterate my commitment to working with Justice Committee members to find an approach that I hope we can all agree on.

The Deputy Presiding Officer: It would be good if you could keep talking until decision time at 17:05. You do not need to rush.

Ash Denham: I will do my very best, Presiding Officer.

Rhoda Grant, Liam Kerr and other members referred to malicious publication, which is a cause of action that the bill reforms. In order to succeed in a malicious publication action, the pursuer must show that the statement complained of was made with malice. The definition in the bill is the same as that in common law for similar types of action, but I recognise the committee's views on the matter and take on board reflections on it expressed in the debate. That is why I am happy to introduce an amendment at stage 2 that I hope will reflect the committee's recommendation.

I consider that the debate reinforces the impression that there is broad support for the bill and for its policy aims. As a whole, the bill seeks to carefully balance the law. However, as members have indicated, there is a difference of views on some of the detail. I am willing to work with members to make sure that we can all, as far as possible, agree on the bill, because that is important.

I once again thank the members who have contributed to the debate. I am pleased about the support for the general principles of the bill. The bill is an opportunity for the Scottish Parliament to consider freedom of expression in modern Scotland. That right comes with responsibilities, and it should not—it must not—be used to unfairly damage the reputation of another. However, we must all be careful that, in seeking to better protect individual reputation, we do not unintentionally inhibit free speech.

The law of defamation is the way in which we balance those two rights, and I look forward to working with the Justice Committee and members from all parties to ensure that we achieve the appropriate balance for modern Scotland.

Decision Time

Meeting closed at 17:06.

17:06

The Deputy Presiding Officer (Christine Grahame): There is only one question to be put. The question is, that motion S5M-23243, in the name of Ash Denham, on the Defamation and Malicious Publication (Scotland) Bill, be agreed to.

Motion agreed to,

That the Parliament agrees to the general principles of the Defamation and Malicious Publication (Scotland) Bill.

This is the final edition of the *Official Report* for this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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