OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 25 August 2020

Session 5

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JUSTICE COMMITTEE

18th Meeting 2020, Session 5

CONVENER

*Adam Tomkins (Glasgow) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

Shelley Jofre (BBC Scotland)
Bill Kidd (Glasgow Anniesland) (SNP) (Committee Substitute)
Luke McCullough (BBC Scotland)
Nick McGowan-Lowe (National Union of Journalists)
John McLellan (Scottish Newspaper Society)
Andrew Tickell (Scottish PEN)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 25 August 2020

[The Deputy Convener opened the meeting at 10:30]

Interests

The Deputy Convener (Rona Mackay): Good morning. This is the 18th meeting in 2020 of the Justice Committee. I start by welcoming all the people in the committee room as well as our virtual participants. We have apologies from Alasdair Allan, who cannot be with us today, and we are joined by Bill Kidd as his substitute.

Before we begin, I remind members, witnesses and staff present that social distancing measures are in place in committee rooms and across the Holyrood campus. I ask that everyone takes care to observe those measures over the course of this morning's business, including when entering and exiting the committee room. I also remind members not to touch the microphones or consoles during the meeting. As usual, members should indicate to the convener if they wish to ask a question and the sound engineer will activate their microphone.

I welcome our new committee member, Adam Tomkins, and ask him to declare any interests that are relevant to the remit of this committee.

Adam Tomkins (Glasgow) (Con): Good morning, everyone. My only relevant interest is that I am an employee of the University of Glasgow, where I have an academic position in the school of law.

Convener

10:31

The Deputy Convener: The next item of business is to choose a new convener. Before we do that, can I first of all just say a few words of thanks to Margaret Mitchell, the departing convener? Margaret Mitchell has steered us through some very important legislation over the years, and I think I speak for all of the committee when I thank her for that and wish her all the very best.

Parliament has agreed that the convener of the Justice Committee shall be a member of the Scottish Conservative and Unionist Party and I understand that Adam Tomkins is that party's nominee. Are members agreed that Adam Tomkins be chosen as the convener of the Justice Committee?

Members *indicated agreement.*

Adam Tomkins was chosen as convener.

The Deputy Convener: I congratulate Adam Tomkins and hand over to him.

The Convener (Adam Tomkins): Thank you very much. That was very expeditiously done. If we can do all of our business that quickly—and indeed unanimously—that would be great.

Can I associate myself first with Rona Mackay's kind and generous remarks about Margaret Mitchell? Not just the committee but the whole of Parliament owes Margaret Mitchell a debt of gratitude for all the work that she has done in steering this committee through for the past four and a bit years. I also thank her, and indeed all the clerks and members of the committee, for making the transition to the new convener so smooth and for welcoming me to the committee.

Defamation and Malicious Publication (Scotland) Bill: Stage 1

10:32

The Convener: Our next item of business is for the committee a return to, but for me a first look at, stage 1 of the Defamation and Malicious Publication (Scotland) Bill. The committee began taking oral evidence in March when it heard from Scottish Government officials who were involved in drafting the bill. Today we start to hear from stakeholders.

I refer members to papers 1 to 3 and I welcome our first panel of witnesses, who are both attending online this morning. We have with us Nick McGowan-Lowe from the National Union of Journalists and Andrew Tickell, who is appearing in front of us in his capacity as a trustee of Scottish PEN. I first came across Andrew Tickell many years ago when he wrote a blog post about me entitled “Adam Tomkins: Unionist stooge?” As a first question, I am highly tempted this morning to ask him whether he thought that that was a defamatory statement, but I think that I shall not.

I thank the witnesses for their written submissions, which are available to the public on the committee’s web pages. We have about an hour for this panel. I will invite Andrew Tickell and then Nick McGowan-Lowe to make opening statements and then we will move into questions.

Andrew Tickell (Scottish PEN): Thank you very much, Adam. It is a great pleasure to be talking to the committee once again in my capacity as a trustee of Scottish PEN.

This is an important bill. I think that it is a good bill and one that is very timely. The Scots law on defamation has not been examined since 1996. During that time we have seen the emergence of Facebook and Twitter and a scenario in which anyone with opinions, thumbs and a smartphone can potentially become a global publisher, so it is entirely appropriate that the committee is scrutinising this bill.

I thank the Scottish Government and the Scottish Law Commission for bringing this forward and for being very constructive partners with Scottish PEN in building what we think is generally a very good piece of legislation and one that will substantially improve the law in Scotland in this area to better protect freedom of expression.

Nick McGowan-Lowe (National Union of Journalists): I thank the committee for this opportunity to speak. I will start with a conclusion. The NUJ believes that the bill will strike a much better balance between the right of press freedom and the protection of individual reputations. We broadly welcome these proposed reforms. We speak from the viewpoint of individual journalists in newsrooms and elsewhere around Scotland. Our perspective is across print, digital, broadcasting and other areas. A significant number of our members are freelance and work in a variety of different ways across the industry. In general, it is fair to say that they are a crucial part of the media landscape, but their incomes and livelihoods are more precarious than those of their staff colleagues and they do not enjoy the same protections around their work and are more vulnerable to legal threats.

The proposed reforms have a significant positive effect on the current chilling effect of legal threats on the reporting of matters of legitimate public interest. We believe that the threat of legal action is one of a number of series of obstacles deliberately used by those with thin skins and thick wallets, not necessarily with a view to bringing any action but in order to deter or delay the reporting of honest journalism. That is an abuse of the intention of the legislation. The higher thresholds that the bill sets and the reduction of the limitation period will help to limit that, while still allowing the legislation to serve those whom it is intended to serve.

Broadly, we welcome the proposed changes and we thank the Scottish Parliament and the Scottish Law Commission for the care that has been taken in drafting it so far.

The Convener: Thank you very much for those helpful opening statements.

Nick McGowan-Lowe, you raised an issue that I think Liam McArthur wants to pick up straight away: the chilling effect.

Liam McArthur (Orkney Islands) (LD): Thank you, convener, and thank you to both the witnesses for their opening comments.

Mr Tickell, you talked about the time that has elapsed since this issue was last looked at seriously and some of the developments that we have seen in the meantime. Mr McGowan-Lowe, you have talked about the chilling effect. That seems to be a view that is widely held. Could either or both of you provide specific examples of how that chilling effect bears out in practice from your own experience?

Nick McGowan-Lowe: I am happy to speak to this. In preparing for this, last week I spoke to a number of our prominent members who are involved in reporting matters of public interest. I am not going to name individuals, publications or cases. However, it seems that, for large organisations that are put under scrutiny, there is a series of responses to legitimate reporting. They

begin with a denial, an attempt to slow down the reporting, letters to the editor, complaints to the Independent Press Standards Organisation and the threat of legal action.

The practical effect of those responses is not necessarily to prevent a story from happening. In many cases, when organisations are contacted they do not know what the story is about. They are asked to comment for a particular, narrow part of it. The aim is disruption. Those are all legitimate ways in which individuals or private organisations can seek to protect their reputation. The way in which they are used here is as legal obstacles to prevent stories.

The practical effect is felt particularly in the context of print journalism, which is an economically weakened industry that has undergone a series of significant cuts. Defending such actions is expensive and time consuming. The cost arises not only from the legal advice but from the cost for a journalist and a senior editor and their lawyers in taking time out of their day to do that, at a time when newsrooms are particularly tight. Because of that, most newspapers will back a story if it will go to page 1, make a splash and move the news agenda, but if it is a story that is likely to be down on page 15, an editor will be loth to justify the cost of defending it.

The problem is that those small stories, which begin with something and get some facts out into the public domain and allow that process to go on, are often the very start of investigative journalism. They often bring people out with other stories and people will make contact and provide other aspects to it. I am not going to comment on individual examples, because I am protecting the members who have spoken to me, but it is absolutely a reality in newsrooms.

Liam McArthur: That is very helpful. Mr Tickell, do you have anything to add from your experience?

Andrew Tickell: Yes, absolutely. I echo all the points that Nick McGowan-Lowe made. Examples include removing information from articles that have been published, which are not defamatory but, as Nick says, would be too expensive to justify defending.

One of the most important pieces of the bill is the change to the limitation period from three years to one year in which to bring an action of defamation. That may not seem important, but one quite well-known strategy is for the person who claims to be a pursuer to send a journalist or writer a legal letter indicating that they are contemplating doing them for defamation, and then simply ceasing interaction with them, so from that moment there is three years within which a legal action can be brought. Therefore, that shadow and threat of potential litigation in future can be used as a way of discouraging journalists from talking about that person or of leading them to write stories about other people instead. That is a potential problem.

I do not know whether any members of the committee have ever received a threat of litigation for defamation, but I have. In preparation for this session, I looked up how long the limitation period has to run for the threat that I am exposed to. I think that it still has 592 days to run, with 503 or so having passed. That has a very obvious capacity to chill publications.

Of course we are not just talking here about journalists. We are talking about writers, bloggers and anyone who engages in the public sphere and may find themselves subject to these threats. The core of this is ultimately economic—“Can I afford to defend myself?” The answer for most Scots is simply, “No, I cannot afford to defend myself and therefore I will take down the notice. I will cave in to the threats. It is not worth my bother. I cannot run the risk of putting my life and my family or whatever at risk for defamation threats.” It is an interaction of all those factors that is particularly relevant and different elements of the bill can intervene quite dramatically at that early stage of the process.

Liam McArthur: That is very helpful. I was going to ask about the financial realities in journalism and how those were creating a particular problem in relation to the chilling effect but, given the responses that you have given, perhaps it would be more relevant to ask this: given that the tactics that you have both described will presumably still be available to an individual and an organisation that believes that it is defamed, is it simply that you feel that the proposals in the bill will give a greater degree of confidence to journalists, writers or whoever to press ahead with publication? What is the benefit here, given that some of the tactics that you have described will presumably still be options that are available to anyone?

Nick McGowan-Lowe: You are absolutely right that the problem, as I put it, of people with thick wallets and thin skins is not going to be solved probably in our lifetime and certainly not by the bill alone. You are absolutely right on the economic state of part of the media industry. In our submission we went into some detail on the practical effects of that.

It is also the NUJ’s position that, although much of the media landscape is dominated by extremely large companies, which in some cases are owners of hundreds of newspapers and have turnovers that are quite astonishing, at a newsroom level the money available and the cuts that have to be made and the cuts that my colleagues and I have

been dealing with right now are quite severe and quite microscopic. The cost of a legal action can be literally measured against the cost of jobs in the industry. I completely agree with Andrew Tickell that the costs of the legal actions will be necessarily high.

10:45

To pick up one point that Andrew Tickell made, I was reminded of a conversation that I had last week about a journalist whose publication had received legal threats. Typically, the language that lawyers use will be indicative to other lawyers as to the intention of their clients. What we are finding is that, where there is literally no intention to bring legal action, and after the story is published the client has no further interest in it, the phrasing in the initial letter is not, "I expect my client to instruct me within 10 days"—which is code for, "I do not know whether they are going to take action"—but, "My clients will be instructing me on this," which makes it seem that the threat is significantly more than it is. It is a deliberate attempt and it is clear that the client has asked for that. Does that cover the point that you raise?

Liam McArthur: Yes. I do not know whether Andrew Tickell has anything to add to that.

Andrew Tickell: Absolutely. There are a number of different things that the bill can do that can help. First, it can be clear about what the law is. There is a much better chance that the public will understand what the law is and what the defences are, as compared to the very fragmentary, rather boutique system of defamation law that we have at the moment.

The rules on secondary publishers, which we might go on to in more detail, are also extremely important, in the sense that the number of people who can credibly be threatened with suits for defamation will considerably constrict as a consequence of that change in the law, so people can have greater confidence that there is no cause of action.

Scottish PEN has suggested an amendment to the bill to introduce a radical, new and innovative approach of providing a new delict for making unjustified threats of defamation actions. We need to look at the pre-trial phase to understand how the chilling effect works in practice. We argue that the law would be further strengthened here by giving people who receive unjustifiable threats of legal action the opportunity to go to the court for a declarator to say in effect that the defamation in question is unjustified and there is no evidence for it, or to get an interdict or order preventing further action or damages, if that would seem appropriate.

Scottish PEN argue that that would much strengthen this element of the bill and be much more specific that unjustified threats of legal action can themselves have consequences in the field of defamation. This innovation was inspired by looking at intellectual property rights, where there is often a struggle with the same issues of threats and menaces without any foundation. Scottish PEN argue that the bill will be further strengthened, in addition to the good provisions that are already in it, by dealing very explicitly with this issue, which we know is a problem in Scotland from talking to colleagues, investigative journalists and others. It is often a problem underneath the surface that never makes its way into the Court of Session, but that does not mean that it is not a problem.

The Convener: Thank you. We will come on to some of those issues later this morning. My next question is for Andrew Tickell to answer first. Given what you have just said about the importance of clarity and legal certainty, would I be right in assuming that you welcome the fact that this bill defines defamation rather than leaving that to future development in the ad hocery of the common law? For the record, I note that you are nodding assent. If you are doing that to indicate that that is an appropriate thing for the bill to do, could you reflect on whether you think that the bill's definition of defamation is accurate and fair or needs to be adjusted or amended?

Andrew Tickell: In line with the idea that the bill is a codification measure, it makes perfect sense that the core idea of the bill—defamation—is defined. On how that definition has been placed in terms of the law, I was interested to read the submissions of a couple of your colleagues from the University of Glasgow, Dr Stephen Bogle and Dr Bobby Lindsay. They have given evidence that there will be a slight shift in the definition in the bill, so that, instead of the definition focusing on the right-thinking person and their reaction to the alleged defamation, it focuses on ordinary people. Your colleagues expressed a concern that that might potentially extend the law in this field. I think that you might hear more from them in a few weeks' time. It is worth reflecting on whether we might be inadvertently expanding the law here.

Nick McGowan-Lowe: I agree with those comments. Having the definition of the central part of the legislation included is extremely welcome.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I want to introduce the subject of the serious harm test. I believe that it would create a new threshold for taking legal action that did not previously exist. Some in the legal profession believe that the test is not necessary and might constitute a barrier for accessing justice. I know that the media tend to favour it, saying that it would protect freedom of expression. Could I have your views?

The Convener: Let us take Andrew Tickell first, as it is a legal question.

Andrew Tickell: We are strong supporters of the serious harm test, which, as you know, was introduced in England and Wales. The arguments against adopting it are largely that it involves English legal problems—effectively, libel tourism and very high awards from the English courts. Our argument would simply be that this additional threshold is appropriate in terms of free expression. In terms of the chilling effect that we know takes place outside of courts, it would give people who are subject to threats and menaces of defamation action greater security. It also has one other benefit. Following the approach taken by the United Kingdom Supreme Court on what we mean by "serious harm", the courts in England and Wales have emphasised that we are looking at real harm in the real world. We are not just looking at the inherent tendency of words to potentially wound people; we are looking at the real social world, the real economy and the real damage to reputations.

That approach not only provides stronger measures and protections for freedom of expression and prevents frivolous cases from turning up in court, but will allow courts to dispense with cases earlier, in the sense that if there is no serious harm, the court will be able to bring a close to litigation at an earlier stage. I think that that would be beneficial for pursuers and for defenders in the sense that it will cost less and waste less time in terms of scrutinising evidence and accumulating all those costs that we know are a cardinal feature of litigation at this level in Scotland. We are very strong supporters of the provision. It is critical to the heart of the bill and the changes that it will make.

Nick McGowan-Lowe: I agree with Andrew Tickell. If harm has been done to someone's reputation, it is in everyone's interests that that is addressed quickly. Having a serious harm threshold allows clarity at an earlier stage for someone seeking legal advice and it allows an additional filter at the start, so that cases that are largely without merit will not proceed much further, not take up court time and not drag on unnecessarily.

Rona Mackay: Can I follow up by asking you a bit about your response to the libel tourism possibility? Some say that it does not exist in Scotland. Can I have your view on that, Andrew Tickell?

Andrew Tickell: One of the arguments is that there is potential for libel tourism if the Scottish threshold is significantly lower than the English threshold. I do not know whether that is important, whether or not it is true. There is certainly not an awful lot of evidence that people are forum shopping into Scotland at this stage. That is partly down to the fact that the award of damages may not make it worth the time. I am not particularly worried about that.

From first principles, we have to ask ourselves what kinds of cases and what kind of injury to the reputations of people we think merit all the costs and all the investment of a full defamation action. It is worth remembering what the test is now. Effectively, it is statements that tend to lower you in the estimation of right-thinking people. That means that, even if your reputation were lowered only extremely slightly, that could give rise to a full-blown court action. That seems to me disproportionate and not a necessary way of protecting free expression in Scotland.

Rona Mackay: Nick McGowan-Lowe, do you have anything to add?

Nick McGowan-Lowe: I am not a lawyer—much to my mother's dismay—but I would echo what Andrew Tickell has said. It is not my impression that, while there have been different standards north and south of the border, Scotland has had a huge influx of libel tourism.

Rona Mackay: So, to recap, neither of you thinks that that is a particularly contentious part of the bill.

Andrew Tickell: That is correct. The Scottish Law Commission embraced that approach early on. There are people who disagree with it: you might hear from some academic commentators who think that it is not necessary, in view of the existing law in Scotland and the limits of litigation. However, I would say again that the limits of litigation are not good evidence that defamation law is not being misused in Scotland—the absence of evidence is not evidence of absence. Things that take place behind closed doors, subject to legal advice, are where we need to focus our scrutiny of where the bill and its various provisions will make the most difference in terms of vexatious use of defamation law by those who have deep pockets and the capacity to sue—which is almost no one in Scotland, by the by. We are talking about boutique litigation.

The Convener: Before I bring in John Finnie, I remind members to direct their questions to particular witnesses so that the witnesses know which one of them should speak first.

John Finnie (Highlands and Islands) (Green): I will ask Mr Tickell about the Derbyshire principle. The bill attempts to codify the Derbyshire principle. For anyone who may be listening in, that is the principle that a public body cannot bring a defamation action. The bill does not define a public body, but it does create an exemption for businesses and charities that deliver public

services "from time to time." What are the risks of that approach, Mr Tickell?

Andrew Tickell: As you say, the Derbyshire principle is the basic principle that public bodies are not entitled to undertake litigation in defamation. It is a longstanding principle from the Derbyshire case that applies in Scotland. In our view, the particular provision of the bill does not go far enough, in that it does not follow the public delivery of services. We know that, in Scotland, a range of public services are delivered by private organisations. As it stands, the bill says that a private company that delivers public services should not be treated as a public body and therefore is not prohibited from bringing litigation in defamation. Our argument is simply this: we can do better than the bill. We can look at a prohibition on any company bringing actions concerning a critique of how they are delivering public services.

In effect, there would be no bar on a private provider in North Lanarkshire bringing defamation actions, whereas there would be a bar on North Lanarkshire Council, for example, suing someone who was critical of their services. Our argument is that we should not just ban public bodies from bringing defamation actions—that is a good thing—but follow the public pound and prohibit private companies from bringing legal actions about how they deliver public services.

If the bill were passed as it is, there would be a risk that critics of public services would be in a bit of a lottery situation, in that they might face defamation action if a public service were delivered by a private provider, whereas if it were a public provider, the defamation action would be barred. Therefore, we think that the bill could better define what is a public body and what kinds of companies should also be barred from bringing such defamation actions.

John Finnie: Nick McGowan-Lowe, do you have a view on that? For instance, in Scotland, prisons are run by the private sector; that is very high profile and there are a lot of issues there.

Nick McGowan-Lowe: Andrew Tickell's summary is exactly right. The NUJ has lobbied in other areas, most commonly on freedom of information, where it is often invisible whether public services are being delivered by private companies or public bodies. It is often simply not obvious. Where the public money is being spent should be available for scrutiny. That is where the point comes from.

John Finnie: Thank you very much indeed.

The Convener: I will follow up on what Andrew Tickell has just said. What is the principle on which you found your claim that it should not be just public authorities that are barred from bringing defamation actions, but all bodies, whether public or private, that are delivering public services?

It is a long time since I read Lord Keith's judgment in the Derbyshire case, which I think was decided some 20 years ago. You will correct me if I am wrong but, as I recall, Lord Keith founded his judgment that local authorities could not sue in defamation on the principle that local authorities are composed of directly elected councillors and their accountability comes not through the law of defamation, but through the ballot box. That would not pertain to a private corporation that was delivering public services on behalf of a public authority, so what is the principle for arguing that the provisions of section 2 of the bill should be extended to cover all private corporations delivering public services?

11:00

Andrew Tickell: That is not quite my argument, convener. I am not arguing that the bill should apply to all companies that provide public services. I am suggesting that, for companies that deliver public services, that aspect of their conduct should be insulated from defamation action. The court should be invited to look at what the company is doing and whether the alleged defamation focuses on that. That would arguably be defensible on the basis that, if public authorities are delivering such services or contracting out such services, in order to have a level playing field for the critique of those services, it is critical that people are free to articulate that critique with equal expectation that it will not be subject to actions in defamation on the basic Lotto principle of whether it is the local authority or a private company that happens to be delivering it. We argue that we should follow the nature of the public services and tie the defamation principle in to that.

Bill Kidd (Glasgow Anniesland) (SNP): My question is specifically for Scottish PEN. Some media stakeholders have called for businesses to be prevented from raising defamation actions altogether. However, we note that Scottish PEN, with the support of a number of others, has highlighted the Australian model as a compromise. In Australia, companies with 10 or more staff are prevented from suing for defamation. Andrew Tickell, could you expand on that proposal and the difference that you think it would make in practice, please?

Andrew Tickell: Absolutely. We initially discussed the issue with the Scottish Law Commission and the Scottish Government. It did not find favour with them, but we wanted to bring it back to the committee for you to scrutinise. Under the bill as it stands, a natural person can sue if serious harm has been done to them as an

individual, but a corporation has to show serious financial harm.

As you say, for a number of years in Australia—I think since 2009—there has been a general prohibition on corporations raising any defamation actions unless they are exempted. Exempted corporations are those that have fewer than 10 staff members in total. We think that the committee should consider the argument in this context. Is there an argument going back to the basic principles of defamation? If defamation is about individual reputation and honour, perhaps there is an argument that corporations do not have those protected characteristics that the law should be concerned about. We know that corporations are involved in litigation in Scotland on issues of defamation, so we argue that the committee should consider introducing a further restriction in terms of corporations.

A benefit of this smaller, micro approach means that the firms that are involved—those with under 10 employees; we are talking small firms here—may be more exposed to defamation than very large corporations that have a range of other techniques and tools, beyond the law and the law courts, to send messages to the public about their reputation and to correct misstatements about what they have done. We argue that the matter is worth considering from first principles: should corporations have this level of protection? We argue that the committee should scrutinise that.

Bill Kidd: As a point of clarification, would you want the restriction to apply only to businesses set up as companies, or to all for-profit organisations outside of the normal business model?

Andrew Tickell: I think that we submitted to the committee some draft legislative language for it to consider. In that, “a non-natural person” is defined as a

> “private company which has as its primary purpose trading for profit, or ... is a charity or has purposes consisting only of one or more charitable purposes”.

That is the definition in our draft language, which you can have a look at yourselves. It is attached to the end of our submission.

There is a range of ways in which you could do that. Some people might object that 10 employees is too few. On the evidence, something like 98 per cent of Scottish firms are small to medium-sized enterprises employing fewer than 49 people. If the committee felt that the proposal was an overly dramatic intervention in the public sphere, you could set a different number. We selected 10, because that has worked in Australian states and, as I understand it, Australia’s defamation laws, in an echo of our processes, are being scrutinised to bring them into the 21st century.

The committee could approach that in different ways, but the core question is what level of involvement of corporations in defamation actions we want to allow, because corporations are not people too, if I can put it that way.

Bill Kidd: That is interesting. Thank you.

The Convener: Nick McGowan-Lowe, do you want to add anything?

Nick McGowan-Lowe: I do not.

The Convener: In that case, I will turn to Rona Mackay and then James Kelly.

Rona Mackay: I turn to the subject of secondary publishers. The bill would exclude secondary publishers from liability for defamatory material. I will ask Andrew Tickell, first, what the advantages are of that approach. Secondly, is there any risk that secondary publishers, especially internet intermediaries, would be emboldened to do nothing about defamatory content? Obviously, that is a very real problem. Is there a risk that it might be exacerbated?

Andrew Tickell: I do not see why, in context. In effect, section 3 of the bill will limit the right of action to the author of a statement, the editor of a statement or its publisher—“publisher” in this context meaning a commercial publisher. A key benefit of the bill is that it will focus on where the alleged defamatory statement comes from.

For example, if there is an article in *The Guardian* newspaper that contains an allegedly defamatory statement and I retweet it, under the law as it stands I am potentially exposed to a defamation action. I will give another example. In the lead-up to the 2014 referendum, an organisation called National Collective wrote a blog post. It was a Frankenstein article made up of various points that were taken from the existing mainstream press about a business organisation, Vitol, that had donated to one of the campaigns. The collective was subject to defamation threats about things that had been published in *The Observer*, in some cases many years before. The provision on secondary publishers will mean that no one who shares material will be subject to the risk of a defamation action.

There is a challenge here. Say that a false statement of fact is made by a media organisation or on a blog. If you are a potential litigant, you will perhaps go after the person who published the false statement. However, you might be driven to go after a person who retweeted it, or shared it, or who has resources—someone who is an attractive person to target litigation against. The bill’s provisions will substantially prevent that from happening. That will be a tremendously good thing, as it will be clear that a much more limited

group of people can be subject to defamation actions.

If you delve into the detail of section 3, you will see that it provides, for example, that you are not to be treated as a publisher simply because you share a hyperlink or a story. Alternatively, if you express approval or disapproval of a statement in a story—if you like something on Facebook—that does not drag you into the whole defamation action. The rules on secondary publishers are important because they will focus any potential litigation on the authors, the editors or the publishers of the statement, as compared to the legion of people all over the world who may or may not share it. That is a tremendously good thing.

Rona Mackay: Nick McGowan-Lowe, what is your opinion?

Nick McGowan-Lowe: I will come at it from a slightly narrower viewpoint. Whereas 10 or 15 years ago a newspaper may have been passed around the workplace, now news articles are shared on Twitter or on Facebook or whatever, often in entirely good faith. It makes no sense, in closely defined legislation, to open up the opportunity for a litigant to pick someone who may be, as Andrew says, the most financially attractive person to approach or perhaps the weakest link or someone who will submit easily. It is a clear point that the author and those directly responsible for the author's work are the people at whom litigation should be aimed.

The Convener: Before I bring in James Kelly, Liam McArthur has a quick supplementary on this.

Liam McArthur: I will follow up on what Andrew Tickell was saying. Is there the potential for the restrictions around secondary publishers to come into conflict with the principle of serious harm, which has already been referred to?

The original author of a statement and the publisher may well be responsible for an alleged defamation, but if they have next to no social media followers and the traction that the article gets is fairly inconsequential, there cannot be any argument of serious harm being done. However, if the article is picked up and shared by somebody with a massive number of followers, it becomes something that presents a real risk of reputational damage to an individual or an organisation.

In that situation, it could be argued that it is the secondary publication that has caused the serious harm and that the two principles, which I can understand on their own, appear to come into slight conflict with each other.

Andrew Tickell: It may be worth delving into the detail of section 3(3), which relates to editors in particular—the people who put material in the public domain and who share it. There is a provision that provides in effect that if the sharing, by retweeting for example, materially increases the harm caused by the publication of the statement, the people who do that are to be considered an editor for the purposes of the legislation. That might address your query.

James Kelly (Glasgow) (Lab): I have a couple of questions on defences. The bill sets out a number of defences that can be used, principally in relation to truth, public interest and honest opinion. Do you think that the defences as set out in the bill are complete? Are they clear enough and fit for purpose?

Andrew Tickell: Yes. I welcome the core recognition of the three defences and the reframing of them. We have truth, we have publications in the public interest, and we have honest opinion. It is particularly welcome that the last defence is to be renamed, as that is very much misunderstood at the moment. The current defence is one of "fair comment", but we are talking about honest statements of opinion. Those are good things, and it is right that the three defences are protected.

I have a point to make about the second part of the bill. We have focused thus far on the defamation provisions, but we also have the additional malicious publication rules in the second part of the bill—

The Convener: Andrew, I am sorry to cut across you, but the next question is about malicious publication. If you keep focused on defences to defamation at the moment, we will come to malicious publication in a minute.

Andrew Tickell: That is fine. All I was going to suggest was that the defences should be clearly applicable in those contexts as well.

We welcome all the defences. The idea of a publication in the public interest is clear in terms of the bill, as is truth—we do not need to use the Latin term "veritas". Finally, a defence of "honest opinion" gives a better understanding to the public about what is protected.

For example, we recently saw the case of Campbell v Dugdale, which was a defamation case in the sheriff court and then in the inner house of the Court of Session. That was upheld on the basis of fair comment—Kezia Dugdale's remarks about Mr Campbell were judged to be fair comment—but I think that that led to considerable misunderstanding of the law. What we are talking about is honest opinion and, in my view, it is absolutely right that the law protects that.

Nick McGowan-Lowe: My answer is shorter. Yes, we believe that the truth, public interest and honest opinion defences cover the bases within

journalism. We are confident that they are well defined in the bill.

James Kelly: I turn now to compensation. The current arrangement in the courts is that, if the parties cannot reach a settlement, the court will calculate compensation and, in doing so, will take into account the actions that the defender has taken to make amends.

The process set out in the bill is different from that, in that the court will calculate what is a likely award based on the case coming to court. Is that a fairer approach, or does it present a barrier for some defendants who are sent on that route?

11:15

Andrew Tickell: This is a point that Campbell Deane made in his submission, when he noted that, under the bill, there is "no discount" for a defender who makes good attempts to settle the case before reaching the court. He pointed out that that was anomalous, and we very much agree.

It is in all our interests in defamation cases that, if people make false statements, we try to address them outside the courtroom environment in a negotiated way. Scottish PEN is very much in favour of that approach and of addressing incorrect statements that have appeared in print.

Campbell Deane therefore makes a good point, in particular that the law could more clearly incentivise negotiation by directing the court, in assessing what kind of damages may be owed, to have regard to the behaviour of the defender and their honest efforts to make an offer of amends. That could be enshrined in the bill by making it clear that a discount should be provided on any damages to reflect such action. Scottish PEN would very much support that approach.

Nick McGowan-Lowe: The NUJ would also support that approach for the same reasons that Andrew Tickell has outlined.

The Convener: There are no prizes for guessing what Liam Kerr is about to ask you about, because I have already told you.

Liam Kerr (North East Scotland) (Con): Yes, I would like to ask three questions on malicious publication—and I shall use my third question to cue up Andrew Tickell's answer on defences.

First, the bill will create a new court action for malicious publication to protect business interests. Both witnesses talked favourably of the serious harm test earlier, but there is no requirement to demonstrate serious harm before raising a claim of malicious publication. Why is that, and should there be a similar requirement in this part of the bill?

I ask Nick McGowan-Lowe to respond first.

Nick McGowan-Lowe: I would have to refer back to my notes.

Liam Kerr: Perhaps Andrew Tickell could take the question, and then Nick McGowan-Lowe can come back in if he wants.

Andrew Tickell: Liam Kerr makes a very good point: it does seem anomalous not to have the same requirement.

It is understandable to some extent that the focus of the bill has been on the defamation elements, as they are the better-known cases that arise. However, I think that that is a challenge.

In our submission, we said that there should be a serious harm principle echoing all the way through litigation in the bill. I would argue that additional forms of malicious publication should reflect the coherent logic of the bill. It should be stated that such actions should have to demonstrate a level of serious harm—and, if we are talking about businesses in this context, we are talking about serious financial harm. It does not seem to me problematic to include that test in the provisions. Scottish PEN would very much support making the bill more coherent on that point.

Echoing some of the things I said before about the dangers of corporate litigation, there is a risk that the malicious publication provisions become a back door for corporations to dodge the higher thresholds around defamation. They then would be more capable than the average person of bringing actions for allegedly defamatory or false statements. We would therefore very much welcome making the bill more coherent.

Liam Kerr: Unless Nick McGowan-Lowe wants to come in, I will move on to a second question.

I will come back to the point that Andrew Tickell made about the potential to dodge the defamation protections, which is particularly interesting. My second question is again slightly technical. The burden of proof operates differently for malicious publication from its operation for defamation. Are you able to explain in very basic terms the difference, whether you think that that difference is wise, and whether you are comfortable with that difference?

Andrew Tickell: I do not know whether I can answer that question immediately. Which particular aspect of the bill did you have in mind in terms of the differences in burden of proof?

Liam Kerr: My understanding is that, unlike for defamation, there is no reversal of a burden of proof. In the malicious publication cases, the

pursuer simply has to show that the statement is false or made maliciously. Do you have any thoughts on that?

Andrew Tickell: I understand. As things stand, it perhaps is not as well understood as it should be. If I bring a defamation action and I can prove that the statement is defamatory, the burden shifts on to the defender to establish that it is true. I suppose that that is relevant in this context, so I might have to go back and have a look at that aspect of the bill again to give you a clearer answer.

Overall, I think that that aspect of the bill has been underscrutinised by everyone who has engaged with the process. It is an important question, so perhaps I can write back to you on the topic.

Liam Kerr: I would be very grateful. I suspect that you are right about the scrutiny of the bill.

On perhaps a similar point—this is where I will cue up the point about defences—the bill defines "malice" in a way that sets quite a low threshold. This question is on a point you made earlier, and I would be interested to hear you elaborate on it. Taken with the low threshold, do you think that there is a danger that the malicious publication provisions effectively offer businesses a way to bypass the protections for freedom of expression that are contained in the defamation provisions? Perhaps in your answer you can bring in your point about defences.

Andrew Tickell: As things stand, that is absolutely a risk. It is worth saying that the malicious publications provisions are about specific types of issues—they are about title and a range of other specific business-orientated elements—so I think that there is a considerable risk.

I mentioned defences earlier. As some of the academic witnesses who specialise in defamation law have also said, the way that the provisions on defences are drafted focuses very much on the issue of defamation, which makes sense in context. It is less clear if they are operative, how they are operative or in what way they would be factored in in a potential malicious statement case. I therefore think that the malicious publication provisions should be scrutinised carefully.

Some people would argue that we could simply get rid of all the additional provisions on malicious communications altogether. Why do we need an additional multiplication of the law? Why is the law of defamation not adequate in those contexts? Maybe there is a more basic question about why the specific issues of title and profitability require additional protection that is not offered by the law on defamation.

Liam Kerr: Thank you. Nick McGowan-Lowe, have you anything to say?

Nick McGowan-Lowe: I have nothing to say on this issue.

Liam Kerr: I am very grateful to you both.

The Convener: The answer to the question might relate to something that Andrew Tickell said earlier in his evidence, which is that defamation is targeted on the protection of reputation rather than on the protection of assets or interests and it is sometimes difficult to show that businesses have reputations. That might be part of the answer.

I will bring in Fulton MacGregor next.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Thanks, convener. Congratulations on your election earlier and welcome to your new role.

I want to ask about the proposed court orders to remove contentious material. Section 30 would enable a court to order a third party to remove contentious material. Do you have any concerns about that provision? If so, are there alternative options for dealing with contentious material?

Andrew Tickell: As you say, section 30 would give the court power to require removal of a statement. Quite how operational that would be given the very international framework for the delivery of publication platforms might be open to question.

We have some anxieties about orders being made and people directed to remove material before a case is concluded or before any defamation has been established as a matter of law. On how it would work in practice, we need to consider how willing service providers are to take material down. Perhaps echoing what Rona Mackay said, I note that service providers can take down material that they regard as problematic, irrespective of what the law of defamation happens to say. That might have some heralds for freedom of expression of its own, but in looking at the law, we should not necessarily examine all its consequences and effects for everyone who might be concerned. We need to focus on whether it would be right that the court could order someone to take material down before any defamation had been established—material that might be perfectly true. We have some anxieties about how the provision might be applied in practice.

Nick McGowan-Lowe: My understanding of the law as it is applied at present is that courts are extremely reluctant to remove material where a defence has been lodged. It is very difficult, on the face of things, to reach an opinion on it until the proof has been heard on the evidence ahead of it. There would be concerns about that. As Andrew Tickell says, there is an international element of

the internet and that of jurisdiction, so quite how it would practically be enforced in all cases is not clear.

Shona Robison (Dundee City East) (SNP): My first question is for Andrew Tickell. Scottish PEN has proposed a new court action to provide protection from unjustified threats of defamation action. How would that work and what difference would it make in practice?

Andrew Tickell: I touched on that at the outset. We have come up with a recommendation that we introduce a new delict of unjustified threats. In effect, it would mean that, if someone was subject to an unjustified threat of defamation, they would be able to take the matter to court. As things stand, people cannot do that. If someone is subject to sustained, baseless threats of litigation, they really just have to live with it. We want a mechanism to be introduced to the law to address that problem and allow those who are subject to such threats to take action to make them cease.

The idea is based on intellectual property law. The inspiration was some legislation that the Westminster Parliament passed, which was introduced because of similar types of problems to the ones that we see in the field of defamation—people making threats and menaces with no substantive case behind them for the purposes of trying to suppress criticism or whatever.

We have set out some legislative language—we had help with the drafting from Doughty Street Chambers, and we thank it for its efforts—to give you a specimen way of giving effect to the idea. It provides for a range of things. It excludes from unjustified threats any attempt at conciliation and all the other out-of-court forms of addressing potential defamation issues. None of those things would be regarded as unjustifiable threats.

As you know, the Scottish Government decided not to include the proposal in the bill, although it consulted on it during the formulation of the bill. It had two arguments for not including it. The first was that it would be an additional barrier to justice for people with low incomes who wanted to bring defamation actions in court, as it might allow powerful people to bring counter-suits to prevent that. However, I do not know that many people of limited means have contemplated bringing defamation actions. If the Scottish Government is concerned about that, it could offer legal aid for defamation actions, which it does not do at present.

The second argument that the Scottish Government gave against the proposal was that it might result in less conciliation before cases arrive in court. That is an interesting argument, because the provision in the Intellectual Property (Unjustified Threats) Act 2017 was justified partly as a way of encouraging people to address criticisms and alleged defamations in good faith and in an open-hearted way before the threats and menaces of going to law are deployed.

Scottish PEN would argue that the proposal could be an innovative additional layer of protection in the law that would be directed at and address a problem that we know exists, which is that people make unjustified threats of defamation action.

Shona Robison: That is interesting. Nick, do you and the NUJ support the proposal?

Nick McGowan-Lowe: We do, for the reasons that I outlined earlier. The legal system is often used to threaten action in cases where there is no basis for it, no justification and no intention to follow through on it. When a legal threat comes to a newsroom or an individual such as a freelancer, it needs to be dealt with proportionately. Such things tie up resources and time and they tie up senior staff within publications and broadcasters, and those with the wallet to afford it can, in effect, delay the publication of stories that are in the public interest because of that. The proposal to deal with vexatious threats and have some kind of counter-action would help to rebalance that current wrong.

As Andrew Tickell said, an argument that was put forward for not including the proposal was that it would represent a barrier to justice. However, defamation is not a legal action that is taken by anyone who does not have access to deep pockets. My general belief is that I do not see how, in practical terms, it would deter conciliation.

The Convener: That brings us to the end of our questions. As neither member of the panel wants to add anything else to the record, I thank Andrew Tickell and Nick McGowan-Lowe for their extremely helpful, useful and full evidence.

I will suspend the meeting for five minutes before we hear from our second panel.

11:31

Meeting suspended.

11:36

On resuming—

The Convener: I welcome our second panel of witnesses. Joining us online—I hope—is John McLellan, director of the Scottish Newspaper Society, and with us in the room are Shelley Jofre, investigations editor, and Luke McCullough, senior policy adviser, both from BBC Scotland. John McLellan has now appeared on our screens, so he must be there, because the camera never lies.

I thank our witnesses for their written submissions, which are, as always, available on the committee's web page. I understand that Luke McCullough wants to make a short opening statement.

Luke McCullough (BBC Scotland): Thank you for inviting Shelley Jofre and me to give evidence this morning.

First, I apologise that Rosalind McInnes, BBC Scotland's principal solicitor, who has literally written the book on Scots law and journalism, is unable to be here. She is on leave and is not in Scotland this week. However, Shelley Jofre has 30 years' experience in broadcast journalism, including 25 years as an investigative reporter at "Frontline Scotland", "Newsnight" and "Panorama", and she is now editor of BBC Scotland's investigative strand "Disclosure". I trained in Scots law, but that was some time ago. I speak today as someone whose role at the BBC includes engaging on policy matters that impact on the future of public service broadcasting here in Scotland.

In essence, BBC Scotland welcomes the bill and supports it in its current form. Although defamation law reform might feel less pressing than other areas that occupy the Parliament's business agenda, the antiquity of much of the existing case law, the growth of citizen journalism in its broadest sense and the vital importance of freedom of expression in a functioning democracy come together to make a compelling case for reform of the law.

As always, there are areas for improvement, including the weight that is given to freedom of expression in the delicate balance with privacy rights. However, the serious harm test, the single publication rule, the codification of the Derbyshire principle and the statutory definition of defamation are to be welcomed. We would not want perfect to become the enemy of good, and we believe that the bill is broadly a good one. We look forward to discussing it with you.

The Convener: Thank you—that was very helpful. John, would you also like to give a short opening statement before we move on to questions?

John McLellan (Scottish Newspaper Society): Yes. Thank you, convener, and congratulations on your elevation this morning.

The Scottish Newspaper Society represents Scottish news publishing organisations, large and small. We are very grateful for the depth of the work that Lord Pentland and the Scottish Law Commission conducted to produce this much-needed bill, and we are indebted to the Scottish Government for introducing the bill to Parliament and to the Justice Committee for inviting us to give evidence on it today.

As other attendees have said this morning, reform of Scots defamation law is long overdue, and the bill marks a significant and welcome rebalancing of the right to freedom of expression and the right of individuals to defend their reputation. The effects of the existing defamation laws are not so much those that are seen in the courtroom, but those that are not. The majority of complaints are settled in private at some cost because the expense that is involved in mounting a defence is even greater. The provisions in the bill will not remove those effects entirely, but they will go a long way towards making them less likely.

The single publication rule and the reduced time bar reflect the reality of modern communication and will take the law out of the analogue era, but the core of the bill is the serious harm test. As has been observed, it will not rule out action by a determined complainer, but it should reduce the opportunity for vexatious actions. Crucially, however, it does not remove the right of individuals to receive redress for genuine damage to reputation, which is as it should be.

Overall, like others, we welcome the terms of the bill, and we look forward to further discussion this morning.

The Convener: Thank you—that was very helpful. The first question will be from Liam McArthur.

Liam McArthur: I thank the witnesses for their opening statements. I congratulate John McLellan on describing the chilling effect without mentioning it. As I did with the previous witnesses, I invite you—perhaps John McLellan first, and then Luke McCullough or Shelley Jofre—to describe from your experience the way in which the chilling effect manifests itself.

John McLellan: As has been described, the arrival of legal letters in a newsroom is not an unusual occurrence. It is some time since I was on the receiving end, but the arrival of such a letter where there is a threat of action immediately results in questions. Do I need to sort this quickly? If I am happy with my position, how much is it going to cost me to defend it?

In my time, which ended in 2012, decisions were increasingly taken on the basis—no matter what had been published and whether it was right or wrong—of saying, "It's expensive to defend, so how can we settle this?" The default among many publishers is now to ask how they can settle at minimum cost, and not whether the principle of what was published is right or wrong.

During the development of the bill, I have spoken to colleagues about the more recent

evidence. Like others, they were reluctant to reopen and discuss specific cases lest the original problem be exacerbated. Nonetheless, it is an ever-present fact of newsroom life that threats are received and they are dealt with financially and on the basis of how expeditious it is to get out of them or limit them, and not on the basis of whether one has a defensible position.

Liam McArthur: Shelley, will you answer the same question, but also factor in the changing financial dynamics that we heard about from the previous panel, which are perhaps exacerbating a problem that has been around for some time?

Shelley Jofre (BBC Scotland): Thank you for having me on the panel. Defamation law and how to avoid being on the wrong side of it run like a seam through everything that we do on the "Disclosure" team, and freedom of expression is something that we are fiercely passionate about.

The work that we do, which is all about holding the rich and the powerful to account, giving a voice to the voiceless and producing journalism that actually changes things, is fundamental to a functioning democracy. I would always argue that we should be given as much freedom and protection under the law as possible to tell stories that matter. However, the chilling effect that everybody else has described is certainly real. It is something we come across all the time in our work.

There are very few media outlets left in Scotland that have the time or the resources to do what we do. During the couple of years that "Disclosure" has been up and running, there have been lots of things that I think you and the general public might not know today if we had yielded to pressure not to broadcast. They include important new evidence in the Sheku Bayoh case, the police investigation of Emma Caldwell's murder, historical allegations of sexual abuse at a children's home, investigations into a rogue national health service surgeon who managed to do untold damage to patients over a number of years, the environmental and human cost of oil platforms from Scotland being broken up for scrap halfway round the world, and the adverse impact of salmon farming in Scotland.

11:45

Those are some of the important stories that we have told in the public interest, and in many of those investigations we received legal letters—sometimes numerous letters—warning us not to broadcast our allegations. I can understand why, in some instances, a smaller news organisation or a freelance journalist who has less experience or just fewer resources and less backing might yield to that sort of intimidation.

I have to say that, when we get a legal letter threatening us, it tends to indicate to us that we are on to something and it makes us try even harder to verify the story that we are looking at. However, I have to be absolutely honest with you and say that, even with our experience and resources, we sometimes do not broadcast everything that we would like to in such circumstances. That is not because we doubt the veracity of the allegations; I am talking about situations where we are absolutely convinced that the story is true.

I am thinking of a recent example where painstaking digging had found allegations from 13 separate credible sources against the same company but, after a lot of legal debate, we stepped back from the most damaging allegations. What was the reason for that? Scotland is a small country and, understandably, many of the people involved were worried that, if they were to go public or even to say that they would be a witness if the matter came to court, they might never get a job again in the business concerned.

The company that sent those letters knows that, and we know that. In the end, we as a public broadcaster have to evaluate whether it is worth the financial risk to publish and be damned.

Liam McArthur: That is very helpful. You describe a situation in which a decision on whether to broadcast or to publish is taken at almost the back end of the process. Would it be fair to say that there are occasions when individuals, companies or sectors are known to be so quick to go to litigation that it is not worth trying to assemble the argument? Is the chilling effect as corrosive as that?

Shelley Jofre: That is not the case for us, but we are in a reasonably privileged position compared with a lot of other journalists these days. The sort of cuts that newspaper journalists are facing have already been described to the committee. If I was a freelance journalist, there might be some companies that I would never think about tackling.

I do not think that there is any target that we would consider too big, but we would certainly think long and hard about publishing allegations if we were not absolutely sure of our footing. We will always give a reasonable length of time for people to respond, especially if the allegations are very serious and detailed. If it is a very long investigation, we might give them a couple of weeks' notice.

I can give a recent example. We went directly to the company concerned and said, "Here are the allegations—what's your answer?" The company then employed a crisis public relations team. We were still speaking to the company, but we also

had to speak to the crisis PR team. At that point, legal letters from a very expensive media law firm, which ran to several pages, started to arrive on a daily basis. That is a tactic, and we all know that it is a tactic.

As part of the process of trying to finish a film, we try as hard as possible to stack up every allegation, which involves going back not once or twice but three times to check how we know what we know. However, most of our time in that final week or two is spent answering letters—in this case, on three separate fronts.

Liam McArthur: As was mentioned in our discussion with the previous panel, some of those options—the legal letters, the delaying tactics and so on—will still be open to those who feel that they have been defamed once the bill, provided that it is passed by Parliament, is in place. What is it that the bill will deliver that provides a greater degree of confidence for people such as you and John McLellan, to whom I will come shortly?

Luke McCullough: I think that it provides clarity. Having a statutory definition of what defamation is—we might come on to that in a moment—gives a position in Scots law that is sure for media organisations to found on, but the serious harm threshold is the major change. To an extent, even without what Scottish PEN was proposing, the fact that there will now be a threshold in statute, which did not exist before, will help to bat off some of the more frivolous attempts to stop investigative journalism.

You are right about the market more widely. As Shelley Jofre said, the BBC is in a slightly privileged position from a financial perspective, but it is not immune from costs. I suspect that you will all have spotted that people in around 1,000 jobs at the BBC across the UK are going through a potential voluntary redundancy process. My previous life before the BBC was in commercial radio, and I think that you were given a clue by the NUJ earlier as to why it is so important to get the bill through now, when there are pressures of time and of money. Journalists are often in a newsroom where they are the only journalist, and if it gets too hard to progress a story, they will do the thing that is easy rather than the thing that is right. The serious harm threshold is the significant change in the bill.

Liam McArthur: John McLellan, do you want to add anything?

John McLellan: Not at any great length; I echo the previous views. The bill gives confidence in the initial rebuttal. It strengthens the ground on which we can say, “No, I’m sorry—we have no case to answer.” Therefore, it strengthens the weeding out process that was mentioned earlier, whereby sometimes letters arrive that are essentially a fishing exercise to see what will come back. Strengthening the grounds on which we can reject a bid means that there will be fewer cases that are likely to be taken further, so it reduces the exposure to further costs, which is very important.

As we say, if somebody is determined to go all the way and they have deep pockets or an effective crowdfunding mechanism or whatever, that individual will still be able to do that, but the bill will provide a more effective filter at the initial stage and—if the case goes all the way to test—a more robust defence when it comes to the crunch.

The Convener: Luke McCullough anticipated my next question. I want to move the focus on to the definition of defamation that is provided in the bill.

Do you have any concerns about that definition? Do you welcome it? Are there any ways in which you think that it could be improved?

Luke McCullough: I hear what Andrew Tickell said earlier about whether there is a little bit of mission creep in what seems to not be a change in definition by moving from “right-thinking” to “ordinary” people. However, as we said in our written submission, it is good to have clarity, because although Sim v Stretch has held up generally, there is some old case law that probably muddies the water a bit. It will not take members of the panel and of the committee too long to think back to a fairly recent high-profile case that the BBC lost, in which the judge stated:

> “the case is capable of having a significant impact on press reporting.”

The reporting in question was the press reporting of someone whose property was being searched by the police, but who had not been arrested or charged with anything. In effect, some judge-made law impacted on the previously established principle of press freedom. Although the BBC certainly did not get everything right in that case and has learned a lot from it, our view is that if there are to be changes in the law that impact on the ability of the press to do its job, it is the job of legislators to make such changes. Having statutory definitions and clarity is to be welcomed.

The Convener: John McLellan, do you want to add to that?

John McLellan: Yes. I agree with that. The problem with trying to nail down a definition is that we are dealing with inexact situations here anyway, and the way in which a definition can be understood will vary from case to case, as we can see from, for example, defamation actions over more specialist areas. What is an “ordinary” person is not the same in every scenario; what is a “right-thinking” person is not the same in every

scenario, either. It moves with the audience and the vehicle.

We had some concerns about the maintenance of the “tends to” element of the definition. I think that there has to be some kind of balance between the right of individuals to defend themselves and the ability to defend such actions. In broad terms, however, we are generally content with what is proposed.

The Convener: Thank you very much. I will bring in Rona Mackay and then John Finnie.

Rona Mackay: I would like to go back to the subject of “serious harm”. Luke McCullough has already touched on the issue, so I will be brief, but I want to tease it out a wee bit more. If the serious harm test is applied, in your opinion, will that make broadcasters and freelancers less risk averse, because there will be a threshold to meet? In essence, is that what you were saying?

Luke McCullough: I think that it removes the frivolous threats that are levelled at journalists. It also makes a distinction between something that is only capable of causing harm and something that causes actual harm. That is a key difference, as we can see if we look at how things have developed in England and the way in which the Supreme Court has moved on its similar legislation, which was passed in 2013.

In addition, I think that the serious harm threshold will allow case law to develop in Scotland that will give us some robust comparators with our nearest neighbours. The issue of potential libel tourism was touched on with the previous panel, but the flipside of that is that there are so few defamation cases in Scotland that, if we want a body of Scots case law to build up, having some cases from England and Wales, which have similar legislation and a shared Supreme Court, is not unhelpful.

Rona Mackay: Shelley, what you said earlier was very interesting. Given the sort of journalism that you do, I can see why you would welcome a serious harm test and how it would aid broadcasters not to get lots of frivolous letters and not to have to spend their time going back and forth.

Shelley Jofre: Yes, although because of the nature of what we do, our targets tend to be big targets anyway and to have deep pockets. Regardless of how the law were to change, at the BBC we always have to have at the forefront of our minds the fact that it is licence payers’ money that we are spending in any costly defamation action. Responsible journalism is what we do, but the burden of proof in a defamation action is on the defendant, so sometimes—this might be the case even in the future—we might well find ourselves in a position in which we cannot air allegations that we are convinced are true, simply because the financial risk of losing a defamation action is too high if we cannot be sure that witnesses would be willing to stand up in court for us.

In some of the stories that we do that are very much in the public interest, the central witnesses are vulnerable for one reason or another. The central witness might be a victim of historical sexual abuse who might have gone on to have addiction problems; someone who is a victim of a miscarriage of justice but who has a background of petty crime; an elderly person in the early stages of dementia who is alleging neglect in a care home; or somebody with depression who says that the medication that they took made them suicidal. For all sorts of understandable reasons, those people might not want to come to court, or we might feel that they would not be able to withstand cross-examination in a high-profile defamation action. At the end of the day, such questions will still remain because of the way in which the law is tilted.

Rona Mackay: I will ask you this and then come to John McLellan. Are there elements in the bill that you think should be strengthened? Is there anything that you would like to be included in it that is not there at the moment?

Shelley Jofre: I think that the BBC is very happy with the content of the bill. We might not think that it is perfect, but it is a bill that we would whole-heartedly support. You will not be surprised to hear me, as an investigative journalist, say that I would like us to be able to say as much as we possibly could if we were sure that it were true.

12:00

John McLellan: I do not think that the bill will have any impact on risk aversion in our newsrooms. It is not about freeing up newsrooms to do more; it is about defending their position in legitimate or accidental circumstances. As things stand, the risks and dangers in reporting go beyond defamation. The high-profile case that Luke McCullough referred to was as much about privacy as it was about defamation. The complexities in media law go beyond defamation, which is just one strand where an enhanced defence will protect against more frivolous or speculative actions. The bill will certainly not make newsrooms more relaxed environments.

John Finnie: Good afternoon, panel. As in the previous session, I have a question about the Derbyshire principle. In attempting to codify the principle, the bill creates an exemption for businesses and charities that deliver public services “from time to time”. As we heard from the previous panel, there is now a range of different

approaches taken to the delivery of public services. To pick up on Shelley Jofre's comment about holding the rich and powerful to account, I highlight that a lot of public services are now provided by predatory corporations that have questionable workplace and accounting practices. Does framing the bill around the Derbyshire principle help in that regard?

Shelley Jofre: I will ask Luke McCullough to answer that question, if you do not mind.

Luke McCullough: We welcome the codifying of the Derbyshire principle, which is vital for the scrutiny of the exercise of public services. As BBC Scotland is a public service broadcaster, that is core to what we do.

There is some risk to the extent that the bill might—from what I can see in the explanatory notes—enable an organisation to use one of its staff almost as a human shield in a way that prevents the bill's intentions from being fulfilled. Prisons were mentioned earlier—the Scottish Prison Service would not be able to litigate against the BBC or any other broadcaster, but a private organisation that was providing identical services might be able to do so.

In the current climate, we might also think about care home provision. Let us say that Shelley Jofre and her team are investigating an allegation of financial impropriety by a board that is delivering one of Scotland's publicly funded language services, but it is a small board that is made up of only eight people. I am not 100 per cent convinced that the bill as it stands would not prevent one of those people from attempting effectively to prevent the legitimate scrutiny of the use of public funds in an organisation. The codification of the Derbyshire principle in the bill is welcome, but there is room for a little more clarification.

John Finnie: Mr McLellan, do you have any comments on how the bill could be improved?

John McLellan: Yes. I speak as a City of Edinburgh councillor; my colleagues are currently discussing matters of importance to the city as we speak.

The provision of services is now such a complicated area. Not only are there private companies providing public services; there are also organisational changes within authorities whereby key public services are provided by arm's-length external organisations that are technically private companies. It is a multilayered landscape, and—as Luke McCullough said—some clarity is required.

We know that a lot of key services are provided by private companies. The important point is whether a private company is acting under the direction of elected members; I allude to the discussion in the previous session. The key difference is between a private company that is acting purely in its own private interests and one that is operating on the basis of a contract that has been approved by elected members. There is a difference between the two, and the legislation could be extended where there is some element of public service and a company is working to a public remit.

The Convener: I have a supplementary question, but it is different from the supplementary that I put to the previous panel. My question is for the BBC journalists. Given that your functions include

"functions of a public nature",

you are defined as a "public authority" under section 2 of the bill, are you not? That would mean that you could not sue for defamation if the bill was enacted. Is that correct?

Luke McCullough: In general, the BBC is deemed to be a "public authority" within the meaning of the Freedom of Information Act 2000, which is UK legislation. However, I suspect the BBC would not be able to sue for defamation, and I cannot think of a time when it last did so.

The Convener: Is the BBC content with that position? Is it content to be excluded from the scope of the law in that regard?

Luke McCullough: The BBC discharges important public service broadcasting functions and has other routes available to it. As with any other organisation, I cannot speak for individuals in the BBC and any impact that they may feel.

The Convener: Indeed. That is interesting—I think that we will explore it a bit further. I will bring in Bill Kidd next, followed by Rona Mackay.

Bill Kidd: I know that the witnesses heard the responses from Scottish PEN on this matter earlier, so it would be interesting to hear any responses that they might have. Some media stakeholders have called for businesses to be prevented from raising defamation actions altogether. Scottish PEN, with support from a number of others, has highlighted the Australian model, which is a form of compromise. In Australia, companies with 10 staff or more are prevented from suing for defamation.

Perhaps the BBC witnesses can start. Would you support such a proposal? What difference would it make in practice?

Luke McCullough: To be truthful, we do not have a lot to say on businesses. More effective work could be done, for example, on capping damages rather than restricting litigants. However, the BBC does not take a particularly keen view on the matter at the moment.

Bill Kidd: At the moment—okay. I put the same question to John McLellan.

John McLellan: We do not have a particularly strong view on the matter. Again, I stress that the preservation of the right of individuals and organisations to seek proper redress where real harm has been done is very important. However, drawing absolute rules that apply no matter what has happened is a bit more problematic.

The number of employees is a fairly blunt instrument; it would not take much to enable a relatively small but extremely well-funded organisation to take action. A very small company might manage millions of pounds' worth of funds and have moneys open to it in order to take action. Such a rule might weed out some actions, but it would not necessarily prevent individuals from finding another route. It might be a bit of a whack-a-mole approach, where you think that you have blocked off one route and then another one pops up because it is relatively straightforward to get round the rules.

Bill Kidd: Thank you—that is an interesting variation on what we heard earlier, so it is very useful to us.

Rona Mackay: The bill would exclude secondary publishers from liability for defamatory material. What are the advantages of that approach? In his opening statement, Luke McCullough mentioned the term "citizen journalism". I am thinking about the bill's provisions as they relate to the internet in particular, where people can now offer an opinion on anything, and that opinion could be defamatory. Is it a good approach to exclude secondary publishers from liability?

Luke McCullough: Yes, in that it is part of the overall theme of bringing clarity to the law, and avoids vexatious claims being made against someone who has "liked" something when they do not know whether it is true but they think that it has come from a reliable source.

In general, the BBC is a primary publisher of almost everything that it publishes, but I can see how the arguments that were laid out in the previous session would operate: that, in general, responsibility should lie with the editor and the publisher of articles, information and journalism. The BBC's editorial guidelines take that responsibility extremely seriously in terms of what the BBC can and cannot say on its airwaves and on its online services.

There is additional protection: if a secondary publication causes an elevation in the level of harm, the legislation would protect an individual who might find their access to justice otherwise cut off. However, in terms of overall clarity for the law, having the primary publisher be responsible for their content seems to be in line with how our own editorial framework operates.

Rona Mackay: I will ask the other witnesses about that, but first I want to tease out whether you think that there is an issue with the internet, although I know that that is not your prime concern. The United States, for instance, offers complete immunity in respect of anything that anybody says on the internet, and it would take no action. Is that a good thing, given that people use the internet so widely and for so much?

Luke McCullough: As a purely personal view, I find it interesting that Ofcom has moved a little bit on how to regulate the internet and how a balance between freedom of expression versus privacy rights could operate in that forum. To an extent, that is a microcosm of the challenge that the bill throws up: how do we balance those two key rights? I do not think that we would ever be in a space where we could say that the internet is off limits. It would seem very odd, given that more and more broadcast services are delivered digitally, to say that there is no scope for a defamation action if something has been published only on BBC iPlayer and that it should be off limits, while something that is put out on the BBC Scotland channel falls within the scope of the law.

Rona Mackay: Does Shelley Jofre have any thoughts on the matter?

Shelley Jofre: As an editor, I always expect to be held to account for the content that I oversee; I would not expect people who shared it in good faith to be held to account. We know that, these days, content is shared widely and quickly and in good faith, so it seems only fair for litigation to be aimed at those who publish and have editorial responsibility for that content.

Rona Mackay: John McLellan, would you like to comment?

John McLellan: I would go along with that view entirely. Trying to nail down what is or is not acceptable in that respect would become very difficult. An absolute ban would be difficult, too, because that would encroach on the right of individuals to seek redress for genuine damage.

As the other witnesses have very ably described, the situation is very complicated. If there is any simplification to be had, it would be in pinning responsibility down to the originator of the material.

There are other elements—for example, where the reopening of old material could be regarded as re-publication. Sorting out that end of it is important. Essentially, publishers are now unable to control access to information because of cacheing, republishing and retweeting in the wider

context. The legislation is in a reasonable place—in going beyond that and trying to tame the internet, legislators would drive themselves mad.

Rona Mackay: I have one more quick question. I will pose a scenario. If a story appeared in the print edition of one of your papers, and it was then published on the digital platform after the digital editor had changed it substantially and added a few bits and pieces, who would be responsible if it contained something defamatory?

John McLellan: It would be the publisher, the editor and the owner of the website. If the story originated from the same newsroom, the publisher would be responsible. If the defamatory aspect resulted from changes that were made by an editor rather than the content by the writer of the original story, the original writer would clearly have a defence. If the writer had not included defamatory material—

Rona Mackay: So the sub-editor would be liable.

John McLellan: The writer would have a defence; the responsibility would lie with the publisher and the editor. That is why the position of editor is still very important—a title needs to have somebody who is legally responsible for the content. In the circumstances that you describe, it would be the editor who would be responsible.

James Kelly: I will move on to the area of defence—I will go to John McLellan first and then to the BBC representatives. The bill sets out three grounds for defence, based on case law: “truth”, “public interest” and “honest opinion”. Are the definitions for those grounds as set out in the bill adequate and clear? Are they complete, or does anything need to be added?

12:15

John McLellan: They are very broad, and their breadth is both their weakness and their strength. I cannot think of anything in particular that should be added.

In the Campbell v Dugdale case, which was mentioned earlier, the judge recognised that although, in essence, there was a defamatory element to what was said, the opinions were honestly held. Under the third of the measures in the bill, therefore, there is a defence.

We are generally content with the definitions in the bill. It is good that we are codifying public interest, because the old Reynolds principles have never been properly tested in a Scottish scenario. There has only been one significant case—Irene Adams, MP v Guardian Newspapers Limited—and it did not run to completion.

The bill does the job that we hoped it would do. In trying to add to it or narrow it down, we would end up going down wormholes, and it would become more and more difficult the narrower or more precise we tried to make the definitions.

Shelley Jofre: I would probably echo what John McLellan said. At the BBC, we are confident that the three statutory grounds—“truth”, “honest opinion” and publication “in the public interest”—are well defined. We deal with the latter ground—the old Albert Reynolds defence—quite frequently. It is possibly helpful for the committee to know that, in practice, the 10 steps in the Reynolds defence have been a useful aide-memoire for us in investigative journalism. In essence, that defence is a responsible journalism test, and it reminds us to ensure that we are able to show our working and demonstrate all the steps that we took all the way along the process to try to verify the story. That means taking every possible and reasonable step to ensure that the story is true.

A critical element is the right-of-reply process, in which the person is given time to respond and to put their side of the story. We think very carefully about that. If we have spent six months on an investigation, we would not give someone just 24 hours to respond; we know that a judge would take a dim view of that. What comes back in that process is often critical, and it forces us to think about our story in a way that we had not done before. Sometimes, it forces us to completely rethink the story.

Nonetheless, given that there is now a statutory defence of publication on a matter of public interest in England and Wales, it makes sense for Scotland to be on the same page as our nearest neighbours.

Rosalind McInnes has told me—I am not sure if I am contradicting John McLellan here—that Albert Reynolds has been referenced twice in Scottish cases, but only twice. If we do not reform our defamation law in line with the law in England and Wales, there is a danger that our case law will not be up to date—we will have old Reynolds defences, while English law is developing more robustly.

James Kelly: I turn to how a compensation figure is set. Currently, the process by which compensation can be calculated allows the defender to set out what steps they have taken to mitigate what they have published. In effect, what the courts then offer is a discount, compared to what the sum could be if the case went through a court process. The bill goes down a different route in that it does not take that into account—the discount is not in place. Is that a fair way to do it or will it inhibit defenders from going down the compensation route?

Luke McCullough: The point that Shelley Jofre made earlier about the BBC being responsible for public money in how it discharges its functions means that we probably would support the ability to discount damages at an earlier stage.

James Kelly: John McLellan, do you have a view on discounts?

John McLellan: Yes. In any negotiation, an ability to understand the parameters and the likely outcomes at the end would be very welcome. The offer-of-amends system as it stands recognises that, but it can be somewhat fluid, so strengthening that would be very welcome.

Liam Kerr: I would like to return to my earlier theme of malicious publication. We heard earlier the concern that the provisions on malicious publication could offer businesses a way to bypass the protections of freedom of expression that are in part 1, on defamation. Is that a fair concern?

John McLellan: I have had a look at that area. There are defences against it in the bill. Section 21 has the condition:

> "the statement has caused (or is likely to cause) serious financial loss to B".

That is important. The need to be able to show real loss is key.

My view is that people are less likely to be able to fly kites on malicious publication than they are on general harm to reputation. As others have said, it is not something that has attracted perhaps as much scrutiny as the rest of the bill, but that is possibly because that caveat is in there.

There is always the possibility that another route will be used, but the rest of the bill allows a determined litigant to go all the way anyway. The important provision relating to whether something has caused, or is likely to cause, financial loss makes that a bit less attractive, I would have thought, but anything is possible. If someone wants to go all the way, spend the money and take the risk, they can.

Liam Kerr: That is very interesting. I put the same question to Luke McCullough. Do the malicious publication provisions offer the way to bypass those protections? If so, are you reassured by John McLellan's caveat about showing real loss?

Luke McCullough: What John McLellan says is helpful. We probably have not scrutinised that part of the bill as much as we have the provisions on defamation, so it was interesting to hear that, as well as hear the broader experience of witnesses in the earlier discussion. If it is a back door to undermining the serious harm threshold in the defamation provisions, that would be of concern, given how much we have welcomed the serious harm threshold elsewhere in the bill.

Liam Kerr: Can I push you on that? You have spoken favourably on the serious harm threshold throughout and, at the outset, John McLellan said that the serious harm test is at the core of the bill. Given that premise, should the serious harm test be ported into the malicious publication part, perhaps to address any possible mischief that was implied by my earlier question?

Luke McCullough: John McLellan is possibly arguing that serious financial loss is the equivalent threshold. If that is the equivalent threshold, that would be welcome, but I would not want to see anything that undermined the serious harm threshold. Does it require porting into that part of the bill? Possibly.

John McLellan: If the bill would benefit from that clarity, then I agree. The clear reference to financial damage in part 2 of the bill is helpful in that regard. If it would be further strengthened by a mention of serious harm, we would welcome that.

Liam Kerr: That is very interesting. Thank you.

Fulton MacGregor: I turn to section 30, which would enable a court to order a third party to remove contentious material. As I did with the previous panel, I will roll my two questions together. Do you have any concerns about that provision? If so, do you think that there are any alternative options to deal with contentious material?

John McLellan: The concern that we had with that area was whether that would signal that there was a problem. When an organisation is mounting a robust defence, an order to remove something may impute liability. In practical terms, even if a robust defence is being mounted, it is customary practice usually for publishers to remove any contentious material from their sites as a matter of course—as soon as you get a problem, you take it down. That, in itself, is an illustration of the chilling effect of the issue. People effectively say, "We are happy with what we have published, but just to be on the safe side, we had better take it down." If part of your defence in court would be, "We are so convinced of our position that we are not taking this material down", but the court orders you to do that, that could be seen to have an implication, especially if there was still jury involvement.

Shelley Jofre: The main concern from the BBC is about being ordered to take down something that you are absolutely convinced is true. I have already described to you the level to which we go to verify our stories before we broadcast them, but we also have a self-regulation process that means that, if there is some doubt, we generally take material down. There is a bit of concern about this particular aspect.

Luke McCullough: The concern is the one that was raised by the first panel: that you could have the instruction to take it down before the matter had been decided by the court. Being instructed by a judge to remove content before the judge has had an opportunity to consider whether or not that content is defamatory almost prejudges the case that you are involved with. As Shelley Jofre said, in a self-regulatory environment, that seems to encroach on the ability of publishers and broadcasters to do what they need to do.

Shona Robison: Good morning. You will be aware of the proposal by Scottish PEN for a new court action to provide protection from unjustified threats of defamation action. Do you support that proposal, and what difference would it make in practice?

Luke McCullough: If I respond on the principle, Shelley can maybe say what difference it would make. In our written submission, we said that we would welcome some of the further ideas of Scottish PEN and that is certainly one that we thought could bring change. The challenge for us, and the reason why we did not put it in writing, is that it is a complex area. How would you make it work? You can see there is a parallel in the Copyright, Designs and Patents Act 1988, where some vexatious attempts to halt actions are now caught by the law. We agree with the principle of the proposal, but we understand that there would be difficulties in practice.

Shelley Jofre: It would obviously be helpful if there was some way of finding a mechanism to be able to reduce in advance the number of threatening legal letters that we get and try to find some way of resolving issues but, on a practical level, how that might work in practice is, I guess, something for you guys to consider. It would certainly be helpful in the sort of work that we do.

The Convener: John McLellan, would you like to add to this?

John McLellan: I think that the proposal is welcome, but that the practicalities of it would be such that a determined litigant would find ways around it. We did not include it in our submission, but referred to other proposals by Scottish PEN that we support.

Shona Robison: That was helpful, thank you.

12:30

The Convener: I have a final question that concerns something that was discussed briefly in our first panel and which I would like your views on. One provision of the bill will reduce the limitation period—the time for raising court action in defamation—from three years to one year, which is quite a significant cutback. What impact would that have, if we enacted it, for your media organisations? Perhaps John McLellan could answer first and then the BBC.

John McLellan: That is an element of law that does not just go back to the analogue era; it goes back to the era of the pigeon. If you have not suffered any harm within a year in the digital era, it is unlikely that you have suffered any harm to your reputation. Three years is an opportunity for speculative litigation. In this day and age, unless you are Robinson Crusoe, it is highly unlikely that anything that has been said about you would not come to your attention within that period. A year is more than adequate and brings the law into line with the position in England and Wales.

The Convener: With Liam McArthur in the room, no one will say anything about being marooned on remote islands. Shelley Jofre or Luke McCullough, do you have anything to add?

Shelley Jofre: I agree with that. A year is more than enough time these days for somebody to decide whether they have been unfairly damaged by something that we have published. At BBC Scotland, we have received a writ just before the three-year limit, and I think that that limit is unduly tilted in favour of the pursuers, to be honest.

The Convener: Thank you, that is helpful. Thank you, John McLellan, Shelley Jofre and Luke McCullough, for your evidence this morning and for your help to the committee.

That brings the public part of our meeting to a close. Our next meeting will be one week today, on Tuesday 1 September, when we will be meeting virtually to continue to take evidence on the Defamation and Malicious Publication (Scotland) Bill. I close the public part of the meeting.

12:32

Meeting continued in private until 12:51.

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