OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 15 September 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

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JUSTICE COMMITTEE
21st Meeting 2020, Session 5

CONVENER

*Adam Tomkins (Glasgow) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Annabelle Ewing (Cowdenbeath) (SNP)
*John Finnie (Highlands and Islands) (Green)
*James Kelly (Glasgow) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
Liam McArthur (Orkney Islands) (LD)
*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor John Blackie (University of Strathclyde)
Christopher Brookmyre
Campbell Deane (Bannatyne Kirkwood France & Co)
Humza Yousaf (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Virtual Meeting

Scottish Parliament

Justice Committee

Tuesday 15 September 2020

[The Convener opened the meeting at 10:15]

Defamation and Malicious Publication (Scotland) Bill: Stage 1

The Convener (Adam Tomkins): Good morning, everyone, and welcome to the 21st meeting in 2020 of the Justice Committee. We have apologies from Liam McArthur.

Our first item of business is the continuation of stage 1 consideration of the Defamation and Malicious Publication (Scotland) Bill. I welcome our panel of witnesses, who are all attending the meeting online. Our witnesses are Professor John Blackie from the University of Strathclyde; Christopher Brookmyre, an author; and Campbell Deane from Bannatyne Kirkwood France & Co. I thank the witnesses for their extremely helpful written submissions, which are, as always, available to the public on the committee's web pages.

I invite the panel to make short opening remarks before we move to questions.

Professor John Blackie (University of Strathclyde): Thank you very much for having me to speak to you. Elspeth Reid, a professor at the University of Edinburgh, would have been with me today, as a great deal of our work is joint, but she is away on holiday, unfortunately, so it is me alone.

Can you hear me?

The Convener: Yes.

Professor Blackie: The bill involves policy questions, which of course are not for me, and technical questions. Our written submission attempts to address some of those technical questions and, at certain points, we provide suggestions for drafting of the bill should our submissions be accepted.

We cover the serious harm threshold and the question whether there should be a statutory definition of defamation. We also deal with malicious publication, the defence of truth—[*Inaudible*.]

The Convener: I am not sure whether it is just for me or for everybody, but Professor Blackie has frozen. While the technical wizards behind the scenes sort all that out—I thank them very much for their work—we will move to Campbell Deane.

Campbell Deane (Bannatyne Kirkwood France & Co): I thank the committee for the opportunity to address you. I am delighted that my fellow witnesses include such knowledgeable figures as Professor Blackie and my current favourite Scottish crime noir author, Christopher Brookmyre. Unfortunately, I suspect that Christopher's views on the topic differ from mine, so I hope that I will not appear in any of his forthcoming novels.

I approach this as a practitioner who, every day for 25-plus years, has advised a large part of the Scottish print media on pre and post-publication defamation issues. One of my quandaries is that although, on the one hand, the bill might benefit the print media, and although I am a huge advocate of the principle of freedom of expression, there is an imbalance in the bill when one puts on the pursuer's hat, particularly in relation to serious harm, which I suspect that we will cover as matters progress.

In short, there is an imbalance. I am sure that the committee has been hearing phrases such as "thin skin and thick pockets" when it comes to trying to stop the publication of various stories. I am not personally aware of that, despite having acted for the media in this regard on a daily basis for a considerable period of time, so my view is that that hand might have been overplayed.

The Convener: That is helpful. We will certainly come to a number of those issues in our questions. Before we do, I bring in Christopher Brookmyre for any opening remarks that he wishes to make.

Christopher Brookmyre: I thank the committee for inviting me. I am here as much to learn and absorb as to contribute, because the legal side of things is far from my area of expertise; I primarily deal in lies.

The Convener: That is tremendous—thank you very much.

We have about an hour and a quarter for questions. We will focus our first questions on Mr Deane and Mr Brookmyre while we try to resolve the issues with Professor Blackie's connection.

Mr Deane, for the benefit of the committee, will you explain how Scots law currently operates to protect privacy and, in particular, what role defamation might have to play in Scots law in the protection of privacy?

Campbell Deane: Those are interesting questions. The privacy arguments are slightly different from the defamation arguments. Although a similar article, privacy involves the question

whether an individual has a reasonable expectation of privacy.

There is little Scottish case law on that particular topic. In a similar way to defamation, we tend to head south and cherry pick the law in England that is compatible with the law in Scotland. It flows from the European convention on human rights, so the convention rights are applicable across the board, in theory.

The position on how we consider whether something is defamatory in Scotland comes down to the classic Sim v Stretch test for a reasonable ordinary reader and whether what has been said is likely to lower an individual in the "estimation of right-thinking" people.

Privacy does not work on that basis, predominantly because once the cat is out of the bag and something has been published, the privacy has to all intents and purposes flown off.

The Convener: In your opening remarks, you said that the bill represents something of an imbalance, but you did not specify what the imbalance is. Do I take it from that—I do not want to put words in your mouth, so please correct me if I am wrong to impute this—that you think that the bill shifts the balance too far in favour of freedom of expression at the expense of the protection of the right to privacy?

Campbell Deane: Yes, I think that. Having acted—and continuing to act—for newspapers for 25-plus years, I find it quite difficult to be adopting this position and thinking to myself, "Hold on a minute—let's roll back freedom of expression." That does not sit right with me. However, that is the view that I have formed.

When the bill was originally talked about, I wrote an article about what is in it for the pursuer. The answer to that is nothing: there is nothing in the bill that would assist a pursuer to litigate. That is not a call to race to litigate in relation to defamation, but it seems that hurdle after hurdle is now being put in play, which achieves very little, apart from potentially increasing expense.

The Convener: Mr Brookmyre, in your professional career as an author, have you had any encounters with defamation law? Do you think about it at all when you are writing or publishing? Has there been any direct or indirect chilling effect, for example, on your freedom of expression as a published author?

Christopher Brookmyre: It is difficult to retrospectively assess the extent to which one self-censors because of the potential for problems.

Twenty-five years ago, I started off writing more overtly satirical fiction in which there were often quite grotesque parodies, not of identifiable public figures, but certainly of identifiable behaviours and attitudes. At that point, I always felt that I was protected by the law of fiction and the fact that my characters were often amalgams of individuals. However, I am conscious that, at times, there is a danger that someone might identify themselves too closely with a fictional depiction. I am perhaps conscious of that only because I do not want to cause a problem for my publisher and I do not want my books to get bogged down in litigation. I cannot point to many concrete examples of fictional works that have fallen foul of defamation law, so I admit that my concern may not always be rational.

I am conscious at times that I am changing things or holding back because I am concerned. In my case, the figures who have most bothered me are public figures who would be most likely to object to a particularly grotesque depiction of attitudes that they might identify themselves with. It is hard to gauge the extent to which I could argue that there is any chilling effect on my work that is borne of more than my natural cautiousness.

The Convener: You mentioned your publisher. I might be about to ask you a question that you cannot answer, but have your publishers ever put any pressure on you to increase your consciousness of the likely liability should you inadvertently offend someone in your work, or do you feel, on the contrary, that you are already quite well supported by your publishers?

Christopher Brookmyre: I have been well supported by my publishers on some of the creative decisions that I have made. However, on occasion, I have received editorial notes saying, "Can you change this because we might be laying ourselves open?" There are times when I have thought that that was a ridiculous concern, because my depiction was too grotesque or it was clearly meant as a joke. In recent years, however, I have noticed more and more that I receive editorial notes asking me to change something so that it is not too obviously identifiable with a particular individual, institution or company.

I have had to change the names of fictional companies because they sounded a bit too much like an existing company or organisation, even when the company or organisation was not in the same field. My publishers seemed wary of mischievous or opportunistic litigation. I defer to my publishers' paranoia over my own, because they will have more experience with those issues and will be talking to lawyers about what might be actionable.

It could come down to individual editors. Sometimes, I receive a lot of editorial notes saying, "Please be wary of that" or "Can you change the character's name, because it sounds too much like someone else?" I had to change the

name of a major character in my novel "Fallen Angel", because it sounded too much like a real person. Given the crimes that the character was going to be depicted as committing, we did not want to claim that there was any overlap. The person worked in the same field, which made it more likely that I would have put myself in jeopardy of an accusation that I had intended a comparison with the real person.

The Convener: That is very helpful. I will bring Professor Blackie back in a moment and then I will move on to Annabelle Ewing. Please could all members and witnesses not try to control their microphones or cameras as that will be done centrally?

Professor Blackie, I do not know whether you were able to hear what Campbell Deane said, but do you think that the bill threatens to undermine the way in which Scots law protects privacy or reputation?

10:30

Professor Blackie: Those are different questions. Privacy is a question of interference with private life. The modern law is, of course, derived from article 8 of the European convention on human rights. England did not, in fact, have a privacy law until it became influenced by that; arguably, we did. Privacy, however, is about interfering in someone's personal sphere. Defamation, today, is not about that—it is about reputation and the consequent impact on the person where reputation is affected.

I suppose that it would have been possible to reconfigure the whole law so that privacy and defamation were dealt with in the same legislation, but I do not think that that is what we are doing, nor do I think that that would be appropriate just now.

The Convener: Annabelle Ewing wants to pick up on a number of those themes.

Annabelle Ewing (Cowdenbeath) (SNP): Mr Deane has fairly unequivocally concluded that the bill does not strike the right balance between freedom of expression and the right to protection of reputation. As far as the key elements of the bill are concerned, what would need to be amended to bring that balance into play?

Campbell Deane: As I perceive it, the main issue is the question of serious harm. I believe that, by introducing that extra barrier, you would be putting a hurdle in the way of a litigant who may well have a perfectly good right of action. You would be forcing them to prove—and, as far as I can see, it will be for them to prove—that they have been seriously harmed by the event.

In a personal injury action, for example, you would not turn around to someone who was involved in a road traffic accident and say, "Well, you only broke your leg—you didn't have to get it amputated. Therefore, we're not going to give you any damages." Why should someone who has been defamed not have the ability to go to court and say, "My reputation has been damaged. I have suffered harm. Why should I have to prove that that harm is serious?" There is no doubt that that will involve cost on both sides, to prove or defend the position that it is not serious harm. That is where I think that the balance primarily falls down in relation to the bill.

No one has said or been able to explain to me how freedom of expression will be improved by the introduction of serious harm. If anything, it is arguable that journalists will take a slightly less responsible attitude and not qualify for the previous Reynolds privilege defence of responsible journalism, because they can work on the premise that, "This isn't going to seriously harm them. We'll just take a nibble at them and cause some damage." That is the issue that concerns me most.

Annabelle Ewing: That is a clear exposé of what you say is the key element of the bill that would merit being looked at, certainly from the pursuer's point of view.

I was interested to hear Mr Brookmyre's answer to the convener's question. He is not a lawyer, but from his position as a writer, does he have a great expectation that the bill, even if enacted in its current form, would have any particular impact on how he approaches his writing? Does he have any expectation that his publisher would be any less cautious in its approach as he has described it?

Christopher Brookmyre: I am not convinced that the bill would have a great impact on how I write, for the reasons that I just outlined.

A writer of fiction is perhaps less wary of the dangers of litigation, because that is a very different sphere to writing journalism, which purports to be fact and to represent the truth. When working on fiction, a writer is always creating a simulacrum of modern reality, and people interpret it in that way. They know that the writer is not necessarily saying that something is true, but rather that that is what they think the world looks like and they hope that their readers will recognise it.

I appreciate why there is a need to update the law and to clarify certain points, but such finer distinctions will not have an impact on my point of view as a writer. I cannot speak for how my editors would interpret such matters but, given that most of them tend to work in publishing in London, I suspect that the extent of the attention that they

are paying to the bill is not vast. For example, the lawyers at my publisher, Little, Brown Book Group, would be more concerned with the implications for the non-fiction books that it might publish, such as biographies, autobiographies or memoirs and so on.

I have to admit that the realm of fiction is quite rarely damaged by defamation issues. It often offers an opportunity to write about characters in an unflattering way but, for obvious reasons, people are reluctant to say, "Hey, you know that really unflattering depiction? That's me." Certainly in my experience, therefore, written fiction is not an area that has been massively damaged by such issues. Perhaps that is just because of its format, though. I could understand that, by its nature, fiction in the form of a stage play, a film or a television programme might be more impacted upon, and that producers of those formats might be more wary of the legal ramifications, but, fortunately, written fiction seems to have been comparatively well protected from them. I cannot think of an instance of an author being sued over a fictional depiction of an individual.

Annabelle Ewing: That is interesting. Thank you for that.

Perhaps I could ask Professor Blackie about a broader issue. The other week, the committee heard from witnesses—from the Faculty of Advocates and a lawyer in the field—who suggested that the approach that is being taken in the bill borrows heavily from that which has been taken down south. However, we do not have the same issues here in Scotland, so it was suggested that the bill is a solution to a problem that does not really exist here. Could you comment on that general proposition?

Professor Blackie: I agree with that, but I would like to add a bit of precision on what is meant by it.

In the work that the Law Commission did on the law in England and Wales, the first reason that was given for having the serious harm requirement was that it was felt that large players were using the lack of such a thing as a way of getting too much power. However, the question of libel tourism then arose; people wondered whether such parties would come to Scotland if we did not have provision for it in our law. There is absolutely no sign of that happening, and we are now nearly seven years on from the passing of the English act.

My second point is that there was a different background in English law anyway, before the act. That is because, in England, there is a distinction between slander and libel. In actions for slander, which is oral defamation, particular financial loss had to be proved, whereas in actions for other types of defamation, it did not have to be proved. There was therefore a muddle in the law in England, which the commission wanted to sort out. However, that is a muddle that we do not have.

Then there are questions about complexity and cost. To understand those, we have to consider two elements. The first is what exactly the reality is on the ground in Scotland, which is what the Faculty of Advocates referred to. If we look at our reported case law—although, of course, it is not an absolute guide to all the claims that have been made—we can see that most claims here are made by ordinary members of the public, and a high proportion of them are not made against the media. In recent years there have been several well-known examples. In one, a member of the Scottish women's curling team raised a claim against her coach for defaming her by saying that she had refused to play in a match. That really was not a media case at all. There are many other similar examples.

My view is that we do not have the same problem here, but the question of the nature of the test also comes into it. If we look at the approach to a number of claims in Scotland—three that have been made since 2007 are mentioned in our joint submission—we can see that the Scots courts will not allow claims to proceed or to succeed where the evidence shows that the statements that were made were basically banter. Our test for defamation is much more flexible than that in Sim v Stretch "cold", if I might put it in that way. The effect of section 1(4)(a) is that the court will apply that in a hidden way. If a claim is really ridiculous, the court will not allow it to succeed or proceed.

In every respect, therefore, I think that we do not need a statutory definition. I believe that having such an approach would cause extra expense. Yesterday, I had a quick look at last year's and this year's reported cases in the English courts in which that question was raised. In a very high proportion of those, there had to be lengthy proof of fact and the defence was successful in saying that the claim met the serious harm threshold. However, that approach adds considerable expense, because people cannot readily make claims without proof of the facts on the extent to which their reputation was harmed.

In Scotland, we have always been able to deal with such matters in written pleadings without hearing any proof of fact at all. That would be a problem if we were to have a serious harm test. It would put up costs, and there seems to be no point in doing that.

Finally, our general law of delict, which includes all legally imposed civil liability, contains a principle called the de minimis rule, which states that trivial defects cannot be sued for, anyway.

On all those grounds, I feel that a serious harm test would not be appropriate for us, in our context. I agree with the faculty's view, and those are the specific grounds for my doing so.

Annabelle Ewing: Thank you very much, Professor Blackie, for that extremely comprehensive answer.

Lastly, I have a brief question for Mr Deane. On the general theme of barriers, costs and so on, when the committee has previously taken evidence on pre-litigation correspondence, some witnesses have expressed the view that it is intimidatory and should be prohibited, but others have said completely the opposite. What is your view?

10:45

Campbell Deane: I do not think that someone should be prevented from writing—or instructing an agent to write—a pre-action letter to preserve their rights.

However, there are two separate ways of looking at the issue. As a general rule, letters that come into newspapers are quite helpful to lawyers who provide pre-publication advice, because they can analyse them and say, "Hold on a minute. They are making that particular point, but we haven't got that buttoned down at all. Let's go and have a think about it." That is responsible. Other letters, though, are, quite frankly, couched in such terms that lawyers know that nothing will ever happen as a consequence of them. However, I cannot see how someone should be penalised for trying to protect their rights. That just does not sit well.

The type of letter that causes most problems goes not to a newspaper but, for example, to an individual who has posted something on Facebook and who is told that unless they remove it now the sending lawyer's client will sue them. That happens, and it is done because the person who has contacted the lawyer to write that letter believes that they have a genuine grievance. I would never issue a letter that was being sent with no intention to take matters any further and was simply a threat. That would just cheapen my brand as a lawyer. If a lawyer is not prepared to follow up such a letter, they should not write it. At the outset, they need their client to confirm that they are willing to go through with action. I would not want to write to someone simply to put them on notice.

Annabelle Ewing: Okay. That is very interesting. Speaking as a lawyer—I declare an interest as a member of the Law Society of Scotland, although I do not currently practise—I recall that there are practice rules about matters such as writing spurious letters that are clearly not based on anything that might go anywhere. Perhaps that presents a different angle on the issue.

Campbell Deane: In Scotland there is certainly no pre-action protocol on writing such letters. However, a letter that a lawyer writes in such a situation will always contain a line that says, in effect, "Go and get separate legal advice on this. Don't take our word for it—go and speak to a lawyer." That is so that the recipient at least has the opportunity to be apprised of matters and does not just have the wool pulled over their eyes.

The Convener: Rona Mackay was going to ask about the serious harm test. I am not sure whether you think that that has already been covered in what we have heard so far.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I have just a couple of quick questions on that, because it has been covered quite extensively.

First, I ask Mr Brookmyre whether he thinks that he would be better protected as an author if a serious harm test were to be introduced in the bill.

Christopher Brookmyre: I really do not feel qualified to answer that; I cannot break down the hypotheticals to think about it. If the particulars of a proposed law are difficult for me to comprehend, it is even harder for me to imagine that they would have much of an impact on how I practise writing fiction.

Rona Mackay: Okay, thank you. That is fine.

I ask Professor Blackie whether he can envisage scenarios in which someone might not be able to proceed because of the serious harm test. Would meeting it be difficult for a pursuer to prove?

Professor Blackie: Yes, I can see examples of that. One of the most obvious examples is that if the case is resisted on that basis, the pursuer would have to go to the expense of collecting further evidence at an early stage, at great cost, and if there is a powerful and well-funded player on the other side, it might cost more money. That seems to me to be the first problem.

The second problem is that in Scotland, many of the cases are not against the media, but are about small things—to do with the internet, increasingly—and what people really want is to vindicate their reputation. It is not about the money; it is about vindicating reputations. The test will present considerable unnecessary barriers and expense.

Rona Mackay: I take it from what Mr Deane has said that he agrees with that. Do you think that there would be people who would be unable to proceed because of the threshold?

Campbell Deane: The point that Professor Blackie makes about it not being about the money is incredibly well placed. When we issue pre-action correspondence, we ask for various things: for the material to be removed, for an undertaking not to do it again, and sometimes for proposals in relation to payment of legal costs. It is usually something along those lines. The vast majority of people are content if the article or statement is then removed. That is it; that is all they want. They simply want rid of it.

I can see situations in which the cost element could get out of hand. One example would be the recent Stuart Campbell v Kezia Dugdale case. Would Kezia Dugdale have succeeded in relation to there being serious harm, if that test had been in play? If we look at Sheriff Ross's determination before the case went to the inner house before Lord Carloway, the sheriff granted Stuart Campbell—in the event that he had succeeded—damages of £100. That could not be considered serious harm. However, to get to that stage of arguing that his reputation had not been damaged or had been damaged only to that extent would have involved at least two days of proof, which would cost a lot of money.

Rona Mackay: That is interesting.

The Convener: We will come back to Rona Mackay in a minute, but first John Finnie has some questions on the Derbyshire principle.

John Finnie (Highlands and Islands) (Green): Section 2 of the bill would create a statutory version of the principle that, in general terms, public authorities are not able to sue for defamation. I put the question first to Professor Blackie and then to Mr Deane. Professor Blackie raised the issue in evidence and suggested a different approach and, helpfully, offered a particular form of words. Can you speak about that part of your evidence?

Professor Blackie: The Derbyshire principle is a good one. Professor Reid and I do not object to it. However, it is important to understand what underpins it. What underpins the Derbyshire principle is its being appropriate that political debate takes place, and not the use of the courts. In Derbyshire County Council v Times, it was found to be appropriate that when someone disagrees with the council's decisions or behaviour as an institution, that is for politics, that politics should be unfettered in argument and that there should not, therefore, be defamation action.

The question is then about which public authorities should be able to rely on that. The guiding question should always be to ask where should things always be left to politics. That is what I have attempted to address in our written submission. As it currently stands, the relevant section is extremely difficult to read and results in several things being potentially unclear. Those boundaries matter.

In asking the question, I go on to deal with several classic issues, including state schools—in England, the law on that is unclear—universities, charities, public utilities and businesses that are owned by public authorities. We are trying to give clarity. It is not satisfactory to leave clarity to ministers doing things by regulations, which—with the best will in the world—could result in an enormous list without the principle behind it being clear. I hope that that is helpful.

John Finnie: Thank you, it is indeed helpful.

Mr Deane, you also allude to problems with drafting, particularly in relation to section 2(5) and the issue of personal capacity. Can you speak about that, please?

Campbell Deane: I think that everyone understands the general Derbyshire principle. It is something that we are taught at the outset in respect of giving advice about defamation. My concern is that we are trying to legislate ourselves into difficulty. More than anything else, there is probably a need to refine the drafting. Section 2(5), for example, tries to separate the public from the private. I struggle with the language in that section, because I cannot fathom where it goes.

I understand the purpose of what is trying to be achieved in the drafting, but the problem is where we draw the line when the public veers into the private or the private veers into the public. If we are acting in relation to a politician who does something in his private life that affects his political position, is that personal capacity or political capacity?

John Finnie: I am sorry to interrupt, but do you believe that this is clouding something that is clear at the moment?

Campbell Deane: I do not know how clear it is at the moment in that I am not aware of any litigation in recent times where the Derbyshire principle has come up so that we could say that we do not know where we are with it. The principle itself is very straightforward. The difficulty arises when we consider private companies that are part of public bodies or the line between personal capacity and private capacity. There are probably two solutions: either we leave it alone, because people understand the general premise, or we refine the drafting so that it is very clear what it is trying to achieve.

John Finnie: Thank you.

Mr Brookmyre, I note that you have said on more than one occasion that you are not a lawyer, but would you comment in general terms on the

principle of public authorities not being able to sue?

I have a further question, for which I will go back to the other two gentlemen. Scottish PEN proposed that only companies with fewer than 10 employees should be able to sue for defamation—the so-called Australian model. Do you have views on that?

Christopher Brookmyre: As a writer of fiction, I would always reserve the freedom to give my impression of how an institution, authority or company is conducting itself. Within the realm of fiction, a writer will sometimes create a parody or grotesque exaggeration of that, because it is sometimes necessary to blow up unpalatable aspects in order to draw attention to them. Necessarily, you are going to create a depiction that is particularly unflattering if you are drawing attention to something that you think is wrong.

11:00

John Finnie: Could that apply to a public authority as well?

Christopher Brookmyre: As a layperson, I do not see why a public authority should be able to have recourse to defamation law to remedy that. To me, it goes back to the principle of any kind of body being allowed to be treated as an individual—much wrong has come of that principle. It is slightly cowardly to be able to say, "We as an organisation are being defamed by your depiction." Individuals should be accountable for their behaviour, and accountability for corporate behaviour should be on the basis of individuals' collective behaviour.

My instinct, admittedly from a position of legal ignorance, is to be uncomfortable with the idea of a local authority or public body having recourse to defamation proceedings as a means of deflecting criticism.

John Finnie: Professor Blackie, do you have a view on the suggestion that action should be open only to organisations with fewer than 10 employees, which is the so-called Australian model?

Professor Blackie: I think that that model is inappropriate. First, that is akin to using a sledgehammer to crack a nut that does not exist in Scotland. The background is the famous case where McDonald's in England pursued a couple of people who ran a campaign against it. However, 10 employees is not a big, nor even a medium-sized, business in Scottish terms. The Scottish economy has an enormous number of businesses that are of that kind of size.

There is a control on business defamation, which is that businesses have to prove financial loss at least in the broad sense, not specifically how much money has been lost. A business is not like an individual, so the Australian model is inappropriate for the Scottish context. The Scottish Law Commission did not raise that in its work and it has not been researched. We would need—

John Finnie: We appear to have lost Professor Blackie again. Could Mr Deane comment on the Australian model?

Campbell Deane: I share a similar view to Professor Blackie. He picked up on a point before his connection was lost that I will make, which is that it is not easy to establish loss as a corporate body. I was involved in a case about five or six years ago at the Court of Session when it was spectacularly difficult to show any loss whatsoever, despite the company going through its accounts and bringing in auditors. That is the level of detail that a company needs to make a case.

The recent case involving Andy Wightman MSP was raised by the Wildcat Haven community interest company. One of the many reasons why it failed was that it could not prove any corporate loss, as that is not easy to do. Corporations do not have feelings as individuals do, so corporate loss is the only thing that they can sue for.

The Convener: I have a follow-up question about the scope of the Derbyshire principle and the way in which the principle is legislated for in section 2. Professor Blackie said that the principle that underpins the Derbyshire rule is to insulate the political and democratic process from any threat of a defamation action being raised by somebody who is elected. Does Mr Deane agree with that, or is the principle to protect the provision of public services more generally, irrespective of who provides them, from the law of defamation? What you think that the Derbyshire rule is trying to achieve will determine how you think section 2 might be amended and improved.

Campbell Deane: I think that it is the former. The principle is to stop people doing that in the political sphere. I suspect that this is not a difficulty now, but the difficulty arises when an individual who is part of an organisation is funded by the organisation to raise defamation proceedings. If the chief executive of a local authority is defamed by a paper or a third party, and the local authority says to the chief executive, "We'll fund this for you; don't worry," that becomes an abuse of process, because the individual is having his funding paid to get round the Derbyshire principle.

The Convener: That is very helpful.

Rona Mackay: I would like to ask about secondary publishing and the wider issue of online behaviour. As a former sub-editor, I was slightly alarmed that Mr Deane suggested in his

submission that a sub-editor could be liable for content. I am a bit confused by all of this. Would the publisher, the author or the editor be liable? Could you clear that up?

Campbell Deane: I may be going a little bit too far in my submission. If an editor tinkers with a statement, for example, as sub-editors are known to do occasionally, they have created the statement and become, for all intents and purposes, an author or an editor in that situation, and they therefore—[*Inaudible*.] I suspect that that is the law as it stands. When I say that what I wrote may be overstated, that is what I mean. There is an argument that, if you wanted to go against an author, an editor or a sub-editor who had changed a piece of copy, you probably could, but I suspect that it is quite unlikely that that would happen. You would have to be a rather vindictive individual to go against those people as opposed to going against the title.

Rona Mackay: Does Professor Blackie have an opinion on that?

Professor Blackie: I agree with Mr Deane that the law is as he says it. There will always be a problem with secondary publishing. If we take the simple example—not the one that we are talking about—of somebody putting something online and somebody else picking it up and putting in online again, that is the background to the question of secondary publishing. Elspeth Reid and I did not make any comments on the issue, because I have not studied that area of law in very great depth. It is not just about the media, so fine tuning might present the kind of difficulty that we are seeing. By the way, it seems most unlikely that a sub-editor would be sued as an individual.

Rona Mackay: Out of interest, Mr Deane, do you target any secondary publishers when you act for pursuers? Have you had to do that?

Campbell Deane: No, not as a general rule. However, particularly in situations in which clients make contact because something has been published online and there has been a ripple effect whereby other people have picked it up and it has gone down the chain, the sad reality is that the first question that one has to ask the client is which of those people has any money. That is the economic reality of litigation.

If the client wants to litigate and fund a defamation action, that is great—let us go ahead and do that—but they will get a Pyrrhic victory if, at the end of the day, there is no money to pay for costs. I can see where it is in their interests to cherry-pick down the line and I can, therefore, see why that particular piece of drafting is helpful. It stops that taking place.

Rona Mackay: That is interesting.

Mr Brookmyre, should bookshops—real or virtual—be protected from liability for defamation for reproducing content?

Christopher Brookmyre: Absolutely. In a world in which the likes of Facebook and Twitter seem to be exempt from responsibility for what is published on their platforms, and with the sheer volume involved—we probably all saw many pieces a couple of weeks ago about how 600 books were published on one day—the idea that bookshops should have responsibility for having even sufficient knowledge of what they are putting out for sale is completely impractical. It is absurd to suggest that there should be a responsibility on bookshops.

Rona Mackay: Thank you. I will widen out into online behaviour and ask all of you, starting with Professor Blackie, whether you think that the bill goes far enough in its emphasis on online content. Should more emphasis have been placed on that aspect?

Professor Blackie: I think that the bill goes far enough. The difficulty in legislating in this field is that the online world is moving all the time. The danger would be that, if you do anything more detailed just now, even in a year's time—certainly in 10 years—it will be dealing with a world that is different. It is wise to be cautious about specific regulations online because of technological development that will come.

Campbell Deane: I whole-heartedly agree with that. We are looking at something that is evolving, and has evolved, quickly over a very short period of time. Different platforms are arising, including different video platforms—all sorts of types of social media—so it is difficult to do otherwise.

Rona Mackay: That is great. Thank you.

The Convener: James Kelly has been waiting patiently to ask questions about the defences that are provided for in the bill.

James Kelly (Glasgow) (Lab): Good morning. I have a question for Mr Deane. In recent weeks, different opinions have been offered by different panels on the offer to make amends procedure, which has been changed in the bill. Some witnesses maintained that it still allows an offer to make amends, but others were of the view that it potentially undermines that process. What is your view?

Campbell Deane: My understanding is that the offer to make amends procedure is still in play. However, as the bill is drafted, I do not think that it automatically provides the defender with the opportunity to receive a discount for holding their hands up as early as they can, prior to defences being lodged, so that the level of compensation

that they ultimately have to pay is reduced. That is definitely something to be encouraged.

Even at the outset, with the initial drafts and round-table sessions at the commission, it was accepted that being able to end litigation as quickly as possible is for the benefit not only of the defender but of the pursuer, because the pursuer understands there and then that he or she has won, and all they are looking for is the level of compensation that they are likely to be paid.

11:15

The wording of the relevant section potentially allows for the court to take that into account, but under the Defamation Act 1996 there was specific reference to the question of discount. The fact that we are having a discussion about whether a discount is available points to the fact that the drafting needs some clarity—that it either allows for a discount or does not.

James Kelly: Your position is that the wording is currently vague, that there seems to be broad agreement that a discount should be available as part of the process, and that what is really needed is an amendment to the bill to make the wording clearer and ensure that the discount principle that is currently enshrined in the process is maintained.

Campbell Deane: Section 2 of the 1996 act was utilised by the media. The answer to your question is yes; it is one of the sections of the act that media and organisations use. If it is being successful, why complicate matters by not using that wording to allow for the same discount? I would thoroughly recommend that the wording—or a part of it—that is involved in the discount is reincorporated in the bill.

James Kelly: Thanks a lot; that is very clear.

The Convener: Liam Kerr wants to ask some questions about the part of the bill on malicious publication, which is an important part of the bill that we have not yet touched on.

Liam Kerr (North East Scotland) (Con): Good morning. I will direct my first question on part 2 of the bill, on malicious publication, to Professor Blackie; Mr Deane might wish to follow up on Professor Blackie's answer.

Professor Blackie, in your submission, you raised issues around the threshold for malice. Under the provisions on malicious publication, the pursuer must show that a statement is "false and malicious". However, that is defined further: the statement is categorised as "malicious" if, inter alia, the pursuer shows that the defender was

"indifferent as to the truth of the imputation".

Does that suggest that a pursuer could win in a case of malicious publication without actually showing what we would understand to be malice? If that is right, does that not represent a significant lowering of the threshold?

Professor Blackie: There is a great deal of difficulty in dealing with and using the word "malice" anywhere in the law of civil liability. You have to decide what it is that you really want to get at here. We must remember that part 2 of the bill is not about defamation, so the question is not answered simply by saying "malice".

There are many areas in the law of delict in which "malice" is used, and it is used in different senses. An example that has been topical in the media in the past week is the Rangers Football Club case—the malicious prosecution. In that context, the issue was to do with motive, but it was qualified by the term "without probable cause". Therefore, the question is, what are you trying to hit here with the term "malice"? There is a danger of the threshold being too low and therefore being overinclusive.

Under current law, malice is traditionally related to motivation. Knowledge of falsity or recklessness as to veracity are indicators of that motivation but, typically, they go along with other factors, whereas the bill makes those indicators simply a threshold level to be crossed where only one of those alternatives is present. That seems to us to be problematic because it does not get at what you are really trying to do here.

It is important to understand that most malicious falsehood cases are really business-to-business cases, so they fall into an area where civil law polices business behaviour. There are other things, such as inducing breach of contract—if somebody is in a business relationship with another in a contract and you try to get them to breach that contract—and conspiracy to do down a business. In practice, we are mostly in that world here. Of course, intention can never be the liability for business-to-business delict, because we have market competition, so the question is, what are we trying to do here?

We do not want to penalise negligence, so if you have something that says that you knew that the statement was false or you were indifferent to the truth, or that it was motivated by a malicious intention to cause financial loss—[*Inaudible*.] There is a danger of saying that the person was negligent about whether they were going to cause business loss, and it is difficult to make it a minimum threshold in deference to police that boundary with falling into negligence.

In our paper, we have suggested that it would be better to follow the American formulation in the US Restatement (Second) of Torts. I should explain the background to that. In the United States, where there are 50-odd jurisdictions as

well as federal jurisdiction, it is an on-going programme, always, to seek to restate, from that enormous volume of differing material, a reasonable rule. Section 623A in the Restatement (Second) of Torts gives the elements for proof of liability for publication of injurious falsehood. That is what we are talking about here under a different heading.

Section 623A says:

"One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if"

and then it gives two conditions. The first starts with "he intends"—sorry about the "he", but that covers he, she or it:

"he intends for publication of the statement to result in harm to interests of the other having a pecuniary value ... or should recognize that it is likely to do so, and ... he knows that the statement is false or acts in reckless disregard of its truth or falsity."

There is no reference there to indifference, and indifference is certainly not the threshold. If we followed that formulation, the bill that we are considering would be properly aligned with the other bits of delict that arise in business-to-business cases, as well as in competition law.

The bill says that only one of those will do—the word that it uses is "either". It says that either the person knew that the statement was false or was indifferent to whether it was true, or that the publication was motivated by a malicious intention. That is the difficulty—it is too low a threshold.

Liam Kerr: I am very grateful for that extremely comprehensive and clear answer. Instead of asking Mr Deane to respond, I will move on to the next question, although if there is a point that he wants to pick up, perhaps he can do so in response to the next question.

My next question is directed at Mr Deane, although, obviously, the two other gentlemen can come in if they wish.

Based on what you have just heard, Mr Deane, there is no serious harm test in the area of malicious publication. It might be argued that that is because business has a greater burden in that it must show that words cause loss, are false or are made maliciously. If I am right on that, does it comfort you that serious harm as a test is not necessary here—perhaps because, as you said earlier, financial loss is difficult to show—or is that higher burden that I just suggested exists actually a chimera, in so far as the threshold for showing malice, as described by Professor Blackie, is particularly low?

Campbell Deane: It will probably come as no surprise to you that, from my perspective, I think that the solution to the absence of a reference to serious harm in relation to business dealings is to lose the reference to serious harm in the earlier part of the legislation. In a nutshell, that is how I would look at it.

There is a different position. I am sure that Professor Blackie will be much better aligned than I am to consider this possibility in relation to the particular issue at hand, but it could be that people would sue almost certainly on the basis of the lower threshold in the part of the bill on malicious publication, instead of going to the part on defamation, to get round the serious harm issue.

As long as you fit into the correct category, and as long as the circumstances relating to whether you could raise litigation in that type of case fit in with the malicious statements provision in part 2 of the bill, under which you do not have to show serious harm, why would you go for the difficulty of raising proceedings that would require you to show serious harm? It just would not work.

Liam Kerr: That is a very important point, and I will put something similar to Mr Brookmyre shortly.

Professor Blackie, Mr Deane has made an interesting point about serious harm. Do you take a different view or do you concur with Mr Deane?

Professor Blackie: I think that there is a danger of exactly what Mr Deane has said occurring. There was a case in England this year where that appears to have happened.

However, I think that that danger would be much less if the definition of malice, as I outlined, was different. The danger is much higher with the term "was indifferent as to", which is in the bill as a minimum threshold. In other words, the minimum threshold is too low for this.

Liam Kerr: That was very useful—I am grateful.

I think that Mr Brookmyre, to whom I wish to direct my final question, might be away temporarily. Is that correct, convener?

The Convener: Indeed, Liam. We must move on to other members' questions. If Mr Brookmyre reappears, we will come back to you if we have time.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I want to focus on section 30 of the bill, which would allow a court to order a third party—such as a website—to remove contentious material. That could happen before a court reached a final decision on whether the material was defamatory. Mr Deane, do you think that that will benefit pursuers?

11:30

Campbell Deane: We are in the terrain of defamation proceedings, so by its very nature—as

I read section 30—it would not be a question of writing to the court and putting in an application. The case would probably need to be in litigation, with costs being incurred because of that.

I apologise—I am just having a quick look at section 30.

The court having the power to remove material will, of course, assist any individual whose main or sole intent in raising proceedings is to have that article removed so that it is no longer online and who is therefore not looking for some form of financial recompense as a result of the defamatory statement.

However, they will have had to go to the extent of raising proceedings to get to that place. You cannot raise proceedings on the basis of a request to remove something; they would have to be raised on the basis that the material is defamatory and is worth X, and that it should therefore be removed. I suppose that, ultimately, it is a negotiating tactic.

Fulton MacGregor: Professor Blackie, do you think that it is proportionate for a court to make such an order before a case has been decided?

Professor Blackie: I have not addressed that particular issue in my thinking before today. I think that it is reasonable to have an opportunity for an interim order during the course of litigation. That can be seen in ordinary personal injury cases, in which there can be an interim order for damages.

What is proposed does not strike me as being particularly onerous on defenders. The case would have to be in court; someone could not get such an order before getting to court. Most cases do not go to court. I think that the provision is sufficiently proportionate, because judges would not make such an order lightly.

Fulton MacGregor: I see that Mr Brookmyre is back. I wonder how he feels about section 30 of the bill; he might have been away when it was discussed. Section 30 allows a court to order a third party to remove contentious material. How do you feel about that? How do you think that it would work in the publishing industry and in your line of work?

Christopher Brookmyre: It would certainly cause a great deal of conflict if a writer was told that an editor was removing a section of their book for that reason; there would be a great deal of tension between writers and editors.

However, I am not qualified to offer an opinion on how it would affect the wider publishing industry.

Shona Robison (Dundee City East) (SNP): Good morning. My first question is about time limits. The bill would reduce the timescale for raising court action for defamation from three years to one. Do Mr Brookmyre and Professor Blackie agree with that change?

Christopher Brookmyre: On time limits, I am inclined to think that, if someone says that something that was published had a demonstrable negative impact on them but it has taken them three years to notice it, it would be hard to demonstrate that there was any particular harm to them. Therefore, I can understand that there should be a window that closes. However, once again, that is not my area of expertise.

Shona Robison: What is your view, Professor Blackie?

The Convener: I think that we might have lost Professor Blackie, so can we turn to Campbell Deane?

Shona Robison: Yes. In addition to saying whether you agree with the change to the time limit, can you tell us whether you have dealt with pursuers who would not have been able to raise proceedings if they had faced a one-year time limit?

Campbell Deane: In relation to whether I am in favour of or against the change in the time limit, I am relatively ambivalent, unfortunately.

Christopher Brookmyre made a point about the length of time that it takes someone to raise proceedings. In those circumstances, the question that is posed in the court is, “Why has it taken you three years to do this, particularly if you want to preserve your reputation?” That must play against a pursuer every time.

As far as journalism and the media are concerned, keeping notebooks, for example, for three years as opposed to one year is neither here nor there. They have to keep notebooks for actions of privacy for a period of up to five years, so the proposed change will not make any difference to the newspaper industry.

As a defender, it is incredibly hard when you reach the three-year threshold to put together all the paperwork that you would have done if the individual concerned had raised proceedings in six or eight weeks or six months. Witnesses may be dead. The journalist may well no longer be in that organisation—they may have moved on. They may no longer have their notebooks or they may be dead. You must make a defence to the action. That is hard, and I can see why, on that basis, there is an incentive to move the time limit from three years to one year.

You asked about raising proceedings on behalf of an individual before the end of the three-year period. I am sometimes contacted by people who are on the cusp of the triennium who pose the question, “Can I do this?” Those are not easy

cases to take on, because you have to try to comply with the triennium. However, the difficulty is that a person will always face the question of why it has taken them so long to bring a case.

I have been in the situation of acting for a client in Scotland who was time barred in England—they had missed the one-year period in England. There is a reported decision called Kennedy v Aldington and others. Mr Kennedy raised proceedings in Scotland only for his Scottish losses. Mr Kennedy was in a unique position, because he had a substantial connection with Scotland. He was not forum shopping—he was able to explain to the court why he should raise the proceedings in Scotland. I have not had that situation in reverse.

Shona Robison: You might have heard that one of the arguments against the reduction in the time limit that has been raised in evidence to us concerns the cumulative effect if the matter has been going on over a period and it is only at a certain stage that someone has had enough—when the straw broke the camel's back, as it were. If the time limit is reduced to only one year, that might remove a lot of the evidence. Do you have any response to that?

Campbell Deane: I can see some merits in that position. I can see the drip-drip effect finally making someone crack and say, "That's it—I want to raise proceedings based on what has taken place."

If someone does that, and the material about them appears online, the time limit does not really matter, because you can rely on the continual online publication to show to the court that it has been continuously published for that period. It is a different matter if a national newspaper publishes a story and three years later—or two years and 364 days later—someone says, "I want to sue on that," and the story has never been followed up.

However, if it is a relentless campaign against someone who has finally had enough, even if the first attack is outwith the three-year period, you can still rely on the other material to form the basis for your proscription.

Shona Robison: Scottish PEN's proposals for a new court action to provide protection against unjustified threats of defamation have gained a lot of interest. Would that be useful for defenders in practice?

Campbell Deane: Is the idea that, if you write a pre-action letter, you can follow that up?

Shona Robison: The proposal is a new court action to provide protection from unjustified threats of defamation. Basically, you could make a counterclaim against someone that an action is an unjustified threat of defamation. Do you have any views on how that would work in practice?

Campbell Deane: I have a smile on my face. Quite frankly, that is bonkers. I do not see how that would be possible to facilitate. You would have to say that the person who instructed you to write that letter specifically lied to you in respect of the allegation that you sent out in your letter. If someone says, "I am accusing you of X, Y and Z," the other person comes to you and you write a letter that says, "My client has not done X, Y and Z," you would have to prove that they had entered into a campaign to deceive purely to stop you publishing.

By its very nature, responsible journalism involves you as the publisher in that situation looking at it and saying, "That's just nonsense. We've got more than enough proof to prove that. They are at it. Publish." By all means, when you publish, reference the fact that they tried to stop you publishing and cause them more damage as a result of that. I cannot see how a scheme could work that would restrict an individual's right to engage in pre-action correspondence on the basis that they could be countersued for so doing.

Shona Robison: Thank you.

The Convener: Liam Kerr wants to come back in—it will have to be a very quick supplementary. I am sorry, but after that we will have to move on to our next item of business.

Liam Kerr: I want to take Mr Deane back to the limitation period issue. The Law Society of Scotland considers that one year is too short a period, because it can take time to discover a defamatory statement. Am I right in thinking that, at the moment, the limitation period has a date of knowledge, so, akin to a personal injury claim, the limitation period starts to run—at least in theory—from the date on which a person finds out about the defamatory statement. If I am right about that, the practical impact of section 32(6) of the bill is that the limitation period starts to run on the date of publication—there is no date of knowledge that can impact that. Is that correct?

Campbell Deane: Did you say section 32(6)?

Liam Kerr: It is section 32(6)(b)(iv), as it amends the Prescription and Limitation (Scotland) Act 1973.

Campbell Deane: I am sorry—you have caught me on the hop.

Liam Kerr: I am sorry. Perhaps I will pose the question later, as I am conscious of the time.

Campbell Deane: [*Inaudible*.]—to the committee.

The Convener: I say to all the witnesses that, if additional issues arise from this morning's oral questions that you would like to help the

committee with, please feel free to write to us with follow-up information.

You have all been extremely generous with your time. I am sorry that we have had one or two technical difficulties along the way. All three of you have raised with the committee points that we will certainly want to consider as we continue to give the bill attention.

At this point, I am afraid that we will have to end this section of the proceedings and move on.

We need to make a big changeover of witnesses, and we are still waiting for the Cabinet Secretary for Justice, whose company we need for our next item of business, so we will have a relatively long suspension of about 10 minutes and will reconvene at 11:54.

11:45

Meeting suspended.

11:54

On resuming—

Subordinate Legislation

International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2020 [Draft]

The Convener: The committee will now consider six statutory instruments: three affirmative Scottish statutory instruments, one negative SSI and two United Kingdom SIs. For the three affirmative SSIs, we are joined by the Cabinet Secretary for Justice, Humza Yousaf, who is accompanied by various officials from the Scottish Government to support the committee in its consideration of the instruments.

We turn to the first of the three affirmative instruments that the committee must consider. I welcome the cabinet secretary and his officials and I invite him to make a short opening statement.

The Cabinet Secretary for Justice (Humza Yousaf): Good morning, convener. Since this is the first time that I have appeared in front of the committee with you as its convener, I put on record my congratulations and welcome you to your role. I am sure that this will be the first of many exchanges, which I look forward to.

The Convener: Thank you very much.

Humza Yousaf: The draft International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2020 confers various legal immunities and privileges on the Square Kilometre Array observatory.

In March 2014, the UK Government committed to investing £100 million in the construction of the observatory, which is around 16 per cent of the total construction cost. That was agreed as part of the process to bring the headquarters to the UK.

A treaty-level agreement—the SKA observatory convention—was signed by seven countries in March 2019. The convention provides the basis for the creation of a new international organisation, the SKA observatory. So far, the Netherlands, Italy and South Africa have ratified the convention. The convention will come into force once all three host countries—namely, the UK, South Africa and Australia—have also ratified it.

The overarching reason for the order is to help the UK fulfil its international obligations, and the order before the committee fulfils those obligations in so far as they relate to devolved matters in Scotland. Equivalent provisions in respect of reserved matters and devolved matters in the rest of the UK are being conferred by legislation at

Westminster. However, to the extent that the privileges and immunities relate to devolved matters in Scotland, conferral rightly falls to the Scottish Parliament. When their respective parliamentary passage is complete, both orders will go before the Privy Council.

Although the order is limited to the issue of privileges and immunities, I will quickly say a little about the background to the observatory.

The project is an international effort to build the world's largest radio telescope. Around 100 organisations across 20 countries are participating in its design and development. World-leading scientists and engineers are working on a system that will require two supercomputers that are each more powerful than the current best supercomputer in the world.

The observatory's unprecedented sensitivity will give astronomers insight into the formation and evolution of the first stars and galaxies after the big bang, the role of cosmic magnetism—I, too, had to Google that—the nature of gravity and, possibly, even life beyond earth.

To enable the observatory to fulfil its purposes and carry out its functions, certain privileges and immunities must apply. That is standard practice for international organisations, as it enables them to function effectively across multiple territories. Privileges and immunities are granted primarily on the basis of—I emphasise this—strict functional need. Their conferral is, in effect, a condition of membership and is necessary to enable the observatory to function as an international organisation in the UK.

The specific purpose of the order is, therefore, to provide immunities and privileges to the observatory, members of staff and designated experts—again, I emphasise this—in the course of official activities in Scotland. It reflects the equivalent Westminster order and the terms of the protocol on privileges and immunities, which has been agreed at international level.

On the nature of the immunities involved, the order provides that the director-general, members of staff and experts shall have immunity from suit and legal processes in respect of things done or omitted to be done—again, I emphasise this—in the course of the performance of official duties.

12:00

It is important to emphasise that the immunity is not for officials' personal benefit and it does not provide carte blanche for officials to ignore the laws and regulations of the host country. The privileges and immunities that are conferred by the draft order are no greater in extent than those that are required by the convention to enable the observatory and specified individuals connected with it to function effectively.

Immunity can be waived by the observatory council in the case of the director-general, and by the director-general in the case of a member of staff or a designated expert. Representatives of a member of the observatory will also be afforded privileges and immunity from legal process while performing their official capacity. That immunity can be waived by the Government of that member.

That immunity does not apply to a person who is a British citizen or to any person who, at the time of taking up their function, is a permanent resident of the United Kingdom.

In the particular case of motor vehicle incidents, the observatory has no civil or criminal immunity where the vehicle belongs to or is operated on behalf of the observatory.

Immunities and privileges are, therefore, limited in that they apply only to official actions and can be waived. They do not give an individual freedom to commit criminal activity. An assault, for example, would be prosecuted in the normal way.

The order will help the UK fulfil its international obligations in respect of Scotland. As a good global citizen, it is the duty of the Scottish Government to bring it forward to the Parliament.

I hope that that is helpful. I am more than happy to take questions.

The Convener: That is very helpful, indeed.

So far, one member has indicated that he wishes to ask a question. I note that all questions will be directed to you, cabinet secretary, but if you want to bring in your officials at any point, please feel free to do so if you think that that would be helpful to you or the committee.

John Finnie: Cabinet secretary, if the order is approved, how many individuals in Scotland will benefit from the international immunities and privileges, which include not paying tax and immunity from civil and criminal law? What is the total number?

Humza Yousaf: Initially, there are expected to be 100 people working in the UK who would be offered those privileges and immunities and, once up to capacity, there could potentially be 200 such people. At this stage, I cannot tell you the number that would be based in Scotland—those discussions will be on-going. As I said, in the UK, there are expected to be 100 people, initially, and, once up to full capacity, around 200 people.

John Finnie: I am sorry if I did not make my question clear, but I meant the total number of individuals in Scotland who will not have to pay taxes and will be given immunity from civil and criminal law as a result of this legislation. As you

know, I have been raising such issues from the period when you were a young man and a member on the Justice Committee with me.

Humza Yousaf: Forgive me, but I do not have that number to hand. You will know that there is a list of dozens of organisations that are granted privileges and immunities, including the International Maritime Organization, the European Police College, the European Organisation of Astronomical Research in the Southern Hemisphere and the European Bank for Reconstruction and Development.

Forgive me for not having the number of people in Scotland that the order will affect, but I can ask my officials to see whether we can get an updated number for you and we can write to the committee with that detail.

John Finnie: I have a further question; forgive me if the answer is contained in the information on the order. Would the immunity extend to premises being inviolate, which I understand is the term, or would Police Scotland, for instance, be able to crave a warrant in respect of premises that are owned and occupied or rented by this organisation?

Humza Yousaf: It is a good question. Through the order, the observatory shall not allow the premises to be used for any unlawful activity, and it shall not permit the premises to become a refuge from justice for persons who are avoiding arrest or legal processes under the law of the United Kingdom or against whom an order of extradition or deportation has been issued by the appropriate authorities. Therefore, if police officers had reason or cause to enter the premises because they suspected illegal activity, there would be nothing preventing them from doing so.

John Finnie: I understood that to be the position for the previous SIs that have been brought to the committee. Is this order different?

Humza Yousaf: Forgive me, I would have to double-check whether that was the case in previous SIs, but under this order, the observatory would not allow the use of its premises for any unlawful activity.

Annabelle Ewing: I am sorry—I lost connection and missed the first part of the exchanges. I have participated in such exchanges with Mr Finnie however, so I hope that I have got the gist. Can the cabinet secretary clarify whether the proposition is ultimately based on the obligations that flow from international law?

We are required to fulfil our international legal obligations, at least in normal circumstances—not to get too political about yesterday's events in the House of Commons—and much interesting legal authority exists on the rationale for the Convention on the Privileges and Immunities of the United Nations, from which all this stems. Is my understanding correct—that the SSI before us in fact just reflects that position?

Humza Yousaf: Yes is the short answer. The immunity and privileges order has previously been conferred on a number of international organisations—some of which are not-for-profit—and a number of the provisions in the order also touch on the Vienna Convention on Diplomatic Relations, and so on.

That is a normal process, which we, as a good global citizen, have to fulfil, thereby also assisting the UK Government where the observatory's headquarters will be based. The UK Government has to pass the order to be able to ratify the convention. It can do that in Westminster for reserved matters, but the responsibility falls on us for devolved matters. The short answer is yes—Ms Ewing's interpretation is spot on.

The Convener: No other member has indicated that they wish to question the cabinet secretary about the order, so we move to its formal consideration. The Delegated Powers and Law Reform Committee has considered and reported on the instrument and had no comments to make on it. Motion S5M-22416 can now be moved, with an opportunity for formal debate if necessary.

Motion moved,

That the Justice Committee recommends that the International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2020 [draft] be approved.—[*Humza Yousaf*]

John Finnie: I thank the cabinet secretary and Ms Ewing for their comments. This is indeed "normal process", because a lot of things that used to be normal are no longer so. In relation to this order, members will note that neither consultation nor impact assessments have taken place. I have said many times when those issues have been brought before us—the number must be in the thousands—that the committee should be concerned with the equitable application of Scots law, not with its disapplication for any individual or organisation. Once again, I oppose this format, this approach and this particular statutory instrument.

Humza Yousaf: I am happy to note Mr Finnie's long-standing opposition to those orders and understand the principle on which he does so.

Although I respect him for taking that consistent approach, I state that this is an important order, not just to allow for the exploration of space, the universe and galaxies, but also because, as a good global citizen, we should confer on others the immunities and privileges that we would expect others to confer on us in their jurisdictions.

I am happy to leave it at that, and I ask members to support the order.

The Convener: The question is, that motion S5M-22416 be agreed to. Are we agreed?

I see that we are not all agreed. Therefore, there will be a division. We will use the chat function on BlueJeans to vote.

For

Adam Tomkins (Glasgow) (Con)
Shona Robison (Dundee City East) (SNP)
Rona Mackay (Strathkelvin and Bearsden) (SNP)
Annabelle Ewing (Cowdenbeath) (SNP)
James Kelly (Glasgow) (Lab)
Liam Kerr (North East Scotland) (Con)
Fulton MacGregor (Coatbridge and Chryston) (SNP)

Against

John Finnie (Highlands and Islands) (Green)

The Convener: The result of the division is: For 7, Against 1, Abstentions 0.

Motion agreed to,

That the Justice Committee recommends that the International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2020 [draft] be approved.

The Convener: I invite the committee to delegate to me the publication of a short factual report on our deliberations on this statutory instrument, and on all the other Scottish statutory instruments that we will consider today. I assure Mr Finnie that his dissent will be recorded. Do we agree to do that?

Members *indicated agreement.*

Management of Offenders (Scotland) Act 2019 (Consequential Amendments) Regulations 2020 [Draft]

The Convener: Our next item of business is consideration of a second affirmative instrument. Humza Yousaf and his officials remain with us for this item. I invite the cabinet secretary to make a short opening statement.

Humza Yousaf: I am sorry—there might be a problem with my connection. Would you like me to speak about the Management of Offenders (Scotland) Act 2019 regulations?

The Convener: Yes.

Humza Yousaf: I will be brief, and I am happy to take questions.

Part 2 of the 2019 act provided for reforms to the system of general disclosure of convictions under the Rehabilitation of Offenders Act 1974. Those provisions, which were supported by all parties through the parliamentary process, included changing some of the terminology that was used in the 1974 act. One of those changes in terminology was to change the term “rehabilitated person” to “protected person”.

Part II of schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 relates to disqualification from jury service as a result of certain criminal convictions. Currently, the 1980 act refers to “rehabilitated persons” for the purposes of the 1974 act rather than “protected persons”. That language needs to be changed to reflect the new terminology under the 1974 act when part 2 of the 2019 act is commenced, on 30 November.

In conclusion, the purpose of the regulations is a consequential change to amend part II of schedule 1 to the 1980 act so that it refers to “protected persons” rather than “rehabilitated persons” for the purposes of the 1974 act. That is simply to maintain consistency with the terminology of the 1974 act.

I am happy to answer any questions that the committee may have. Please forgive me for any connection issues that might have interrupted that presentation.

The Convener: We are hearing you loud and clear, cabinet secretary—well, I am, at least.

Thank you for your presentation. No member has indicated that they wish to ask a question, so we move straight to the formal consideration of the regulations. The Delegated Powers and Law Reform Committee has reported on the instrument and has made no comments. I ask the cabinet secretary to move motion S5M-22518.

Motion moved,

That the Justice Committee recommends that the Management of Offenders (Scotland) Act 2019 (Consequential Amendments) Regulations 2020 [draft] be approved.—[*Humza Yousaf*]

Motion agreed to.

Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2020 [Draft]

12:15

The Convener: Our next item of business is consideration of a third affirmative instrument. The cabinet secretary and his officials remain with us for this item. I invite the cabinet secretary to make a short statement on the instrument.

Humza Yousaf: Again, I will be relatively brief.

Earlier this year, the Parliament passed legislation that created the role of a Scottish biometrics commissioner who will have oversight of the acquisition, retention, use and destruction of biometric data such as fingerprints, DNA and facial images by Police Scotland, the Scottish Police

Authority and the Police Investigations and Review Commissioner.

I understand that the Parliament anticipates that the recruitment of the commissioner will be progressed over the coming months, with the successful candidate taking up the appointment early next year.

The order will add the Scottish biometrics commissioner to the list of public authorities specified in part 3 of schedule 19 to the Equality Act 2010, which are required to comply with the public sector equality duty under section 149 of that act. The order would, therefore, place a duty on the commissioner, when exercising their functions, to have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the 2010 act; to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Some examples of the commissioner's functions in which this duty is expected to apply are the framing of the content of a code of practice that the commissioner is required to prepare; the reviews undertaken by the commissioner on how biometric data is managed by bodies subject to their oversight; and the recommendations that the commissioner may choose to make.

I recognise the importance of ensuring that the commissioner exercises their functions with due regard to the equality duties, and I consider that this order offers the best approach to ensure that that happens.

I am happy to take questions.

The Convener: No member has indicated that they wish to ask a question about the order, so we move to its formal consideration.

The Delegated Powers and Law Reform Committee has considered and reported on the instrument and has made no comments. I ask the minister to move motion S5M-22573.

Motion moved,

That the Justice Committee recommends that the Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2020 [draft] be approved.—[*Humza Yousaf*]

Motion agreed to.

Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Amendment Rules 2020 (SSI 2020/246)

The Convener: Our next item of business is consideration of a negative instrument. I refer members to paper 4, which is a note by the clerk on the instrument.

No member is indicating that they have any comments to make. Are members content not to make any comments to Parliament on the instrument?

Members *indicated agreement.*

The Convener: That concludes our consideration of the Scottish statutory instruments.

European Union (Withdrawal) Act 2018

Law Enforcement and Security (Separation Issues etc) (EU Exit) Regulations 2020

European Institutions and Consular Protection (Amendment etc) (EU Exit) Regulations 2018 (SI 2018/1391)

12:20

The Convener: Agenda item 9 is consideration of two United Kingdom statutory instruments and the issue of legislative consent. I refer members to papers 5 and 6, which are notes by the clerk on the instruments.

Do members have any comments to make on the Law Enforcement and Security (Separation Issues etc) (EU Exit) Regulations 2020?

John Finnie: Over a period going right back to when the UK temporarily opted out of the Lisbon accord, the committee has had concerns about any deficiencies that might arise in relation to the collaborative approach that exists between Scotland's police and prosecution services and those of the European Union. I would be concerned if there were any deficiencies that have not been highlighted. Could the cabinet secretary comment on that?

Humza Yousaf: I am happy to do so. None has been raised with me. I will double-check with my colleagues, and I will get back to the member, via the committee, if they are aware of any.

John Finnie: Thank you. Given the previous work that the committee has done, it would be helpful to understand whether any gaps remain. I fear that some do.

The Convener: I underscore the fact that the cabinet secretary should respond to the whole committee on that point if there are any issues to raise.

I see that members have no further comments to make on that instrument.

Do members have any comments to make on the European Institutions and Consular Protection (Amendment etc) (EU Exit) Regulations 2018? No member is indicating that they have any comments to make on that instrument.

Do members agree that the Scottish Parliament should give its consent to the two UK instruments?

Members *indicated agreement.*

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

Members *indicated agreement.*

The Convener: That concludes the public part of our meeting. Our next meeting will be held a week today, on Tuesday 22 September, when we will meet in hybrid format, which means that, although the committee will be able to meet physically in the Scottish Parliament, members will be able to dial in remotely if they wish. At that meeting, we will complete our evidence taking for stage 1 of the Defamation and Malicious Publication (Scotland) Bill by hearing from the responsible minister, Ash Denham.

12:23

Meeting continued in private until 12:35.

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