OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 26 January 2021

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 26 January 2021

CONTENTS

JUSTICE COMMITTEE
3rd Meeting 2021, 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)
*Rhoda Grant (Highlands and Islands) (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 ATTENDED:

Ash Denham (Minister for Community Safety)
Andy Wightman (Lothian) (Ind)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Virtual Meeting

Scottish Parliament

Justice Committee

Tuesday 26 January 2021

[The Convener opened the meeting at 10:00]

Defamation and Malicious Publication (Scotland) Bill: Stage 2

The Convener (Adam Tomkins): Good morning, everyone, and welcome to the third meeting of the Justice Committee in 2021. We have received no apologies this morning. We are joined by Andy Wightman and the Minister for Community Safety, Ash Denham. I welcome you both to our meeting.

Our first agenda item is stage 2 consideration of the Defamation and Malicious Publication (Scotland) Bill. Members should have with them a copy of the corrected marshalled list and the corrected groupings for debate.

This is a fully virtual meeting, and we will use the chat function on BlueJeans as the means of voting electronically today. When we vote, I will call for members to type Y in the chat box to record votes for yes; I will do the same in turn for no, for which members will type N, and for abstain, which members will record by typing A. The clerks will collate the results, and I will then have to read not only the results, but the names of who voted which way, so I will identify each member by their vote. If I make a mistake, please alert me straight away through the chat box—by typing R, "mistake" or "idiot", for instance—and I will then be able to correct the mistake before we move on. As I understand it, once we have moved on, we will not be able to go back and correct earlier errors—no pressure, then. I will take things as slowly as I can, so that we all have time to manage everything properly.

As always, I ask members and the minister to keep their contributions as brief as they can, and always to use the chat function on BlueJeans, typing R in the usual way to catch my attention if they want to speak.

I remind the minister's officials that they cannot speak during this stage, although they can communicate with the minister directly.

Finally, if we lose the connection to any member or the minister at any point, I will suspend the meeting so that we can try and get them back into the meeting. If we cannot do that after a reasonable time, the deputy convener and I will have to decide how to proceed.

If there are any questions, please ask them now. If not, we will make a start.

Section 1—Actionability of defamatory statements

The Convener: Amendment 29, in the name of Andy Wightman, is grouped with amendments 30 to 32 and 36. If amendment 29 is agreed to, I cannot call amendments 30 to 32, due to pre-emption.

Andy Wightman (Lothian) (Ind): In policy terms, all these amendments relate to section 1.

In the committee's stage 1 report, members recommended

"that the Scottish Government reviews the evidence we have heard and sets out a clear statement on why the serious harm test is still required."

I am not persuaded that the minister has done that in her response to the stage 1 report.

My amendments seek to do three separate things in policy terms. Amendment 29 would remove the serious harm test in its entirety, and any provisions for any threshold test at all. Amendments 30, 31 and 36 would take a different approach: they would retain a threshold test but reduce the threshold from "serious" to "actual" harm.

Amendment 32 stands on its own, providing what I consider to be a more appropriate qualifier to the financial test.

As the committee is well aware, the serious harm test was introduced to the Defamation Act 2013 in England, for reasons that are well known, namely the volume of litigation and the vexatious nature of some of it, and because there was a muddle in English law as a consequence of the distinct wrongs of slander and libel—a muddle that we do not have in Scotland, as I think Professor John Blackie pointed out in evidence. Other arguments were presented to the committee by people such as Campbell Deane and Duncan Hamilton.

The Scottish Law Commission concluded that a threshold was "desirable", but it spent very little time considering at what height the bar should be set.

Since the introduction of the bill, I, as a legislator, have come to question more and more the justification for a serious harm threshold. My concern is exacerbated by the fact that the bill, in section 1(4), introduces a statutory definition of defamation.

We are therefore in the curious—and, I would say, bizarre—position of proposing to enshrine in law a statutory civil wrong, while saying, in the very same section of the bill, that there is nothing that anyone who suffers that wrong can do about it, unless they can demonstrate that the harm is serious. Who are we, as the legislature, to tell those whom we represent that they cannot pursue justice for a statutory civil wrong that we have created? Amendment 29 deals with the matter bluntly by removing the serious harm test altogether, thereby leaving section 1 as simply defining defamation.

Removing the serious harm test would also remove any threshold for actionability. As members know, in an action before a court, harm is currently presumed. It has to be proven at proof, but there is no necessity to demonstrate any such harm in order for proceedings to go straight to a full proof, with all the attendant costs. An argument for a threshold test can be justified as a means of providing full reassurance to writers, publishers and broadcasters that they will be sued for defamation only if some evidence of actual harm can be demonstrated to a court in a pre-proof procedure. If it cannot, there will be no action.

As an alternative, therefore, to removing the serious harm threshold in its entirety, I propose in amendments 30 and 31 to replace the word "serious" with "actual". That would necessitate the pursuer evidencing that there had been, or was likely to be, actual harm caused to them before any case could proceed. It is an alternative to getting rid of the test altogether, which is a solution that I would be more comfortable with and which I would encourage the committee to support.

I propose the replacement of "serious" with "actual" for four reasons. First, I do not think that there is any justification for a serious harm test. Secondly, the Supreme Court ruling in Lachaux v Independent Print Ltd means that the English threshold test must depend on the facts and not just the inherent meaning of words. Replacing "serious" with "actual" is therefore consistent with the decision in Lachaux.

Thirdly, as I have already argued, the serious harm threshold conflicts with the statutory wrong that is created in section 1(4), and it may—it almost certainly will, in fact—exclude perfectly valid complaints. Parliament should not deny citizens recourse to the courts where they have suffered harm that falls short of serious harm. Fourthly, and more fundamentally, there is a good case for a procedure whereby the current presumption of harm is assessed according to whether people have actually been harmed.

Amendment 32 would change the test of "serious" financial loss in section 1(3) to a test of "significant" loss. The reason for that is that the term "serious" does not sit well, in my view, as an appropriate qualifier for financial loss. What is serious for a small company may not be serious for a large one. The term "significant" is more proportionate and reflects more precisely the relationship between the loss and the size of the organisation's financial strength.

I have one more observation to make on section 1(3), which relates to "non-natural" persons that have as their

"primary purpose trading for profit".

I invite the minister to reflect further on whether that definition is intended to capture community interest companies, which may or may not have profit as their primary purpose. I ask because, in the case in which I was involved as a defendant, the pursuer was a community interest company and, under the common law, had to show patrimonial loss. If some community interest companies do not trade primarily for profit—they still trade for profit, but not primarily—it looks to me as if they will be excluded from the scope of any action for defamation, and I am not sure that that was the intention.

Finally, amendment 36 would amend section 5, which is, as the explanatory notes highlight, designed to replace the phrase "materially injure" in the Defamation Act 1952 with "serious" to ensure consistency with section 1(2)(b) of the bill. Thus, if amendments 31 and 32 are agreed to, the word "serious" should be deleted from section 5. I do not think that it would add anything to insert the word "actual" there, as the threshold test will already have been met by the time defences are being argued at proof, and in order to be consistent with the statutory definition in section 1(3).

These provisions require further scrutiny, stress testing and consideration, and my amendments contribute to that endeavour.

I move amendment 29.

Annabelle Ewing (Cowdenbeath) (SNP): In my contribution to the stage 1 debate on the bill, I asked the minister to further reflect on whether the balance struck in the bill between freedom of expression and—[*Inaudible.*]—reputation was the right one. To be fair, the minister did just that. She certainly agreed to meet me, and I understand that she also met other members, to discuss the matter in more detail.

I am satisfied that the need to deal adequately with the chilling effect requires an appropriate balancing. That was highlighted by many witnesses who gave evidence to the committee. Following my further testing of the argument with the minister, it is clear to me that she had further

reflected carefully on the matter and had marshalled her arguments accordingly.

The Scottish courts have demonstrated their pragmatic approach to procedural matters over many centuries, and I expect that that approach will persist.

John Finnie (Highlands and Islands) (Green): I will make a brief contribution in support of Mr Wightman's amendments.

I remind members of the phrase "access to justice", which is frequently referred to us. That phrase is often abused in communications with our committee, but Mr Wightman has made a compelling case about the parameters that have been set and the implications that that might have for access to justice. Are we really saying that people would make frivolous claims in that way? It is important that the public feel that gaining access to a court is not about status but is about the rights or wrongs that people perceive, which are for others to judge.

For those reasons, I support Mr Wightman's amendments.

The Minister for Community Safety (Ash Denham): Good morning.

The threshold test of serious harm is an important reform of the current Scots law of defamation, and it has been the cause of sharply divided opinion among stakeholders and in the Parliament. Perhaps that issue more than any other highlights the delicate balance that is sought between two competing rights: the right to reputation and the right of freedom of expression. The Scottish Government's view is that, where damage to reputation is presumed, as happens currently, the law does not get the balance right.

The committee has heard directly from stakeholders about how they have experienced the chilling effect. They have told the committee that the threshold test is necessary to give them the confidence to resist attempts that, in their view, are aimed at stifling their free speech. If damage to reputation is always presumed, there can be no such confidence.

The courts in Scotland have set out that, even in a case in which there is found to be minimal damage to an individual's reputation, an award of damages should be of substance. If more were then to be added on top of that for presumed damage done to reputation, any award would likely have serious consequences. Faced with the threat of defamation proceedings where damage is presumed, even if there is little actual damage, most individuals would probably take the safest option and remove the material complained of. Having a threshold test of serious harm can, in those circumstances, make an important difference. After all, it seems to me only right that, if a person says that their reputation has been damaged, they should have to show to what extent it has been damaged.

As an alternative, amendments 30 to 32 would replace the serious harm test with one of actual harm. I understand that the view is that Scots law should have a threshold test, but that it should not be one of serious harm. However, the proposal in the amendments to change the test to one of actual harm would set the bar too low, meaning that any evidence of harm—no matter how little—would be enough to meet the test, so almost all actions would proceed.

Furthermore, the amendments would signal to the courts that Parliament intended something different from the serious harm test. That would deprive us of the clarity on how courts should treat the threshold test of serious harm that has come with the United Kingdom Supreme Court's interpretation of section 1 of the 2013 act in England and Wales. The result would likely be a long period of doubt and uncertainty about what the test of actual damage means, which is, of course, the opposite of the certainty in the law that the bill tries to achieve.

That might also have an effect on what is published in Scotland. The publication of allegedly defamatory material often spills over territorial boundaries. Why should the people of Scotland have less protection for free speech than people in England and Wales have?

The committee has heard examples of the chilling effect in Scotland, but having a lower threshold that could easily be breached would not significantly deter such behaviour.

10:15

Amendments 31 and 32 would have the effect of removing the serious harm test for companies and replacing it with an actual harm test, whereby "significant" financial loss must be established. That would mean that individuals would need to show actual harm and companies would need to show "significant" financial loss. Amendments 31 and 32 would have the effect of treating such persons differently in law, and I am not sure that I understand why that should be the case. After all, not every company is a multinational or a large company with turnover in the millions of pounds. Many companies in Scotland are small—some are micro-enterprises—and, for them, their reputation will be especially important.

On the drafting of amendment 29, I point out that the removal of section 1(1) of the bill would reinstate the current rule that proceedings for defamation can be brought even if a statement that is complained of is conveyed only to the

person about whom it is made and not to a third party. I am not sure whether that is Mr Wightman's intention, but its effect would go beyond the threshold test of serious harm, and the current drafting of section 1(1) has been welcomed as an important change by a large number of stakeholders.

In all, setting the threshold too low could have serious consequences for freedom of expression. It would not give enough confidence to those who wish to defend their freedom of expression in the face of a defamation action, while making it only slightly more difficult to protect reputation.

I will end with a minor point. On the consequential change that amendment 36 seeks to make, removing the word "serious" from section 5 and failing to replace it would leave a gap in the law, as the policy behind the threshold test would be circumvented.

Therefore, I ask Mr Wightman not to press amendment 29 and not to move his other amendments in the group.

The Convener: I invite Andy Wightman to respond and to wind up on group 1.

Andy Wightman: First, I want to follow up on what Annabelle Ewing said. I acknowledge that I had a very productive meeting with the minister on the topic at hand, but we have not concluded anything as a consequence of those discussions.

I am glad that the minister acknowledges that we need a threshold test, and I think that the committee is agreed that we need one. A threshold test is useful to counter the chilling effect. The question is whether that test should be whether the harm is "serious".

I have two points to make. As the minister said, there was a stark division in the evidence that the committee received on the topic. The Scottish Law Commission was clear that there should be a threshold test, but it did not spend a great deal of time considering whether the test should be whether the harm is "serious". It took that as a default position, because that was the position in England.

The minister raised the issue of whether the Scots law of defamation should be different from the law in England and Wales when it comes to the actionability test. The argument that we should be entirely consistent with what happens in England and Wales is never made by ministers in many other areas. The Scots law of defamation should develop and evolve on the basis of its own needs. One of those needs is that people in Scotland want access to justice, which they should have. The reasons for the introduction of a serious harm threshold in England are absent in Scotland. I mentioned two of them, and the committee heard about a few more in the evidence that it received.

I come back to my principal concern, which is that section 1(4)(a) creates a statutory wrong whereby

"a statement about a person is defamatory if it causes harm to the person's reputation".

What is being said is that if that wrong is committed against someone, they have no redress—they cannot bring any action whatsoever—unless they can demonstrate, possibly at some cost, that that harm is serious. I do not think that that is good law—I think that there is a stark internal contradiction in the bill—and I do not think that it is fair to the people of Scotland, many of whom suffer harm as a result of untrue malicious statements that are made against them. I think that they are entitled to some redress.

Therefore, my purpose in amendments 30 and 31 is to allow evidence of actual harm being caused—in other words, to deal with the problem that people allege exists, which is that lots of frivolous threats are made to people when no harm at all has been caused. The point is that, at the stage at which people write legal letters to one another, they can make any allegation they like about harm. Therefore, there is a good argument for a threshold test, but in my view a test involving "actual harm" is much more appropriate.

If the argument continues beyond stage 2 because my amendments on "actual" are dismissed, I will come back suggesting the word "significant", perhaps. We need to consider carefully both the justification and the impact of using the word "serious". There is little justification for its use in Scotland, and it sets up an internal contradiction by creating a statutory wrong and then saying to people, "Your Parliament has created this wrong. You have suffered it, but there is nothing you can do about it."

The Convener: I take it that you are pressing amendment 29, Mr Wightman.

Andy Wightman: I will not press amendment 29. I doubt that there is any appetite for it and the minister mentioned that it unhelpfully deletes one word.

Amendment 29, by agreement, withdrawn.

Amendment 30 moved—[Andy Wightman].

The Convener: The question is, that amendment 30 be agreed to. Are we agreed? If members do not agree, they should type N in the chat box.

Members are not agreed. There will be a division.

For

Finnie, John (Highlands and Islands) (Green)
Grant, Rhoda (Highlands and Islands) (Lab)
McArthur, Liam (Orkney Islands) (LD)

Against

Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Robison, Shona (Dundee City East) (SNP)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 30 disagreed to.

Amendment 31 not moved.

Amendment 32 moved—[Andy Wightman].

The Convener: The question is, that amendment 32 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Green)
Grant, Rhoda (Highlands and Islands) (Lab)
McArthur, Liam (Orkney Islands) (LD)

Against

Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Robison, Shona (Dundee City East) (SNP)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 32 disagreed to.

Section 1 agreed to.

Section 2—Prohibition on public authorities bringing proceedings

The Convener: Amendment 1, in the name of the minister, is grouped with amendments 33, 2, 3, 34, 4 and 35. If amendment 33 is agreed to, I cannot call amendment 2 due to pre-emption.

Ash Denham: Section 2 aims to place on a statutory footing the common-law principle that public authorities cannot raise defamation proceedings. Public authorities have a reputation, but they need to protect it using political means and not defamation law. The public interest is best served by allowing unrestrained comment on the actions of democratically elected bodies. That is the fundamental rationale behind the Derbyshire principle. The committee accepted that it is an important principle that should be codified in the bill, but recommended that the section be redrafted to make clearer the Scottish Government's intention. The four Government amendments in the group will do that.

The Scottish Government has been clear about what it considers to be caught by the Derbyshire principle. The amendments seek to insert an expanded description of what constitutes a public authority. The types of bodies that should be caught by the principle are the various forms of local government and central Government institutions, and include those institutions that they own or control. A court or tribunal is also included.

Section 2 will retain, in proposed new subsection (2)(d), the catch-all definition of what constitutes a public authority. Defamation law is very sensitive to the facts of individual cases, and public service delivery has changed significantly over the past two decades and continues to do so. Having that catch-all definition will provide the required flexibility to ensure that all public authorities that should protect their reputation at the ballot box do so.

The Scottish Government considers that listing all the specific bodies that are prohibited from raising defamation proceedings would, in the long run, be too restrictive. As I have said, models of public service delivery may change and new bodies will be created, while others will become owned or controlled. To have a list in the bill would make it challenging to keep up to date with all such changes and would not allow the law to develop in a satisfactory way. It might be that some governmental institutions that should be prohibited are not, because they have not been added to the list. I will nonetheless commit to providing in the explanatory notes a number of specific examples of the bodies that the Scottish Government considers to be prohibited.

The bill as introduced allows the Scottish ministers to specify persons who are not to be treated as a public authority. The amendment to section 2(6) would allow the Scottish ministers to specify persons who are to be considered a public authority. The power is to be subject to the affirmative procedure, after consultation. That amendment would add flexibility to deal with marginal cases or cases where changes to public service delivery justify a different approach. That is a sensible and proportionate power to take if the narrow list of types of institutions to be prohibited is adopted.

Two minor amendments are to be made to sections 2(4) and 2(5). The first reflects that there is now more than one reference in section 2 to ownership and control and the second clarifies that, in addition to an office-holder, employees can raise defamation proceedings in their own name. That latter issue was raised by some stakeholders during stage 1, and the Scottish Government

decided that it was best to put the matter beyond doubt.

On amendments 33 to 35, John Finnie has said that the Derbyshire principle, which section 2 codifies, should be wider than prohibiting governmental bodies from raising defamation proceedings and that private companies and charities that deliver public services should also be prohibited. The Scottish Government does not agree with that approach.

A public authority has the ability to protect its reputation at the ballot box, and a private company can protect its reputation by raising defamation proceedings where its reputation has been unfairly damaged. That right is recognised by our courts and by the European Court of Human Rights. If amendment 33 were agreed to, a private company or charity that delivers public services would no longer be able to protect its reputation. It would not have access to the courts and it would not have the ballot box. How, then, could such a company remedy false and damaging statements that were published about it?

It is not right to strip a private company of its right to raise defamation proceedings on the one hand without at the same time providing it with an alternative way to protect its reputation. Amendment 33 does not achieve the necessary balance between protection of reputation and freedom of expression that the bill tries to seek overall. It is hard to understand why two private companies should have different rights based solely on who they sell services to.

However, the bill makes a number of important changes that will allow individuals to rightly and fairly criticise the delivery of public services even when they are provided by a private company or a charity. It does that while continuing to allow such companies or charities to protect their reputation where necessary.

Amendment 33, in removing subsections (3) and (4), would remove the presumption that bodies that exercise public functions sporadically are not to be considered a public authority. Use of the words "from time to time" is intended to reflect the fact that such entities may operate on a contractual basis but does not preclude the possibility of their being found to be public authorities. Instead, that finding may not be made solely on the basis of their carrying out functions of a public nature from time to time. With that presumption removed, anyone who contracted with a public authority—any large or small company or charity—would risk being considered a public authority. Given the importance of reputation to such businesses or other operations, would they continue to contract to deliver those services? Would they price such risk into their contracts with local or central Government? If so, that might have a financial impact on local authorities.

10:30

Even if amendment 33 is agreed to, it is possible that the courts may interpret section 2 narrowly and exclude those bodies anyway. That would be in line with the decisions of the courts to date in relation to what constitutes a public authority under the Human Rights Act 1998. Also, the section is supposed to codify the Derbyshire principle, which is primarily concerned with governmental bodies. As we are all aware, that would mean that it is unlikely that private companies would be included, because they are not governmental bodies, even if they occasionally exercise public functions.

Finally, the drafting of amendments 34 and 35 creates an anomaly. As amended, the regulation-making power would leave it open to the Scottish ministers to exclude governmental bodies and companies owned by Government but not private companies owned by the Government. That seems to create entirely the wrong impression, given the underlying purpose of the provision.

I move amendment 1 and encourage members to support my other amendments in the group.

The Convener: I invite John Finnie to speak to amendment 33 and the other amendments in the group.

John Finnie: Thank you, convener. [*Inaudible*.] What we do know is that the rationale for the decision behind the Derbyshire principle was that public bodies should be

"open to 'uninhibited public criticism' and that reputation should be protected by political rather than legal means."

What should public bodies face uninhibited criticism about? It is the delivery of services, performance and the extent to which they effectively serve our citizens. A number of bodies that deliver public services in Scotland have a statutory obligation, which is to serve their shareholders. Is it reasonable that "uninhibited public criticism" should cease just because a function is outsourced?

The phrase "from time to time" was touched on by the minister—I will come back to that shortly.

The committee heard from a number of people about this issue. Dr Andrew Tickell talked about following the public pound in the delivery of public services—I think that many members would warm to that theme. We heard from Guardian News and Media that

"there would be considerable public interest in creating an environment in which people are able to criticize and scrutinise the actions of for profit corporations."

We also heard concerns about the matter that the minister alluded to, which is efforts made to circumvent some of the issues by initiating proceedings in a person's name.

The Minister for Community Safety said:

"We need to ensure that we take a flexible approach so that courts can deal with complex and nuanced cases as things develop."—[*Official Report, Justice Committee*, 22 September 2020; c 10.]

Depending on the project—or the level of racketeering, but I cannot say that—private finance initiative and public-private partnership contracts typically last 25 to 30 years, and some even longer than 40 years; that has huge implications for public services such as schools and hospitals.

The current sleeper contract, awarded to Serco, is a 15-year contract. The Scottish Prison Service has 13 publicly managed prisons and two that are run by private operators, Serco and Sodexo. Electronic monitoring of people who are on home detention curfew is undertaken by G4S. Significant public money goes on our ferries, and it would seem that Caledonian MacBrayne, which provides routes in the Clyde and Hebrides, is afforded a different approach from Serco—there is a name that keeps recurring—which provides ferries in the northern isles.

I particularly want to talk about an issue that one of our witnesses alluded to in relation to North Lanarkshire. In one of my constituency cases, the provider of care-at-home services was initially a private company, but it had insufficient capacity to provide the level of care that was required; therefore, the service was supplemented by the local authority. Is it not ironic that different approaches would be taken with regard to the totality of care that was provided to the individual?

In his judgment, Lord Keith of Kinkel outlined that

"It is of the highest public importance that a democratically elected governmental body ... should be open to uninhibited public criticism."

If we look at PPP and PFI, and the reputation of companies in their role in the public sector, where are the checks and balances, given that several Administrations will come and go over the course of such projects?

Section 2(2) contains the definition of "public authority". The devil is always in the detail, but we did not hear any detail about subsection (6) from the minister. It would be helpful if she could cover that point in her summing up.

This is not an ideological debate on the merits or otherwise of outsourcing public services. I think that my views on that issue are clearly understood. It is about our important scrutiny function. As I said, Administrations can come and go. For example, a 15-year rail contract might be overseen by many Administrations. That is a long time to give added protection to a company that provides an important public service, and which is more than capable of looking after itself.

Parliamentarians have legal privilege, and it would be a source of real regret if we did not extend the right of uninhibited public criticism of the providers of public services to our fellow citizens.

Rhoda Grant (Highlands and Islands) (Lab): I speak in support of John Finnie's amendments. If a company or organisation is carrying out a public service, it is important that it is properly scrutinised, and that there is no chilling effect. When we look at how public services are delivered by private companies, quite often the companies are failing. Recently, there was an issue regarding the inadequate meal and lunch packs that were being provided. If the company involved is able to sue, there may be issues when it comes to publicly debating such matters and criticising the company. If the public pound is involved, there should be no chilling effect when it comes to any criticism. I therefore support John Finnie's amendments.

The Convener: Thank you. No other member has indicated that they wish to speak in this group, so I ask the minister to respond and wind up.

Ash Denham: Most of the comments were about the right to criticise the delivery of public services, which is an important right that the bill already takes seriously. Our approach to the matter and the policy intention of the bill make sure that such criticism is possible.

The bill already makes a number of changes that, when taken in combination, strongly protect the freedom to criticise delivery of public services. There is the serious harm test, the reformed defence of honest opinion and the new defence of publication on a matter of public interest. Those provisions work together to ensure that we protect the ability of individuals to freely criticise the private delivery of public services. Companies would have to show that a defamatory statement had caused "serious financial loss", and I believe that the committee has heard that that is not an easy thing to prove.

The reformed defence of honest opinion will widen the defence to include facts that a person "reasonably believed" to be true. Dr Scott told the committee that the extended defence

"is innovative and has not been done anywhere else, and it will help Scottish law to move away from the surfeit of technicality in this area of law."—[*Official Report, Justice Committee,* 8 September 2020; c 18.]

The new defence of publication on a matter of public interest will also protect the individual's ability to criticise public services.

I want individuals to be able to discuss openly matters of public importance and significance. Taken together, the reforms that I propose in the bill will provide the necessary protection for that. Although well intentioned, John Finnie's amendments do not provide that protection and go way beyond our aim of codifying the Derbyshire principle.

The Convener: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
McArthur, Liam (Orkney Islands) (LD)
Robison, Shona (Dundee City East) (SNP)
Tomkins, Adam (Glasgow) (Con)

Against

Finnie, John (Highlands and Islands) (Green)
Grant, Rhoda (Highlands and Islands) (Lab)

The Convener: The result of the division is: For 7, Against 2, Abstentions 0.

Amendment 1 agreed to.

Amendment 33 moved—[John Finnie].

The Convener: The question is, that amendment 33 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Green)
Grant, Rhoda (Highlands and Islands) (Lab)

Against

Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
McArthur, Liam (Orkney Islands) (LD)
Robison, Shona (Dundee City East) (SNP)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 33 disagreed to.

Amendment 2 moved—[Ash Denham].

The Convener: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
McArthur, Liam (Orkney Islands) (LD)
Robison, Shona (Dundee City East) (SNP)
Tomkins, Adam (Glasgow) (Con)

Against

Finnie, John (Highlands and Islands) (Green)
Grant, Rhoda (Highlands and Islands) (Lab)

The Convener: The result of the division is: For 7, Against 2, Abstentions 0.

Amendment 2 agreed to.

10:45

Amendment 3 moved—[Ash Denham].

The Convener: The question is, that amendment 3 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
McArthur, Liam (Orkney Islands) (LD)
Robison, Shona (Dundee City East) (SNP)
Tomkins, Adam (Glasgow) (Con)

Against

Finnie, John (Highlands and Islands) (Green)

The Convener: The result of the division is: For 8, Against 1, Abstentions 0.

Amendment 3 agreed to.

Amendment 34 moved—[John Finnie].

The Convener: The question is, that amendment 34 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Green)
Grant, Rhoda (Highlands and Islands) (Lab)

Against

Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
McArthur, Liam (Orkney Islands) (LD)
Robison, Shona (Dundee City East) (SNP)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 34 disagreed to.

Amendment 4 moved—[Ash Denham].

The Convener: The question is, that amendment 4 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
McArthur, Liam (Orkney Islands) (LD)
Robison, Shona (Dundee City East) (SNP)
Tomkins, Adam (Glasgow) (Con)

Against

Finnie, John (Highlands and Islands) (Green)
Grant, Rhoda (Highlands and Islands) (Lab)

The Convener: The result of the division is: For 7, Against 2, Abstentions 0.

Amendment 4 agreed to.

Amendment 35 not moved.

Section 2, as amended, agreed to.

Section 3—Restriction on proceedings against secondary publishers

The Convener: The next group is on secondary publishers. Amendment 5, in the name of the minister, is grouped with amendments 6, 7 and 37.

Ash Denham: Section 3 is intended to limit the circumstances in which a defamation action can be brought against a secondary publisher. In short, someone who is not the author, editor or primary publisher of an allegedly defamatory statement should not be capable of being sued, except to the extent that they are responsible for a statement's content or the decision to publish it. Subsections (3), (4) and (5) set out a number of situations in which a person is not to be considered to be an author, an editor or a publisher.

Those protections are equally intended for an employee or agent of a secondary publisher in the same situation if they are not responsible for the content or the decision to publish the statement that is complained of. That is similar to the current legal position as provided for in section 1 of the Defamation Act 1996. However, some doubt has arisen as to whether the drafting of section 3 adequately carries those protections over into the bill.

For instance, subsection (4) is not framed as being about when someone is or is not responsible for the statement's content or the decision to publish it. It is framed as being about whether a person is to be considered the author, editor or publisher, so it might not help to answer the question whether an employee or agent is responsible for the content of the statement or the decision to publish it.

To address that, amendments 5, 6 and 7 expressly deal with the position in subsections (3) to (5) and, for the avoidance of doubt, make clear that an employee or agent would—just like their employer or principal—not be liable in the situations outlined in those subsections if the activity described was the only involvement that they had with the statement.

On amendment 37, I understand that stakeholders are wary of the Scottish ministers having the proposed regulation-making power. However, as the Scottish Government has made clear in the delegated powers memorandum that accompanies the bill, the reason for taking that power is to enable the Scottish ministers to future proof the bill. As the bill has progressed, I have tried to express a preference for having as much of the law of defamation as possible in the bill rather than in regulations or court rules.

The drafting of section 3 has largely replicated a similar provision in the Defamation Act 1996. Who could have predicted the changes that social media has brought to us since then? Although there is therefore some merit in leaving the provision in its current form so as to be able to address what the future might bring, I am reasonably confident that only technological developments and changes in the use of technology for dissemination of materials and information would be likely to prompt the Scottish ministers to revisit the provision.

However, I am concerned that the drafting of amendment 37 does not significantly take into account the fact that not all changes in the use of technology for the dissemination of material will be the direct result of technological developments; for example, there might be cases in which technology that is already developed is repurposed. The result might therefore be that those who need protection would have to wait longer for primary legislation to provide it.

I therefore ask Mr Kerr, if he is so minded, not to move amendment 37 at this stage and instead to work with the Scottish Government to ensure that the power of ministers is restricted to reflect technological developments or changes in the use of technology for dissemination of materials and information.

I encourage members to support the amendments in my name, and I ask Mr Kerr to consider not moving his amendment and instead to work with the Scottish Government to develop it further.

I move amendment 5.

Liam Kerr (North East Scotland) (Con): Good morning to the committee and the minister. Amendment 37 is a very specific amendment that was suggested by the Law Society of Scotland. As ever, for completeness, I remind members that I am a member of the Law Society of Scotland.

The purpose underlying the amendment is to limit the delegated powers of ministers to technical amendments while allowing the flexibility that the minister just talked about to modernise the law in line with technological developments.

I will explain what I mean by that. The powers to modify sections 3(3) and 3(4) under the delegated powers in section 3(6) are, as drafted, very wide. As the minister said, it of course makes sense to have that provision; we need a provision so that, when changes are needed to take account of technological developments, they can be made easily and quickly.

It also makes sense to preserve a power to clarify the application of the bill to a particular set of circumstances or to when amendment is needed to reflect innovation. That requires to be done easily by regulation. However, it also makes sense to limit that regulation-making power to only such situations, in order to allow the law to be modernised in line with the current principles but without granting the Scottish ministers inappropriately wide powers. I seek to restrict the ability to amend the situations that merit that.

I have listened carefully to the minister, who has made interesting points, and I am interested to hear the committee's thoughts on the issue. If the minister is so confident that the changes will be limited to technological innovations, why not simply say so in the bill? I would like to listen to contributions to the debate, and I will decide whether to move the amendment when the convener puts the question to me later.

The Convener: No member has indicated that they wish to contribute to the debate on this group. I will pass back to the minister to wind up and to respond to what has been said.

Ash Denham: The Scottish Government wants to take powers to future proof the bill in order to take into account future technological developments. I accept the principle of Liam Kerr's amendment 37, but I would like to work with him in making a slight edit in order to be satisfied that it does exactly what we want it to do and no more. I hope that he will not move the amendment, which will allow us to work together to make slight edits and lodge it again at stage 3. I accept the principle of what he is trying to achieve.

The Convener: Thank you, minister. That is clear and helpful.

Amendment 5 agreed to.

Amendments 6 and 7 moved—[Ash Denham]—and agreed to.

The Convener: Liam Kerr, will you move or not move amendment 37?

Liam Kerr: The minister has worked closely with me and the rest of the committee on amendments. I have listened to what she has said and I take it in good faith. I look forward to continuing to work with her. On that basis, I will not move amendment 37.

Amendment 37 not moved.

Section 3, as amended, agreed to.

Section 4 agreed to.

Section 5—Defence of truth

The Convener: I invite Andy Wightman, if he is still with us, to move or not move amendment 36. If Mr Wightman has had to leave, I invite John Finnie to move the amendment on his behalf.

John Finnie: Andy Wightman is double booked; he has another committee meeting to attend. I said that I would move the amendment on his behalf.

Amendment 36 moved—[John Finnie].

The Convener: The question is, that amendment 36 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Green)
Grant, Rhoda (Highlands and Islands) (Lab)
McArthur, Liam (Orkney Islands) (LD)

Against

Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Robison, Shona (Dundee City East) (SNP)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 36 disagreed to.

Section 5 agreed to.

Sections 6 to 11 agreed to.

Schedule agreed to.

Sections 12 and 13 agreed to.

Section 14—Acceptance and enforcement of offer to make amends

The Convener: The next group is entitled "Offer to make amends: amount of court awarded

compensation". Amendment 8, in the name of the minister, is the only amendment in the group.

11:00

Ash Denham: The offer of amends is a helpful way for a publisher who admits that they have published a defamatory statement to apologise and correct the record. In some instances, an offer of compensation is also made. It avoids the need for costly legal proceedings, and the quick resolution can help to restore an individual's reputation.

The sections that deal with the offer of amends are intended to restate the procedure, not to change it, except for one minor procedural alteration. Evidence to the committee cast doubt on a court's ability to vary an offer of compensation. Some evidence suggested that that aspect of the offer has not changed and that a court could vary an offer, but other evidence suggested that the drafting excluded that possibility. The committee recommended that the Government clarify the position and put it beyond doubt. Amendment 8 does that: it states explicitly, as the Defamation Act 1996 does, that a court is able to vary an offer of compensation by increasing or decreasing the amount to be paid in compensation from that offered.

I move amendment 8.

Amendment 8 agreed to.

Section 14, as amended, agreed to.

Sections 15 to 18 agreed to.

Section 19—Actions against a person not domiciled in the UK or a member State etc

The Convener: The next group of amendments concerns changes required as a result of European Union exit on jurisdiction and information society services. Amendment 9, in the name of the minister, is grouped with amendments 10 to 12 and 28.

Ash Denham: The matter of civil jurisdiction has been given a great deal of attention because of the UK's withdrawal from the EU and the subsequent trade agreement. Those changes, and the uncertainty surrounding them, meant that drafting the jurisdictional rules in the bill was always going to be challenging.

Rather than try to second guess the outcome of the withdrawal agreement and trade negotiations, or to take wide powers for the Scottish ministers, the Scottish Government opted to legislate for the legal position at that time. The position is now clearer, and the amendments make the necessary adjustments to take into account the legal position as it stands today.

Amendments 9 to 12 remove references in section 19 to EU-associated terminology such as "member State", "the Brussels Regulation" and "the Lugano Convention", as the UK is no longer a member state or a signatory to the Lugano convention in its own right. If those deletions are made, the jurisdictional rules limiting the circumstances in which an action for defamation may competently be brought in a court in Scotland are to be found under the Civil Jurisdiction and Judgments Act 1982.

I point out that the UK has applied to accede to the 2007 Lugano convention as an independent contracting member. The outcome of the application is pending. Once acceded to, that would have implications for jurisdiction in defamation actions. If and when the UK accedes, the Scottish Government intends to use the powers in section 2 of the Private International Law (Implementation of Agreements) Act 2020 to make regulations for those purposes. There is, therefore, no longer a requirement to make separate, specific provision in the bill for regulation-making powers.

Section 34 also reflects the legal position at the time when the bill was introduced. Section 34 would have allowed the Scottish ministers to make regulations on how providers of information society services were to be treated in proceedings for defamation and for malicious publication under part 2 of the bill. Those regulations would have been used to implement the provisions of the EU electronic commerce directive into the bill, had the UK not withdrawn from the EU at the end of January 2020. That regulation-making power is no longer required. The bill provides protections to secondary publishers in section 3 akin to those in the directive—indeed, it goes further. Amendment 28 deletes section 34.

I move amendment 9 and ask members to support the other amendments in my name in this group.

Amendment 9 agreed to.

Amendments 10 to 12 moved—[Ash Denham]—and agreed to.

Section 19, as amended, agreed to.

Section 20 agreed to.

Before section 21

The Convener: The next group of amendments, on malicious publication, is the biggest group that we will consider today. Amendment 13, in the name of Liam Kerr, is grouped with amendments 14 to 25.

Liam Kerr: I will deal with my amendments slightly out of order.

Amendments 13 and 25 are basically probing amendments on aligning the law on malicious publication with that on defamation. A number of witnesses thought that that should be explored, and that is what I am seeking to do.

Amendment 13 imports the serious harm test from section 1 into the malicious publication part of the bill. It largely mirrors the approach in section 1, with some minor alterations to reflect the context of malicious publication. In effect, it requires the statement to be published other than to the offended person and that serious harm has been caused.

In the evidence sessions, I expressed a concern that the bar for the wrong of malicious publication is sufficiently lower than that for defamation for potential litigants to be encouraged simply to switch their action from defamation to malicious publication. That cannot have been the intention, and my amendment seeks to ensure that it will not come to pass.

My amendment 25 also seeks to pick up on matters that came out in evidence by making it clear that the defences to defamation proceedings are applicable to proceedings involving malicious publication. When I pressed the point with the minister at stage 1, her view was that such defences would apply and that she would make that clear in the explanatory notes. I recall that because it did not quite stack up with my reading of the bill as introduced. If the minister is right and the defences apply without anything in the bill to that effect, I do not think that the explanatory notes provide sufficient comfort, given the inherent ambiguity. Further, if the defences do not apply, that needs to be explicit.

Amendment 25 seeks to ensure that the defences in relation to defamation also apply in relation to malicious publication. Rather than repeating defamation provisions in the malicious publication part of the bill, the amendment simply provides a new section that sets out that the defences in sections 5 to 7 apply to proceedings brought under the malicious publication part. Given the ambiguity, it is important that the Government's view on that is expressed and on the record—hence my reason for lodging the amendment.

A separate point is made by amendments 23 and 24. Those amendments seek to put some kind of de minimis on the degree of financial loss that requires to be shown for an action to be brought. At present, section 24 simply requires that a statement is

"more likely than not to cause such loss",

with no actual loss being required. Members will recall that I was quite concerned about that in the committee's evidence sessions. My feeling is that that goes back to the low threshold for a cause of action under malicious publication, and I do not think that that is particularly desirable. Therefore, I have lodged amendments 23 and 24, which, in combination, seek to give the courts a power, by act of sederunt, to set a minimum level of loss to a pursuer before proceedings can be brought.

As I have said, the minister has been very helpful in trying to work with me, and, I suspect, with the rest of the committee, throughout the process. She sent me a letter that explained her position on amendments 23 and 24, in which she said that, by operation of law, the principle of de minimis would apply. Of course that is true, but I am all for certainty, so I prefer to offer the option for the courts to set a level. I heard the minister's response to Andy Wightman's amendments earlier. If he is right that we need to be clear about the level of harm, what better way to do that than by specifying?

I have wound back a bit, as I think that one would typically expect such a threshold for financial loss to be set by the Government or during the parliamentary process, rather than by the Court of Session. By way of example, I refer to the jurisdiction thresholds that are set in section 39 of the Courts Reform (Scotland) Act 2014. I hope that the committee will consider my proposal to be a reasonable halfway meeting point.

I am interested to hear the committee's and the minister's thoughts on my amendments.

I move amendment 13.

Ash Denham: I ask the committee to bear with me because a fairly long explanation is required on some points.

The Scottish Law Commission gave a great deal of consideration to the overall issue of verbal injury, as I have said to the committee previously, and to the new statutory cause of action of malicious publication. The definition of malice that the commission came up with reflects the common-law position, and it is the legal test that the Scottish Government took forward when the bill was introduced.

The committee heard evidence that the legal test in the bill was too low a threshold, and in its stage 1 report it called for the test to be strengthened. In particular, the evidence of Professors Blackie and Reid was that the bill's definition of malice removed the traditional requirement of a "design to injure".

I understand the committee's concern that, if the bill is not amended, companies that operate for profit may use a malicious publication action to circumvent the increased protections for freedom of expression brought about by part 1. Given the strength of the committee's view on the matter and

the evidence that it received, the Scottish Government committed to bringing forward amendments to adjust the legal test. Amendments 14 to 22 address that matter.

In the bill as introduced, the legal test of malice is met when the pursuer proves that the imputation complained of was presented as a statement of fact and that the person who made the statement either knew that it was false or was indifferent as to its truth, or publication was motivated by a malicious intention to cause harm to the person's business or business activities.

The Government's amendments will alter that test. The pursuer will now have to prove that the imputation complained of was presented as a statement of fact and that the person who made the statement knew that it was false or was recklessly indifferent as to its truth, and that publication was motivated by a malicious intention to cause harm to the person's business or business activities. Adding the word "recklessly" raises the bar in line with the committee's concerns. Without that, mere negligence would be enough to fulfil that part of the test. Instead, and in line with the committee's concerns, to meet the strengthened test a pursuer must show that a defender made a false statement or clearly did not care whether it was true or not and—in addition—that they had a desire to cause harm.

I turn now to Mr Kerr's amendments. The two delicts of defamation and malicious publication are distinct and the law treats them differently. The balance in each should be based on the features that are unique to it. The serious harm threshold test is needed in the law of defamation because the law makes a number of presumptions that are favourable to the pursuer. It presumes that a defamatory statement is false and made with malice, and—at present—that there is damage to reputation. However, the serious harm test will provide that any such damage will need to be proved in the relevant circumstances. That, I think, creates an appropriate balance between the two presumptions that benefit the pursuer and the serious harm test, which benefits the defender.

The situation in malicious publication is different. As it stands, the pursuer no longer benefits from the presumptions as to falsity and malice but instead defenders benefit from the requirement on pursuers to prove all three of falsity, malice and financial loss. Adding even further burden to pursuers in malicious publication proceedings by way of amendment 13 would, in my view, create an inappropriate balance between the burdens on pursuers and defenders.

To give an example, because this is quite complicated, if an individual said of a company that its staff or owners were incompetent, aggressive and unpleasant, in order to establish proceedings of malicious publication, the company would have to prove that the statement was false, that it was made with malice—the test of which the Scottish Government has brought forward amendments to strengthen—and that it had caused financial loss. Taken together, those are serious hurdles in relation to which the pursuer bears the burden of proof. If it were a defamation action, the burden would be on the defender—that is, the person who made the statement complained of. To then add that the hurdle should be set even higher, as Mr Kerr suggests, would mean that it would be near impossible for a pursuer to raise a successful action.

We should bear it in mind that the Scottish Law Commission thought that malicious publication proceedings were necessary because they fill gaps that would be left open if they were removed. It said:

> "were these categories of verbal injury removed, then defamation would be the only actionable form of wrong."

The effect of amendment 13 would likely be that persons would be left without any legal remedy for the unfair damage that was done to them.

If it is Mr Kerr's intention to introduce to malicious publication something similar to the threshold test of serious harm in defamation proceedings, I ask him to consider the effect of the drafting of amendment 13 on the law of malicious publication. In copying section 1 of the bill, the member imports legal concepts that are suited to the law of defamation into a different delict.

On amendments 23 and 24, Mr Kerr seeks to allow the Court of Session to set a minimum level of financial loss below which an action of malicious publication cannot be brought. I point out that companies vary in size and turnover, from small family businesses to huge conglomerates. To have a single minimum amount would be unlikely to account for such differences.

It does not seem appropriate to me that something that is so important and which affects the limits of free speech should be left to the rules of court. The minimum level is something that should, and must, be debated and decided on by the Parliament.

I turn to amendment 25. As I have already said, the bill deals with two distinct delicts: defamation and malicious publication. The law treats those two delicts differently, and the contrast between them might have given the impression that the Scottish Government has given defamation more consideration than malicious publication. The idea that the defences to a defamation action, as are laid out in part 1 of the bill, should be repeated in part 2 for a malicious publication action might contribute to that impression. The two delicts are different in nature, and the law presumes different

things. It is because of those different presumptions that the law of defamation needs those defences, whereas the law of malicious publication does not.

In defamation, when a statement that is complained of is determined to be defamatory, the law presumes that that statement was false, that it was a statement of fact and that it was made with malice. The law of defamation needs robust defences so that the defender can prove why a statement might not be defamatory. In relation to malicious publication, however, the law does not presume those elements—the wording of the new statutory delicts reflects that point. Instead, it is for the pursuer, and not for the defender, to prove that the statement that is complained of is one of fact.

Accordingly, there is no need for defences in relation to matters of malicious publication: the onus is on the pursuer rather than the defender, so it is open to the defender to dispute any proof that the pursuer might offer. The Scottish Government has clarified the point in the explanatory notes to the bill and the committee has had sight of those notes in advance of this meeting.

Finally, if that argument has not persuaded Mr Kerr, and if he is minded to press amendment 25, I say to him that he would be introducing defences that have developed over a great deal of time in one branch of law into another, with all the unintended consequences that that might cause. The courts would be bound to try to find meaning in the introduction of such defences and it is not at all clear how they would do so in the present circumstances.

Such a change should not be made without further research or consultation. Any statutory defences should be adapted to reflect the new codified versions of the malicious publication delict, and it is particularly telling that the Scottish Law Commission did not feel the need to do that as part of its wide-ranging reform.

I ask Mr Kerr not to press his amendments 13, 23, 24 and 25, and ask members to support my amendments in this group.

11:15

The Convener: No member has indicated that they wish to contribute to the debate. I ask Liam Kerr to respond to what he has heard, to wind up, and to press or withdraw amendment 13.

Liam Kerr: I will respond briefly. I confirm that I support the minister's amendments, which are good and—she will concede—called for. I am happy to see those amendments go in the bill.

The minister has spoken persuasively. Her discussion of my amendments 13 and 25 has persuaded me and I do not intend to press amendment 13 or to move amendment 25.

On amendments 23 and 24, I have listened and thrown the ideas around in my head, and I will not move either of them. However, I think that there is something in them. It would be good to talk that through. If the minister does not mind speaking to me about them before stage 3, I might bring something else forward.

I seek leave to withdraw amendment 13.

Amendment 13, by agreement, withdrawn.

Section 21—Statements causing harm to business interests

Amendments 14 to 16 moved—[Ash Denham]—and agreed to.

Section 21, as amended, agreed to.

Section 22—Statements causing doubt as to title to property

Amendments 17 to 19 moved—[Ash Denham]—and agreed to.

Section 22, as amended, agreed to.

Section 23—Statements criticising assets

Amendments 20 to 22 moved—[Ash Denham]—and agreed to.

Section 23, as amended, agreed to.

Section 24—Limit on requirement to show financial loss

Amendments 23 and 24 not moved.

Section 24 agreed to.

Sections 25 and 26 agreed to.

After section 26

Amendment 25 not moved.

Sections 27 to 29 agreed to.

Section 30—Power of court to require removal of a statement etc

The Convener: We move to the penultimate group of amendments, which is on powers of court in relation to a statement. Amendment 38, in the name of Fulton MacGregor, is the only amendment in the group.

Fulton MacGregor (Coatbridge and Chryston) (SNP): The aim of amendment 38 is to achieve a proportionate balance between the protection of reputation, the right to freedom of expression, and the power of the court to make orders to the operator of a website in the early stages of defamation proceedings.

Section 30 would allow a court to order the operator of a website to remove a statement that is the subject of a complaint. When the court has had the chance to consider the argument from both sides and has come to a full conclusion, an order to remove a statement that has been found to be defamatory is entirely reasonable, and I think that the committee accepted that. However, in the explanatory notes, it is explained that the power

"is not confined to circumstances in which the final outcome of the proceedings has already been determined by the court. Accordingly, the court would be entitled in an appropriate case to grant an order for removal or cessation of distribution on an interim basis, before the final outcome of the proceedings is known."

In our evidence sessions, concerns about that power were raised by media groups, including the Society of Authors, Scottish PEN, the BBC, *The Ferret*, civil society, legal academics and organisations including the Open Rights Group, which I thank for its input on amendment 38.

Given those concerns, it is important to consider whether an alternative measure would strike a more proportionate balance. It is in seeking a proportionate balance in the early stages of a defamation dispute in the court system that amendment 38 proposes to amend the court's power to "remove the statement" and to replace it with a court power to order the website operator to

"state in a prominent location on the website that the statement is subject to such proceedings."

I should make it clear that amendment 38 seeks to leave intact the power of the court to order the operator by interdict to remove the statement at the end of proceedings. The amendment is focused primarily on when proceedings are on-going, in terms of when the power could appropriately be exercised.

In addition, I point out—although it might be obvious—that nothing in amendment 38 would prevent the website operator from removing, of their own free will, the statement that has been complained of, which they are entitled to do throughout any potential defamation dispute. In practice, operators in such a situation would therefore have a choice between removing the statement and leaving it with a statement in a prominent position, to the effect that it is the subject of proceedings. Committee members can draw their own conclusions about which action operators might choose to take, but the choice would be there.

Amendment 38 seeks to introduce into Scots law the standards for allowing a court to order an appropriate qualification, where an action has been initiated. I believe that it meets the policy objectives of the bill—to strike an appropriate balance between freedom of expression and protection of reputation, to clarify the law, and to improve its accessibility.

All that said, I have had preliminary conversations with the Government and am reassured that we can work together to develop a workable amendment ahead of stage 3. I will obviously listen to what the minister and—if they want to speak—any other members say. However, at this point, given those conversations, I am inclined not to press amendment 38.

I move amendment 38.

The Convener: As no other member has indicated that they wish to speak, I call the minister to respond.

Ash Denham: Section 30 of the bill grants courts a power to order the removal of material that is the subject of defamation, or part 2, proceedings from any website on which it appears. It is intended to provide for the fact that it might not always be possible for the author of material that is the subject of proceedings under the bill to prevent further distribution of the material or to orchestrate its removal.

Under the law as it stands, Scottish courts do not have similar powers to those that are conferred on courts in England and Wales by the Defamation Act 2013. As far as amendment 38 is concerned, I do not see any reason why a court should not have the power either to remove material that is hosted on a website or to append a notice to it.

Although I understand that there are concerns about free speech in relation to removing material altogether, courts would have to consider granting the remedy only where that was justified and, in doing so, would have to balance the right to freedom of expression with protection of reputation. In relevant circumstances, that is a useful remedy that can help to restore a person's unfairly damaged reputation.

Equally, it would be useful to have in the bill that the court could, where the balance might favour freedom of expression, append a notice to the statement that is being complained of, as amendment 38 would do.

Fulton MacGregor has already said that he is minded not to press amendment 38. I would be more than happy to work with him ahead of stage 3 on an amendment that would reflect the principles behind what he seeks to achieve.

The Convener: I invite Fulton MacGregor to wind up and to press or seek to withdraw amendment 38.

Fulton MacGregor: Given my concluding remarks and what the minister said, I am happy

not to press my amendment 38, and to work with the minister ahead of stage 3.

Amendment 38, by agreement, withdrawn.

Section 30 agreed to.

Section 31 agreed to.

Section 32—Limitation of actions

The Convener: We reach our final group, which is on limitation. Amendment 26, in the name of Liam Kerr, is grouped with amendment 27.

Liam Kerr: Amendments 26 and 27 concern limitation periods, which members will recall me exploring during evidence taking. I am still not completely persuaded on the one-year limitation point, but I can see all sides of the debate. I do not seek to amend the one-year limitation period.

11:30

Under section 19A of the Prescription and Limitation (Scotland) Act 1973, there is a general power to override time limits, but it does not specifically refer to defamation actions as the English provision under section 32A of the Limitation Act 1980 does. Arguably, there is therefore weaker protection for claimants who, currently, are automatically entitled to bring a case, under the three-year limit.

There is merit in amending section 18A of the 1973 act to make it clear that, over and above what is provided for in section 19A, the court has the power to allow an action to continue beyond expiration of the one-year period. I am not sure that I see a reason not to do that—simply for clarity—and I would be pleased to have the committee's support on that.

In relation to amendment 27, members will recall that section 33 currently makes provision for mediation and provides a pause in the limitation period, which is helpful. Several witnesses felt that that ought to be extended to other forms of dispute resolution, including arbitration, expert determination and, perhaps, press complaints bodies or ombudsman bodies, so I have drafted the amendment accordingly.

In the minister's response to me, which I mentioned earlier, she said:

"As to expert determination, this is most useful in technological cases where the technical specification does not meet agreed upon standards. It is highly unlikely that this form of ADR would be utilised in cases of defamation or malicious publication. Accordingly, I don't think that it is appropriate to include this in the Bill".

That is as may be, but even if it is "highly unlikely" that a provision will be utilised, it is nonetheless possible that it could be utilised. Accordingly, we should have precision about when limitation would be paused, which my amendment 27 offers.

I considered amending section 32 on mediation, but given that that section has been added separately to an existing section on arbitration, there seems to be logic in keeping the proposed new section separate, too.

For those reasons, I will move amendment 26. I would like to hear, in particular, the minister's thoughts on amendments 26 and 27.

I move amendment 26.

The Convener: No member has indicated that they wish to contribute to the debate on the group.

Ash Denham: Section 19A of the Prescription and Limitation (Scotland) Act 1973 outlines the "equitable" discretion of a court to override a time limit. The section specifically mentions defamation actions by cross-referring to section 18A of the act, which deals with limitation of defamation actions.

I understand that Liam Kerr has a concern about how the 1973 act compares with the similar act in England and Wales, but no stakeholder has brought up that issue. Limitation and prescription periods for defamation actions formed part of the consultation work that was undertaken by the Scottish Law Commission; the Scottish Government consulted further on limitation periods, after that. The power of a court to override a time limit was never questioned in those consultations.

On amendment 27, I point out that section 19CA of the Prescription and Limitation (Scotland) Act 1973 provides that

"Any period during which an arbitration is ongoing in relation to a"

defamation

"matter is to be disregarded in any computation of the"

limitation period. The Independent Press Standards Organisation and IMPRESS—the Independent Monitor for the Press—which are the two current press regulators in the UK, deal with complaints by way of arbitration, so they are already are caught by that provision.

As to expert determination, it is primarily used in technological cases in which a technical specification does not meet agreed standards.

However, alternative dispute resolution is an effective means of resolving disputes involving defamation or malicious publication proceedings. I welcome Liam Kerr's efforts to widen the number of situations in which ADR can be used without unfairly penalising the parties who are involved. The Scottish Government needs a little bit more time to consider the drafting of the amendments,

but if Liam Kerr is willing, I am sure that, ahead of stage 3, we can work together to come up with acceptable amendments that avoid unintended consequences.

I ask Liam Kerr not to press amendments 26 and 27.

The Convener: I ask Liam Kerr to respond and wind up, and to press or seek to withdraw amendment 26.

Liam Kerr: I am grateful for the minister's comments. There is something there, so I would like us to work together on amendments. I look forward to working with her to achieve that.

Amendment 26, by agreement, withdrawn.

Section 32 agreed to.

Section 33 agreed to.

After section 33

Amendment 27 not moved.

Section 34—Provision of information society services

Amendment 28 moved—[Ash Denham]—and agreed to.

Sections 35 to 40 agreed to.

The Convener: We come to my favourite question during stage 2 proceedings. The question is, that the long title be agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. The bill will be reprinted as amended at stage 2, and will be published online at 8.30 tomorrow morning.

The Parliament has not yet determined when the stage 3 debate will be held. Members will be informed of that in due course, along with the deadline for lodging stage 3 amendments. In the meantime, stage 3 amendments can be lodged with the clerks in the legislation team.

I thank the minister and her officials, and Andy Wightman, for joining us.

Subordinate Legislation

Act of Sederunt (Fees of Messengers-at-Arms and Sheriff Officers) (Hague Service Convention) (Amendment) 2020 (SSI 2020/423)

Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/424)

11:36

The Convener: Our next agenda item is consideration of two negative instruments, as set out in the agenda. I refer members to the relevant papers.

No member has indicated that they want to comment on the Scottish statutory instruments. Furthermore, no member has indicated that they want the committee to make any comments to Parliament.

Justice Sub-Committee on Policing (Report Back)

11:37

The Convener: Our final agenda item is a report back on the meeting of the Justice Sub-Committee on Policing that took place on 18 February. I refer members to the relevant paper and invite comments or questions from members to John Finnie, who is the convener of the sub-committee.

No member has indicated that they have any comments or questions. Mr Finnie, is there anything that you wish to draw to the committee's attention in addition to what is in the report?

John Finnie: There is nothing further to add, convener. On-going matters are covered and published on the committee's web pages.

The Convener: That concludes our meeting. Our next meeting will be a week today, on Tuesday 2 February, when we expect to consider the Hate Crime and Public Order (Scotland) Bill at stage 2.

I wish everybody a good morning.

Meeting closed at 11:37.

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