OFFICIAL REPORT
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Justice Committee

Tuesday 22 September 2020

Session 5

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Pàrlamaid na h-Alba

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JUSTICE COMMITTEE
22nd 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:

Ash Denham (Minister for Community Safety)
Michael Paparakis (Scottish Government)
Jo-anne Tinto (Scottish Government)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Justice Committee

Tuesday 22 September 2020

[The Convener opened the meeting at 10:00]

Defamation and Malicious Publication (Scotland) Bill: Stage 1

The Convener (Adam Tomkins): Good morning, everyone, and welcome to the Justice Committee's 22nd meeting in 2020. This is a hybrid meeting—members are attending in person and online. We have no apologies.

Agenda item 1 is the committee's final evidence session for its stage 1 scrutiny of the Defamation and Malicious Publication (Scotland) Bill. I welcome Ash Denham, the Minister for Community Safety, and the Scottish Government officials who are supporting her. I invite the minister to make short opening remarks before we ask questions.

The Minister for Community Safety (Ash Denham): Good morning and thank you for inviting me to give evidence on the bill. The normal legislative process has been interrupted by the public health emergency, so we approach the end of stage 1 almost 10 months after the bill was introduced. I am grateful to the committee and its clerks for their persistence.

In some ways, the bill is not of the normal type that the committee considers, because it is, by and large, a product of the Scottish Law Commission. As far back as March 2016, the commission published a discussion paper on the subject and, more than four years later, we are discussing the outcome of that work. I thank the commission for its careful and diligent work on the reform.

The bill implements all the substantive recommendations that the commission made when it looked at defamation law as a whole. The bill lays out a substantial part of defamation law in modern language.

Defamation law must strike the right balance between two values that sometimes pull in different directions—the principle of freedom of expression and the protection of reputation. They are both fundamental human rights that are vital in a modern democracy. I will look at some changes that the bill proposes; I am sure that none will be news to the committee.

The bill defines a defamatory statement, which is a positive step to define defamation. Provisions also set out what is not defamation. The bill expresses in more modern language the standard common-law definition, which was set out in 1936.

We are introducing a threshold test of serious harm, which must be met before an action for defamation can proceed. The test is needed to ensure that only claims with evidence of harm are allowed to proceed. If we allowed claims to proceed on the legal presumption that damage had been done in all cases, we would not achieve an appropriate balance.

The bill makes important provisions to cover in defamation law the role of secondary publishers. The current definition of publication is wide and means that the law can be abused to silence legitimate free expression. Secondary publishers can be induced to act as censors that remove content irrespective of its accuracy or importance. Ultimately, it should be for the court, rather than those who might be motivated by economics, to determine and balance fundamental rights. The bill will enable that approach.

Malicious publication is closely aligned with defamation, but it is distinct and the provisions on it protect different interests, so the balance should differ. The commission gave the subject detailed and thorough consideration and recognised that, without such provisions, Scots law would have a gap. The bill does not weaken the current definitions; it merely replicates them.

Finally, I would like to touch on the Derbyshire principle. I favour including in the bill a statement of the principle that although public authorities have a reputation that might need to be protected, that must be done though the ballot box, not through the court.

Overall, the bill seeks to ensure that our law of defamation is fit for the 21st century. It provides a clear and accessible framework that more appropriately balances freedom of expression and protection of individual reputation. I believe that the bill gets the balance right, and I am happy to take questions from the committee about how we have struck that balance.

The Convener: Thank you, minister. That was very helpful. You touched on a number of issues that have been raised with us in our evidence sessions and which members will want to explore with you.

I will start on one of them. The bill emanates from the work of the Scottish Law Commission, but it does not mirror that work in its entirety. There are some differences, one of which is that, as I understand it, although the Scottish Law Commission did not recommend that defamation be defined in the legislation, the bill does that. Moreover, it does so using language that is different from the language that has been used in

Scots law for 80 or 90 years now. Why did the Government decide to depart from the Scottish Law Commission's recommendation and provide a statutory definition of defamation? Why did the Government decide not to just copy and paste the language that we have used in Scots law for 90-odd years?

Ash Denham: You are quite right. Substantively, this is the bill that the Scottish Law Commission developed, but it varies from that in a small number of areas, one of which is definition. We have done that because reputation is of vital importance to individuals. The law of defamation is obviously about protecting reputation, so it needs to be as clear and as accessible as possible. Having a statutory definition of defamation in the bill will help to provide that clarity.

The committee heard from the Law Society of Scotland on the phrasing. It said that the definition "reflects the common-law test". The definition is meant to be a simple restatement, in modern language, of the common-law test that was set out by Lord Atkin in the case of Sim v Stretch. As you rightly pointed out, that is now 84 years old, and it sometimes needs to be explained to juries. When that happens, it is explained to them in the terms that we have put in the bill. I think that it is important and useful to have the definition in there.

The Convener: Some of our witnesses have suggested that the bill could usefully state that, although the definition is set in statute, it is not intended to be set in stone. From time to time, as defamation law continues to develop—it tends to develop slowly in Scotland, because we have very few defamation cases—the courts will want to revise aspects of it, including, perhaps, its very definition. They will also want to ensure that there is a degree of continuity between the law before and the law after the bill is enacted, especially if, as you have just said, the purpose of the definition in the bill is to give effect to what the common law already provides. Have you reflected on whether the bill could usefully be amended in that respect? Would it be an unhelpful amendment if the bill was to say expressly that the courts should continue to refer to common law as they develop defamation law through the trickle of cases that come before them in Scotland?

Ash Denham: That is a good point. Obviously, the definition reflects common law. There are explanatory notes that go with the bill, and anybody looking at them will understand that the definition reflects that.

There are additional elements. You could be looking at the onus on proof or presumption, or falsity or malice, which are left to be dealt with by common law. When they are looking at the definition, the courts will have that in mind, and they will see the continued relevance of case law that has built up over time.

I take the point. I know that the Law Society raised the issue with the committee, as did Professor Reid and Professor Blackie, and I can commit to looking at it further. Obviously, I will consider the committee's report, and if you make recommendations on this area I will certainly look at them.

The Convener: One of the things that strikes me about the law of defamation is that the single biggest change to it in recent years has been the creation of the Reynolds defence. Everyone has welcomed the addition of that defence in the law of defamation: we have not received any evidence that countermands that view. That is judge-made law; it is a defence that was created not by statute, but through case law, in the ordinary way of common-law development.

A number of our witnesses have suggested that we would not want to see the bill being interpreted by the courts as if it were, or was intended to be, the last word in the on-going development in the law of defamation in Scotland. Do you and the Scottish Government share that view?

Ash Denham: Yes.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I will follow up with a specific question for you, minister. The committee has heard some concern about the use of the term "ordinary" people, rather than a reasonable person-type test, as the term "ordinary" people might reinforce social prejudices. Would you look at that if enough concern was expressed? Why is it okay to use the term "ordinary" people?

Ash Denham: As I have said, it is meant to be a simple restatement in modern language of the common-law test. One of the things that is good about the process that we are going through is that, if we are going to define defamation, everyone in this legislature should be able to agree on that as far as possible, and to vote for it, so that we are all clear about the definition.

The use of the term "ordinary persons" in the bill is not meant to refer to any specific part or section of society, but to suggest a general, objective legal construct. As I have said, in modern practice, a defamatory statement is sometimes explained to juries as being one that uses words that

"would tend to make ordinary readers think the worse of the pursuer."

I am not aware of that having created any difficulties so far in the courts, but I ask Michael Paparakis to add a little more on that.

Michael Paparakis (Scottish Government): As the minister said, in the bill, we have not tried

to revolutionise what we mean by defamation. The term "ordinary persons" is a standard description that is used by sheriffs in addressing the jury in a defamation case. They refer to a defamatory statement as being words that

"would tend to make ordinary readers think the worse of the pursuer."

In the bill, we have carried over the idea of "right-thinking members of society" into more modern words. A court that is looking at the provision along with the explanatory notes would understand that and interpret it accordingly.

The Convener: Annabelle Ewing wants to ask about the serious harm test.

Annabelle Ewing (Cowdenbeath) (SNP): I note that, in her opening remarks, the minister suggested that the Government is trying to ensure that cases can proceed only where there is evidence of harm, rather than evidence that might be viewed as frivolous. However, actual evidence of harm and serious harm are not exactly the same thing.

In evidence to the committee, the view has been expressed that setting the bar at serious harm risks introducing a barrier to ordinary pursuers. [*Inaudible*.]—is likely to make the process much more complex and costly. Could the minister comment on those concerns?

Ash Denham: The threshold test is a sensible reform of defamation law. If someone is going to say to a court that their reputation has been damaged, they should be able to prove to the court that it has been damaged. That is a sensible starting point.

Also, when people are notified that a statement that they have published is defamatory, the existence of the threshold will give them confidence that the damage will have to be proved in court.

10:15

I do not think that the threshold will make things more complicated or expensive. An individual who has been defamed currently has recourse to a simple procedure for raising an action for damages—I do not know whether the committee has discussed that. The court procedure is designed for lay people to use; that avenue is open to people. I understand that a procedure can be raised for as little as £19, so I do not think that access to justice is an issue.

Annabelle Ewing: Some witnesses from whom the committee heard pointed to what has happened south of the border by dint of, inter alia, the setting of a threshold at not just harm but serious harm. Before stage 2, it might be worth having your officials investigate the issue further, because we are seeing very complex processes down south, just to deal with the serious harm element.

I heard what you said. However, some witnesses think that the bill's approach in this regard is very much a sledgehammer to crack a nut, in that, south of the border, the Defamation Act 2013 sought to resolve problems with defamation that had arisen in England, whereas in Scotland we have very few cases. Indeed, our witness from the Faculty of Advocates said that the bill provides

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

Will you comment on the wider issue to do with the bill not getting the balance quite right when it comes to the serious harm test?

Ash Denham: The bill is getting the balance right. Across the piece, it attempts to strike the balance that we discussed and to reduce costs for all parties by introducing more effective remedies for protecting reputation and stronger protections for freedom of expression.

I do not agree with the characterisation that the bill is about English solutions to English problems. The Scottish Law Commission developed a set of proposals. It took a wide-ranging look at the Scots law of defamation and made a large number of recommendations, as the committee knows. It certainly did not confine itself to considering whether English defamation law should be replicated here; that was not the commission's approach at all.

Chief among the commission's recommendations was that there should be a threshold test of serious harm. I understand what the stakeholders have said about the threshold, and it is for the committee to decide whether we have taken the right approach, but I think that if someone thinks that they have been damaged by a statement they should show how they have been damaged. That seems to me to be the right approach. Currently, the law presumes that damage has been done, which I do not think strikes the right balance—the bill will create a better balance. Michael Paparakis might want to say something about that.

Michael Paparakis: There is not much that I can add. As the minister emphasised, the Scottish Law Commission looked at the law of defamation and malicious publication in the Scottish context—it did not just copy the provisions of the 2013 act for no reason. It felt that reform of Scots law was required and it made recommendations. That is what we put forward in the bill.

The Convener: Do you have more questions on that, Annabelle?

Annabelle Ewing: We have probably exhausted the subject for the moment.

Rona Mackay: I have a follow-up question. Witnesses from the media talked about vexatious litigation and warning letters, which they perceive to be quite a problem. Legal stakeholders said that that is part and parcel of what they do and just represents how the system works. Will the serious harm test affect such activity?

Ash Denham: I hope so. It is difficult to quantify the effect that the test will have and how much effect such activity has. My officials can give examples of how measures are working in England and Wales.

Exactly as the member suggested, we have the chilling effect, which the committee has heard quite a bit of evidence on. If someone creates content and a letter is served, the secondary publisher may decide to pull the content immediately, whether it is right or wrong. That affects freedom of expression.

One of the bill's key aims is to give people confidence about their rights and obligations under defamation law. Having everything in one place in a clear and accessible way will provide such confidence. The threshold test is an important part of that.

Liam McArthur (Orkney Islands) (LD): I will follow up Annabelle Ewing's questions. She quoted Duncan Hamilton from the Faculty of Advocates referring to what the faculty perceives to be

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

He drew on supporting evidence that shows not that there is too much defamation litigation, but that there is if anything too little. Since the Defamation Act 2013 was passed south of the border, we have had the opportunity to see whether more litigation would move north of the border, where a lower test has applied, but there does not seem to be evidence of that.

I take on board the point about the Scottish Law Commission's recommendations, but the faculty says that, although there would be benefit in the law being tested, we are not seeing examples of that. The risk is that setting a higher threshold of serious harm will choke off litigation, which will not necessarily benefit the public, including the people Annabelle Ewing referred to.

Ash Denham: The test is part of the overall balance of the bill. Do you accept that, if someone said that their reputation had been damaged, we would expect them to show how it had been damaged?

Liam McArthur: That was accepted, but the seriousness of the harm is for a court to decide and will be reflected in any damages that are awarded. Setting a high threshold could tip the balance too far in favour of one side when there is no evidence that too many cases are coming forward. As I said, the faculty pointed out that the number of cases is limited.

Ash Denham: It is right that the level of cases is low. Michael Paparakis will speak about the effect of the harm test in England and Wales.

Michael Paparakis: Since 2013, the number of defamation cases in England and Wales has increased almost year on year. The threshold test has not overly prevented cases from arising. Courts have determined that the test has not been met in some cases and have thrown them out. I have examples of a couple of cases if the committee wants them.

On the level for the threshold test, the Scottish Law Commission considered all the issues and recommended that serious harm was the appropriate level for cases in Scotland. That is what the bill implements.

The Convener: Defamation addresses the relationship between freedom of expression on the one hand and protection of reputation on the other. Moving the threshold from harm to serious harm tilts that balance in favour of freedom of expression. That is the policy aim behind the bill that the Government seeks to pursue—is that right?

Ash Denham: The aim is to rebalance the bill, yes.

The Convener: Do you mean to rebalance it in favour of freedom of expression?

Ash Denham: Yes.

The Convener: Is that an intended policy outcome of the bill?

Ash Denham: Yes; it was an intended policy outcome of the Scottish Law Commission.

The Convener: Is it the Government's intended policy outcome? It is the Government's bill.

Ash Denham: It is. We took the recommendations from the Scottish Law Commission and I also agree with them.

The Convener: Thank you. John Finnie has questions on the Derbyshire principle.

John Finnie (Highlands and Islands) (Green): There has been a lot of discussion about the principle of a ban on public authorities suing for defamation and a number of questions have been posed; I am sure that you have followed that discussion. If I noted this correctly, you referred

earlier to "the ballot box and not the court" being used for issues.

We know that the definition includes exemptions for businesses and charities that deliver public services "from time to time". One of the challenges is that the contracts for the many different bodies that provide a wide range of public services do not necessarily align with the local or central Government electoral processes.

Stakeholders have concluded that section 2—the statutory version of the principle—both expands on the common-law position so that a wider selection of organisations are prevented from protecting their reputation and fails to protect all those who criticise public service delivery from defamation litigation. Arguably, that satisfies no one. Can you explain the Scottish Government's rationale for legislating in that way?

Ash Denham: The aim of the provision is simply to place on a statutory footing the common-law principle that public authorities cannot raise defamation litigation. As the member has noted, public authorities have a reputation but they need to protect it through political means and not defamation law. Allowing comment on the actions of democratically elected bodies obviously serves public interest and that is the fundamental rationale behind the Derbyshire principle. I listened to the evidence that was given to the committee on the matter and, although opinions differ a little bit around how that principle should be drafted, it is universally accepted that the principle is important.

I want to be clear that, as far as I am concerned, the bill will protect those who criticise public service delivery even when a private body delivers that service. It is also my opinion that the provisions in the bill will sufficiently protect those who criticise the public services that are provided by private companies.

I will let Michael Paparakis explain the list of factors, as well as the drafting of "from time to time", which the member raised.

Michael Paparakis: That drafting appears in the Human Rights Act 1998 and has been used in a number of bills since then. The courts are aware of that form of words and have interpreted it for more than 20 years. We think that the approach that is taken in the bill should mirror that form of words.

When the court considers the public authority of private bodies, it takes into account certain factors about what a private company does, whether it is on contract and so on. You will be aware that the Lord Justice Clerk, Lady Dorrian, in the Ali v Serco case last year decided on a number of factors that related to the court's approach to interpreting that form of words. The drafting in the bill provides a sensible and flexible approach to how the courts will interpret what a public authority is for defamation law.

John Finnie: Notwithstanding what I have heard from both the minister and the officials, concerns remain about the drafting and the suggestion that it would increase uncertainty for organisations outside the public service that deliver public services, such as electronic monitoring for prisons; universities have also been mentioned in the past. Do you plan to lodge any amendments in that particular area? That would have to be reflected in the committee's stage 1 report.

10:30

Ash Denham: We do not currently have any plans to lodge any amendments on that. We need to ensure that we take a flexible approach so that courts can deal with complex and nuanced cases as things develop. We need to bear in mind that public service delivery is not what it was 20 years ago, and we need to allow a flexible approach. I would certainly be happy to carefully consider the committee's recommendations on that point, and I will take another look at the evidence on it.

John Finnie: Thank you—that is reassuring.

The Convener: I want to ask a follow-up question about that. As Mr Finnie indicated in his questions, some of our witnesses have said that they think that section 2 is too broadly drawn and some have said that they think that it is too narrowly drawn. It seems to me that that difference of view depends on what people think the purpose of the rule in Derbyshire is. I think that there are two options, and I wonder which option the Scottish Government prefers.

The first interpretation of the rule in Derbyshire is that it is designed to capture only people who are elected. If a person is elected through the ballot box—this goes back to the minister's original remarks, which Mr Finnie picked up on—and they are criticised by members of the public about the way in which they are performing their functions, they do not have recourse to the law of defamation.

However, there is another view, which relates to what the minister has just said. That view is that the way in which public services are delivered has changed beyond recognition over the past decade or two, so the purpose of the rule in Derbyshire really should be to protect those who criticise the way in which public services are delivered, irrespective of who they are delivered by—whether that is by people such as us, who are elected, arm's-length organisations or corporations.

We will therefore have a clearer view of what the drafting of section 2 should look like only if we have a really clear view to start with of what the purpose of the rule in Derbyshire is. In the Government's view, what is it?

Ash Denham: The first.

The Convener: Right. I respectfully suggest that that might lead you into difficulty with the drafting of section 2, because you might find it difficult in a single section to protect two interests that are not always compatible with each other.

Ash Denham: I take your point on that, but it does not expand on the common-law definition. We are replicating that, and we are just trying to codify it in a sensible and flexible way. However, I have said to the committee that, if it has a strong interest in the matter and does not think that the balance is right, I will endeavour to look at that again with the drafters and see whether there is maybe a way in which that could be changed or whether we could put something into the explanatory notes that might be helpful.

The Convener: When Lord Keith, who was, of course, a Scottish law lord, delivered his judgment in the Derbyshire case—even though it was a case from England and Wales—he did not think that the rule in Derbyshire protected the delivery of public services. He thought that it protected those who wanted to criticise councillors and members of Parliament, who are directly elected. The principle that underpins the Derbyshire rule is an issue that we will want to draw out as the bill progresses.

I have said enough about that. Rona Mackay has questions about online behaviour.

Rona Mackay: The bill would exempt secondary publishers from any liability in defamation. We know that a similar approach is taken in the USA and that online service providers there take no action to remove even clearly defamatory content. Does the minister accept that that is a risk? Should the bill have gone a bit further with regard to online content?

Ash Denham: Are you talking about the take-down approach?

Rona Mackay: I was going to ask about that, yes. Obviously, the bill does not have the take-down approach that we see in the 2013 act, and it repeals section 1 of the Defamation Act 1996, which requires secondary publishers to take reasonable care.

What should someone do if they have been defamed? Most people would just want that material taken down. Do you think that more could be done in that respect to protect people?

Ash Denham: I am aware that a number of stakeholders have put forward arguments around that area. The aim of the provision is not to give internet companies free rein—that is not we are going for. However, we have to balance that with the principle that secondary publishers are not actively responsible for the content, even though, at present, they are held liable for that.

The committee has heard from Scottish PEN on this issue. The proposal will ensure that the focus is more firmly on where the defamatory statements come from, and on the authors, editors and publishers of those statements.

The issue of take-down is interesting. I think that it is a lot more complicated than what you suggest. Superficially, it seems like the take-down procedure might be a silver bullet that would fix the issues. However, in practice, that approach does not seem to be working as effectively down south as it was hoped that it might. Michael Paparakis can say more about that.

Michael Paparakis: The take-down procedure will usually involve a person who thinks that they have been defamed by a statement contacting the internet company with a notice of complaint. The website operator would send that notice to the person who has posted the statement. If that person wants to stand behind their statement, the statement stays up. They do not have to pass on their details to anyone else. The statement will come down only if the person who has posted the statement does not respond to the notice of complaint. We think that that goes against the idea of freedom of expression—it goes too far. We believe that the approach that we are taking in the bill to secondary publishers is appropriate. It allows the court to determine whether a statement is defamatory and whether it should come down, rather than leaving it up to the vagaries of the take-down procedure.

Rona Mackay: I appreciate what you are saying. I think that the only problem with that approach is that, with the take-down procedure, the statement disappears, which is better for the complainant, because court action takes a long time, which means that the defamatory material will be around for longer.

Ash Denham: But if the statement is not defamatory, and is eventually proven not to be defamatory, the take-down procedure is not good for the author. That brings us back to the balancing act, does it not?

In answer to your question about what someone should do if there is a defamatory statement about them online, they can go to court and use the simplified court procedure to ask the court for damages or for the statement to be removed from

the website. That procedure need not involve a solicitor, and the costs start at £19.

The Convener: James Kelly wants to ask about the defences in the bill.

James Kelly (Glasgow) (Lab): The defences that the bill codifies around truth, honest opinion and publication in the public interest were broadly welcomed by the witnesses we heard from. However, with regard to the truth defence, some concern was expressed about the fact that only the sting of the allegation needs to be proven. Further, with regard to honest opinion, there was some concern about the fact that there was not enough protection for satire or hyperbole. Having listened to the witnesses' concerns, what is the minister's view? Are there any areas in which she would consider making amendments in the light of that feedback?

Ash Denham: Thank you for the question. The matter has been very carefully considered in order to strike the right balance in the bill, and I think that it has been struck with regard to issues such as satire and hyperbole. I will ask Michael Paparakis to go into a bit more detail on the defences.

Michael Paparakis: With regard to satire and such, the Scottish Law Commission considered the point and was of the view that the glue of the honest opinion defence is that the opinion is genuinely held by the person who makes the statement. The Faculty of Advocates also pointed to a case—Macleod v Newsquest—in which the court considered the matter of satire or parody. In that case, the action that was raised was about the context of a sketch piece. The action was dismissed on the basis that

"the ordinary reader would have understood that the article had been written for his or her entertainment in a cheerful, irreverent and playful spirit, and had contained elements of fantasy."

As things stand, there is enough protection for satire and parody, and we think that the drafting achieves that aim.

James Kelly: It is interesting that, in your answer, you refer to previous case law. One of the issues that has come up is that, understandably, people feel that strong case law will be important in relation to defences. As was mentioned earlier in the session, there was a lot of support for the Reynolds defence and the principles around it. Has the Government given any consideration to setting out the principles in the bill, to make them clearer and stronger?

Ash Denham: The bill places the current Reynolds defence on to a statutory footing. The explanatory notes to the bill make that explicit—in paragraph 41, if the committee wants to check it. I would expect that previous case law in relation to defence would continue to apply. The courts will continue to take it into consideration, but I am interested in the committee's view as well. I am able to commit to reflecting on whether any further clarification is needed in that regard, but I await with interest the committee's report and any recommendation that might be forthcoming on the issue.

James Kelly: I am sure that the committee will—[*Inaudible*.] I am sorry for the interruption there, convener. I am sure that the committee will reflect on the point. I note that you say that there is reference to the principles in the explanatory notes. If they were in the bill, that would make the position stronger and clearer.

The Convener: We will move on to malicious publication, on which Liam Kerr has questions.

Liam Kerr (North East Scotland) (Con): Thank you. Good morning, minister.

Part 2 of the bill relates to malicious publication. You are clearly in favour of the serious harm test for defamation; however, the serious harm test does not appear in the malicious publication part of the bill. Will you explain your thinking behind that?

Ash Denham: No, the test does not appear in part 2. We have defamation and we have malicious publication, and I am sure that Liam Kerr is aware that they are distinct causes of action. Malicious publication covers statements that are likely to be highly damaging but that are not necessarily defamatory. We would all recognise that the difference between the two things results in a different balance having to be found. The bill does not lower the threshold for malicious publication compared with defamation; it recognises that they are different actions and that a different balance needs to be sought. Other tests will need to come into play for malicious publication.

Liam Kerr: Do you not accept that the bill does lower the threshold? The bill requires that

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

I think that I am right in saying that there is no definition of "financial loss", and therefore there is no de minimis. If the statement is only likely to cause financial loss, that is not a serious harm test, is it? Therefore, should it not be concluded that, if there is a serious harm test in part 1, there ought to be a serious harm test in part 2?

10:45

Ash Denham: They are two distinct causes of action. I do not necessarily accept the logic that the same threshold test should be used for two

different actions—to my mind, that does not necessarily follow.

I think that we have struck an appropriate balance. As Mr Kerr rightly points out, there are additional tests, such as the one for proving financial loss. Jo-anne Tinto might be able to say more about the tests.

Jo-anne Tinto (Scottish Government): The Government thinks that, with malicious publication, because the falsity test and the malice test are hurdles that must be overcome, it is not necessarily relevant to include the serious harm test. With defamation, on the other hand, falsity and malice are presumed, so those hurdles do not have to be overcome, with the result that the serious harm threshold is an option.

Liam Kerr: That is a reasonable point. I understand the point about the different hurdles that have to be overcome and the different ways in which the malicious publication provisions and the defamation provisions operate. However, I want to pursue the question of malice with the minister. The way in which malice is defined in sections 21, 22 and 23 suggests that all that needs to be shown is that the maker of the statement was

"indifferent as to the truth of the imputation".

It has emerged from our evidence sessions that that indifference as to the effect of the statement is a rather low threshold. What do you say to that?

Ash Denham: I do not agree at all that it is a low threshold. The Scottish Law Commission gave a great deal of consideration to the issue of verbal injury and the new statutory cause of action of malicious publication. In my opinion, the definition of malice that the commission has come up with accurately reflects the common-law position.

Jo-anne, do you have anything to add on that?

Jo-anne Tinto: No, I have nothing to add.

Liam Kerr: I am not sure that the definition of malice reflects the common-law position. When you talk about the common law, I think that you are referring to the concept of verbal injury, which is an area in which the law has been described as "obscure and uncertain". If that is right, does the bill not provide an opportunity to codify that and make sure that it is right? Should we not do that rather than just reflect an obscure and uncertain position? Have you not missed an opportunity to remove those ambiguities?

Ash Denham: I think that the committee has had evidence on the matter from the Faculty of Advocates and Dr Stephen Bogle, who agreed that the definition is a reflection of the present law.

Liam Kerr: James Kelly asked about defences. Part 1 of the bill codifies the defences as they currently exist, but I do not see the same defences applying to part 2. Am I right in saying that the defences do not apply to part 2? If not, why not?

Ash Denham: The situation is not exactly the same. The defence of fair comment would apply, as would the defence of absolute privilege and the defence of truth.

Liam Kerr: Would they apply to part 2?

Ash Denham: They would apply to malicious publication. Does that clear that up?

Liam Kerr: It does. This is a genuine question: where in part 2 does it say that those defences apply? I accept the minister's assertion, but I would like to know where in part 2 it says that those defences apply.

Ash Denham: I will let Michael Paparakis give you the detail on that.

Michael Paparakis: The bill is structured in such a way that malicious publication is dealt with in part 2, but I am not sure that it is obvious how the defences would apply. The Law Commission makes clear—in its discussion paper, I think—which defences would apply to malicious publication. We did not necessarily want to codify that to the same extent in the bill as we did for defamation law. We do not go into clearing up which defences would apply to malicious publication, but the defences that we put in the bill, such as truth and honest opinion—we also touch on absolute privilege—would apply in a malicious publication action.

Liam Kerr: I muse, then, whether that area is ripe for amendment, to make it absolutely clear that sections X, Y, and Z apply as defences in part 2. Minister, do you think that there would be value in pursuing that?

Ash Denham: I can certainly commit to looking at that carefully if an amendment is lodged on the issue.

Liam Kerr: I listened to the minister not necessarily accepting my premise that the threshold might have been lowered. Some stakeholders have suggested that there could be a lower threshold just with the lack of the serious harm test and the definition of malice, for example. Does the minister accept that there is a risk that the malicious publication part of the bill will become the part of choice for those wishing to assert, in effect, defamation as a way of avoiding the higher thresholds that the minister is introducing in part 1 to prevent defamation actions?

Ash Denham: I do not think so. I can see the point that the member is making, but there will still be a requirement to prove falsity. There is still a requirement to prove financial loss, as we have

discussed. I do not expect that that would happen, but the member raises an interesting point.

The Convener: Fulton MacGregor wants to ask about court orders to remove material.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I have been asking about section 30 throughout the evidence gathering. The power in section 30 provides for an intermediary measure before the court has reached a final decision, and we have heard mixed views on that. Some stakeholders are quite in favour of section 30, whereas others, particularly media stakeholders, suggest that it could be disproportionate and could force the removal of material that might not ultimately be found to be defamatory. What is your view on that, minister? Could you speak a wee bit about the justification for, and the Government's thinking behind, legislating in that area?

Ash Denham: That is an important point. It will be helpful if I make it clear to the committee that the power of the court to order the operator of a website on which a defamatory statement has been posted to remove the statement—even if just as an interim measure—can be exercised only once court proceedings have commenced. The court will therefore have an opportunity to hear from both parties where possible. It is important that the court has the flexibility to be able, in an appropriate case, to take prompt action to protect reputation.

Although I would expect such cases to be really rare, it is important that we have that provision in the bill. The committee has also heard evidence that the approach is reasonable and is likely to be used only when it is absolutely necessary. It is worth pointing out that the courts currently possess that power, and I do not think that we are aware of any evidence that they are abusing it at the moment.

The Convener: Liam McArthur wants to ask about time limits.

Liam McArthur: We talked earlier about the serious harm threshold. There is another area where it has been identified that the thresholds have changed quite markedly: the balance that the convener was talking about has perhaps shifted in relation to time limits, too. It is partly the reduction from three years to one year for bringing an action for defamation, and partly the fact that the clock starts running from the point of publication rather than the point at which an individual becomes aware of material. Concerns have been raised about the impact of that. One is that there might be a delay in an individual becoming aware of a statement having been made. The other is that the initial publication of a statement may not be sufficient to justify or provoke such a case being brought, but the cumulative impact of the repetition of the statement may lead the individual to feel that they have no option but to bring a defamation case. How will the bill address such concerns?

Ash Denham: If someone suffers damage to their reputation, they usually become aware of it quite quickly. We are again back to the balancing act in relation to time and how long things should take. A one-year period strikes the right balance. It is enough time to assess the damage and prepare for litigation, or to engage in alternative dispute resolution, if appropriate in that case.

Courts will have discretion to allow litigation to proceed outwith the one-year limitation period where they consider that there is a good reason to do so. In the examples that you gave of something coming to the attention of the individual close to the end of the time period after publication or of there being a cumulative effect, if an individual can say that defamatory statements have been made that have caused them serious harm, courts could make allowances for that. They will have the discretion to allow litigation to proceed even if it is after the one-year period.

I hope that that strikes the right balance.

Liam McArthur: Would that latitude for the courts also address concerns that were raised, partly in relation to timeliness but also on the question of secondary publication? The case for defamation might perhaps be questionable because of the audience that a statement can reach when it is initially made, but when repeated by someone or on a different platform with a far greater reach, the case for defamation and meeting the serious harm threshold might be more obviously made. Would the court have sufficient discretion to take that into account?

Ash Denham: It would, because if more prominence were given to the statement in subsequent publication, that would be considered to be a material difference, which would result in a restarting of the one-year clock. It is a flexible approach.

The Convener: On flexibility and the court process balancing various interests, Shona Robison has some questions about protection from unjustified threats.

Shona Robison (Dundee City East) (SNP): My first question is on Scottish PEN's proposal to introduce a form of court action to protect against unjustified threats, which has received support from some stakeholders, although others are not so supportive. Did the Scottish Government consult on such a provision? Why does it not feature in the bill?

Ash Denham: It is not a good fit for the law of defamation, which is why it has not been taken

forward. It has raised some human rights concerns, which I will ask my officials to speak to in a moment.

An unjustified threats provision is likely to make things much more difficult. Michael Paparakis will provide a bit more detail on that.

Michael Paparakis: Our concern is that an unjustified threats provision would not have the intended effect that Scottish PEN thinks it would have. It is concerned about the effect of threatening letters being received, and thinks that having the delict of unjustified threats would stop those letters. It might well do, but we think that it might instead result in people cutting out that initial step and simply going straight to court, which I do not think is the solution that anyone wants.

Obviously, the delict of unjustified threats comes from intellectual property law, where things are potentially more absolute than they are in defamation. It is something that we consulted on and considered but, ultimately, we do not think that it should be taken forward.

11:00

Ash Denham: One of the primary aims of the bill is to simplify things and add clarity. The issue of unjustified threats would add complexity that is not necessarily appropriate in this area. At the moment, defamation proceedings involve a test of serious harm, the new statutory defences and the offer of amends. Taken together, those things should give the defenders the confidence to resist the threat of litigation. I do not think that the inclusion of unjustified threats is warranted, and it would add unnecessary complexity.

Shona Robison: On that subject, witnesses have highlighted what they perceive as the intimidatory nature of pre-litigation correspondence and have talked about having a pre-action protocol, which exists in England for media and communication cases. Would that be a better way of controlling the pre-litigation environment? Would you consider looking at having some sort of similar protocol in Scotland?

Ash Denham: I have seen some of the evidence that the committee has taken on this matter. I understand that there is a feeling that that protocol is helpful in England. However, it is a matter for the Scottish Civil Justice Council. If the committee is particularly interested in the issue, I could write to the council to ask it to consider taking such an initiative.

Shona Robison: The committee can discuss that, but it would be helpful to know the council's views.

Witnesses have referred to what they call anti-SLAPP—strategic lawsuit against public participation—actions as a more direct way of dealing with litigation that is motivated by a desire to stifle criticism. In some North American jurisdictions, a defendant can argue that litigation threatens their right to free speech and, if the court agrees, the plaintiff must show that their action is more likely than not to succeed before they can continue. What is the Government's view on incorporating a protection of that nature in the bill? Have you considered that?

Ash Denham: That is not something that I am minded to introduce at the moment. The balance that the bill is striking should give content creators confidence about their ability to publish something that is in the public interest, so I do not think that the facility that you propose would be necessary.

Liam Kerr: I would like you to explain something again, minister—this is a genuine question; I did not catch what you said earlier. Why, if we reduce the limitation to one year, should it not be from the date of knowledge rather than from the date of publication, as the bill envisages?

Secondly, I listened to what you said about the fact that section 19A of the Prescription and Limitation (Scotland) Act 1973 gives the court the ability to extend the time limit if it is "equitable to do so". As you know, I come from an employment law background and, in employment law, the criteria for extending a limitation are pretty clear.

Might the bill provide you with an opportunity to reconsider whether the idea of something being "equitable" is the best test for a time limit being extended and to consider whether the idea of it being "reasonably practicable" to present a claim within one year might be better?

Ash Denham: The motivation for reducing the time period, as I discussed when I spoke to Mr McArthur, is that the fear of defamation proceedings that content creators feel for years and years after they have published the content has a chilling effect. We are looking to strike an appropriate balance.

Michael Paparakis: We think that the date of knowledge and date of publication are more likely than not to coincide, and the date of publication is a more definite and fixed point. As the minister said, if there is a material difference, there is an allowance for the restarting of the one-year period.

The issue to do with section 19A of the 1973 act comes from the general law of prescription. If we decide to make changes to that, I do not think that we should do so through defamation law. The issue might have wider implications than what we have discussed today.

Liam McArthur: In earlier questions, we have skirted around the issue of accessibility. Media

representatives have made points about the changing shape of the media environment, which involves far greater use of freelancers, for example, who will often not have the weight of a legal department behind them. What consideration has been given to what information, advice and support—perhaps funded by or produced by the Scottish Government—can be given to reassure such individuals and ensure that they understand their rights and responsibilities under the law, even if, in due course, they would almost certainly need to seek the support of a solicitor for more detailed advice? Is there a role for the Scottish Government to provide such support for those who might need it?

Ash Denham: I will give that some thought. One of the key strengths of our approach is that we are bringing all of the key issues of defamation into one piece of legislation and are modernising the language, which will, in itself, make it more accessible, because people will know where to go, can read the law for themselves and can understand what their rights and obligations are under the law of defamation. However, as I said, I will give your point some thought.

Liam McArthur: That would be helpful. The point that you make is valid, but it probably suggests that now is an opportune moment to provide some supporting documentation that at least gives people that general level of understanding.

The other point that was made was that even seeking legal advice about whether to instigate or defend a defamation case can result in costs that rise very quickly. Has the Scottish Government given any consideration to changing the rules around access to legal aid in cases of defamation?

Ash Denham: We have not done so. I have no plans to review legal aid or the tests that apply to defamation at this point.

Liam McArthur: Would the Government be willing to consider the extent to which that issue is an inhibitor to people taking a case or deciding whether to defend one?

Ash Denham: The Scottish Government has pursued access to justice and modernising civil litigation to quite a great extent, for instance through the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. We have a more accessible and affordable civil justice system in Scotland than we had previously. On balance, it is possible to raise an action for damages quite inexpensively, using the simplified procedure that I have already talked about. The fact that those routes are available means that there is not an access to justice issue here, as far as I am concerned. Therefore, I am not minded to review legal aid in that regard.

Liam McArthur: Shona Robison talked about Scottish PEN's proposal for a pre-action procedure that might speed things up and reduce costs. Dr Andrew Scott—I think—also referred to the introduction of a preliminary process or hearing that could deal with take-down requests and make quite quick decisions on whether words have a defamatory meaning. Might the Government be prepared to look into that issue further?

Ash Denham: My officials will correct me if I am wrong, but I think that I am right in saying that both those issues concern court rules and would come under the remit of the Scottish Civil Justice Council.

Michael Paparakis: That is correct. Mr McArthur is perhaps referring to the idea that sheriffs would get more case management powers. Obviously, they would be able to direct proceedings according to the nature of the defamation, so there would be scope to have a single-meaning hearing to attribute the meaning to the defamatory statement. Certainly, under the simplified procedure, sheriffs have a great deal of scope for case management powers. I know that the Scottish Civil Justice Council was considering a wider review of the ordinary procedure, partly with a view to giving sheriffs more case management powers, too. The direction of travel is certainly towards allowing sheriffs more freedom to direct the proceedings. That would certainly be of value in defamation law.

Liam McArthur: From what you have said, it appears that a certain degree of latitude already exists. However, from the evidence that we have taken, I think that there is a question about whether that latitude is being used as widely as it should be. Therefore, before we invest further powers in this area, it might be helpful to understand why there might be a resistance to using the powers in the way that has been suggested.

Ash Denham: That is a fair point. If the committee has an interest in that and wants to make a recommendation on that point, I would be happy to write to the Scottish Civil Justice Council to express views about the benefits of early determination and so on, under the case management arrangements.

The Convener: No member has indicated that they wish to ask any further questions, minister, so I thank you and your officials for the evidence that you have given us this morning.

That concludes the evidence-taking sessions on the bill at stage 1, and it also concludes the public part of our meeting. Our next meeting is a week today, on Tuesday 29 September, when we will take evidence from Gil Paterson on his proposed

post-mortem examinations (defence time-limit) (Scotland) bill.

We will now move into private session.

11:12

Meeting continued in private until 11:53.

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