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Tuesday 2 March 2021

CONTENTS

	Col.
TIME FOR REFLECTION	1
BUSINESS MOTION	3
<i>Motion moved—[Graeme Dey]—and agreed to.</i>	
TOPICAL QUESTION TIME	4
Covid-19 (Brazilian Variant)	4
Legal Advice (Publication)	7
COVID-19	10
<i>Statement—[First Minister].</i>	
The First Minister (Nicola Sturgeon)	10
SCOTTISH PARLIAMENTARY ELECTIONS 2021	30
<i>Statement—[Graeme Dey].</i>	
The Minister for Parliamentary Business and Veterans (Graeme Dey)	30
BUSINESS MOTION	41
<i>Motion moved—[Graeme Dey]—and agreed to.</i>	
DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) BILL: STAGE 3	42
DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) BILL	58
<i>Motion moved—[Ash Denham].</i>	
The Minister for Community Safety (Ash Denham)	58
Liam Kerr (North East Scotland) (Con)	60
Neil Bibby (West Scotland) (Lab)	62
John Finnie (Highlands and Islands) (Green)	64
Liam McArthur (Orkney Islands) (LD)	66
Rona Mackay (Strathkelvin and Bearsden) (SNP)	67
James Kelly (Glasgow) (Lab)	70
Adam Tomkins (Glasgow) (Con)	71
Ash Denham	72
CODE OF CONDUCT RULE CHANGES	76
<i>Motion moved—[Bill Kidd].</i>	
Bill Kidd (Glasgow Anniesland) (SNP)	76
REIMBURSEMENT OF MEMBERS' EXPENSES SCHEME	78
<i>Motion moved—[Liam McArthur].</i>	
Liam McArthur (Orkney Islands) (LD)	78
DECISION TIME	80
EATING DISORDER AWARENESS WEEK 2021	84
<i>Motion debated—[Rona Mackay].</i>	
Rona Mackay (Strathkelvin and Bearsden) (SNP)	84
Kenneth Gibson (Cunninghame North) (SNP)	87
Brian Whittle (South Scotland) (Con)	89
Emma Harper (South Scotland) (SNP)	90
The Minister for Mental Health (Clare Haughey)	92
CORRECTION	95

Scottish Parliament

Tuesday 2 March 2021

[The Presiding Officer opened the meeting at 14:00]

Time for Reflection

The Presiding Officer (Ken Macintosh): Good afternoon. I welcome members to the chamber. As usual on a Tuesday, we begin with time for reflection.

Our time for reflection leaders today are Mia Fallon and Nathaniel Sweeney, who are the living on £2 campaign project representatives from St Aidan's high school in Wishaw. I will hand over to Mia and Nathaniel.

Nathaniel Sweeney (St Aidan's High School, Wishaw): Hello, everyone. I am from St Aidan's high school in Wishaw, and I am with my friend Mia Fallon to discuss my school's £2-a-day challenge.

To briefly summarise, the challenge, which was proposed by Mr O'Donnell, our head of social subjects, was to go through a school week with only £10 to spend on food, raising awareness of the one third of the world's population who must live on less than \$2 a day.

Each participating student was asked to find sponsors, who could donate any amount of money to charity. I asked my parents and close relatives, who then asked other family members and, through a chain reaction, I garnered more than £275.

However, other students took on more creative methods, posting on sites such as Instagram and Snapchat, to help spread the word further. In total, our school raised £1,311. That is a great amount for a challenge that, originally, was just intended to raise awareness about poverty and the frightening position that millions of families around the world are facing.

Mia Fallon (St Aidan's High School, Wishaw): Before beginning the challenge, I do not think anyone comprehended the obstacles that we would face throughout the week and just how little money we could spend.

During the week, preparing and budgeting was difficult for many of us, as we had to go to several shops for the best-priced foods, and I had similar boring meals across the day.

During the challenge, the link between poverty and obesity became clear, as the cheapest foods tend to contain little nutritional benefits. Many of them come from cans or packets, and there was a

lack of fresh foods and vegetables due to the insane prices.

By the middle of the week, we had small meals very infrequently, leading to our being hungry throughout the day, with no money to buy snacks. That affected our mindsets and concentration levels in our work. Many of us were exhausted and were not motivated to complete anything.

I have reflected on the past week and it has become apparent that that is what a third of the world endure every day. I have lost all self-pity, becoming instantly more thankful for and appreciative of everything that I have in life.

We intend to donate all the money that we raised to local charities, including Paul's Parcels, which is a voluntary group that is striving to eradicate food poverty in Shotts.

The Presiding Officer: Thank you very much indeed for your contribution, Mia and Nathaniel.

Business Motion

14:03

The Presiding Officer (Ken Macintosh): We move on to the next item of business, which is consideration of business motion S5M-24273, in the name of Graeme Dey, on behalf of the Parliamentary Bureau, setting out a revision to today's business.

Motion moved,

That the Parliament agrees to the following revision to the programme of business on Tuesday 2 March 2021—

delete

6.05 pm Decision Time

and insert

5.30 pm Decision Time)—[*Graeme Dey.*]

Motion agreed to.

Topical Question Time

14:04

Covid-19 (Brazilian Variant)

1. **Alison Johnstone (Lothian) (Green):** To ask the Scottish Government whether it will provide an update on the detection of the so-called Brazilian variant of Covid-19 in Scotland. (S5T-02690)

The Cabinet Secretary for Health and Sport (Jeane Freeman): Three cases of the Covid-19 variant of concern, which was first identified in Japan but which is associated with Manaus in Brazil, have been identified in Scotland. They relate to three individuals who travelled from Brazil to Aberdeen via Paris and London. As members would expect, contact tracing has been undertaken and close contacts have been followed up and offered testing, as usual.

In an additional precautionary step, the close contacts of those contacts have been identified and followed up. That additional step is being taken to ensure that all possible precautions are under way. Passengers on the Heathrow to Aberdeen flight on the afternoon of 29 January, flight BA1312, are being contacted. However, because not all the data that we have received about its passengers is correct, we are asking anyone on that flight who did not provide up-to-date contact details to call the national health service national contact tracing centre on 0800 030 8012.

There is currently no evidence of community transmission, but that is of course being closely monitored by Public Health Scotland and the public health team at NHS Grampian, with our national clinical advisers in close contact with both.

The variant is of concern because of the possibility that it is more contagious than the current dominant Covid-19 strain in Scotland and because of how it responds to current vaccines. The extensive and detailed work to reach a confirmed expert view on both those aspects continues.

Alison Johnstone: The cabinet secretary will be aware that the Brazilian variant has now been found in 15 countries that are not on the United Kingdom Government's red list. Does the cabinet secretary accept that current border restrictions cannot adequately protect people in Scotland from this concerning strain of Covid-19?

Jeane Freeman: I absolutely do, as does the Scottish Government, which is why we want much tougher protections on our international borders,

around the whole UK, for all international travellers. As Ms Johnstone rightly says, the variant has been detected in other countries that are not currently on the red list.

It is important to recognise that, although we have advanced genomic sequencing capacity in Scotland and in the rest of the UK, that is not necessarily the case in countries around the globe. Therefore, it is difficult for those countries to know whether they have any particular variant, which makes it difficult for the global position to be understood. One of the key ways that it can be understood—with citizens here and elsewhere therefore protected—is to have that managed isolation system and the testing that is part of it, so that genomic sequencing can be carried out and variants can be identified.

As Ms Johnstone knows, the point of the virus, like all viruses, is to mutate whenever it is given the opportunity, and it is those mutations that we need to be able to identify quickly and against which we can then act in order to protect our citizens.

Alison Johnstone: Can the cabinet secretary advise us what proportion of samples are currently being sequenced to detect strains of concern? Does Scotland have access to an adequate proportion of UK capacity? What action is the Scottish Government taking to increase genome sequencing capacity in Scotland?

Jeane Freeman: Genomic sequencing is carried out by COG-UK, as the COVID-19 Genomics UK Consortium is known, which has two partner organisations in Scotland, and by NHS Scotland's sequencing service.

A representative number of positive polymerase chain reaction samples in Scotland are genomically sequenced. That number can be increased when we have situations such as this one, where a variant is identified. The figure is around 4 to 5 per cent in normal times, but it can be increased. Additional testing and sequencing provisions are in place for people returning from travel abroad.

As recently as yesterday, I had a further conversation with our chief medical officer, who will pursue the option of further increasing genomic sequencing capacity in Scotland. As we look ahead, we can undoubtedly see, alongside our increased testing capacity, additional precautionary and protective steps, in that further genomic sequencing on the basis of an increased sampling of positive PCR tests might give us further protection measures.

Gillian Martin (Aberdeenshire East) (SNP): Having read about the circumstances surrounding the three people from the north-east who came back from Brazil with the new strain, I have

concerns about the risk of new strains being brought in by people who start their journeys in high-risk areas but travel via airport hubs in countries that are not currently deemed to be high risk. I am concerned that people are not being required to quarantine at their point of entry into the UK, to prevent them from spreading infection as they make their way to their final destinations.

Given that new strains can take time to be identified, is it not time that the UK Government followed Scotland and adopted the same policy of quarantine for arrivals from every country and not just those that are deemed to be high risk at a certain point? I would be interested to hear what conversations have been had with the UK Government on all those points.

Jeane Freeman: I completely agree with all the points that Ms Martin made. The instance that we are talking about exemplifies why our Scottish Government approach of requiring much tighter controls on all our international borders is so important. Ms Martin is right, in that the ideal and correct position, on which we continue to press the UK Government, is that, at the very least, passengers whose final destination is Scotland should be required to quarantine at their point of entry and should not come through any of the hubs south of the border to travel to Scotland, which obviously creates a gap in the protective measures that we need to put in place.

My colleague Mr Matheson has those conversations regularly with his counterpart and I know that the First Minister has raised the issue, certainly on more than one occasion. I raise the issue at the regular four-nations health ministers meetings that I have, which are at least weekly at the moment, and I know that my colleagues elsewhere share those concerns. Even if we stick with the red list, the question is how quickly countries that should enter the red list can be identified—the answer is not very quickly, which is a particular concern. The more straightforward and protective approach, which would guard against inward transmission in a better and more proportionate way than is currently the case, is to say that all international arrivals—with the exemptions that are already there—should have to enter managed quarantine.

Jackie Baillie (Dumbarton) (Lab): The concerns about the Brazil variant of Covid-19 are that it potentially spreads more easily and that it can evade the immune system, leading to re-infections. Two cases of the variant have been found in south Gloucestershire. There, people are doing surge testing, including door-to-door testing of people who live in particular postcode areas. There are three cases in Aberdeen, so I would be interested to know what the Scottish Government is doing. We have previously raised the need to

use all available testing capacity. Is the Scottish Government testing everyone who was on the plane? Will it use surge testing to stop the spread of this much more infectious virus?

Jeane Freeman: I welcome Ms Baillie to her new portfolio and look forward to our constructive engagement in the remaining weeks of the parliamentary session.

What we are doing around the three cases in Aberdeen is targeted testing. Let me take that in steps. Two of the individuals required hospital treatment. All staff who were in contact with those individuals have been tested—that is in addition to the regular testing that our national health service staff undergo, of course. There is a connection with a local school, so there is testing for the people involved there. Testing is also offered to close contacts who have been experiencing symptoms and to passengers and crew from the Heathrow to Aberdeen flight, whom we are contacting, should they experience any symptoms—remembering the time lag between the date of that flight and now. That is the basis on which that work is being undertaken.

My understanding from Public Health England is that what is happening potentially relates to a later flight, which arrived from Brazil via, I think, Zurich. Because those cases were not initially isolated in the way in which our cases were, I can understand the sense of surge testing in that regard.

The decision about testing and how it is used is, of course, clinically led by our colleagues in public health.

Legal Advice (Publication)

2. Murdo Fraser (Mid Scotland and Fife) (Con): To ask the Scottish Government whether it will publish the legal advice that it received regarding the judicial review into the handling of harassment complaints against the former First Minister, Alex Salmond. (S5T-02691)

The Deputy First Minister and Cabinet Secretary for Education and Skills (John Swinney): The maintenance of legal professional privilege is routine and is an essential part of good government. No Administration since devolution has disclosed legal advice in the context of litigation, and I have expressed my concern about setting a precedent that could hamper future Administrations in receiving candid legal advice. The Government has taken unprecedented steps to share with the Committee on the Scottish Government Handling of Harassment Complaints, in confidence, a summary of the legal advice that it received during the judicial review, supplemented by oral evidence by the Lord Advocate.

However, in recent days, a number of accusations have been raised that, if not

responded to, could undermine confidence in the Parliament, the Government and our independent justice system. In light of those developments, I have concluded, in line with the terms of section 2.40 of the Scottish ministerial code, that the balance of public interest in these exceptional circumstances now lies in releasing to the committee and for publication the contents of legal advice received by the Government during the judicial review, and in particular the advice from external counsel. The law officers have provided their consent that there are compelling reasons for disclosure in the specific circumstances.

Subject to the completion of the necessary legal notifications, we aim to release the material to the committee this afternoon. In order to address the desire for the information to be available as soon as possible, we have focused on providing information that charts the development of the judicial review and, specifically, the changes in prospects that emerged during that process.

Murdo Fraser: This episode demonstrates the contempt that the Government holds for the Scottish Parliament. For months, the committee has been calling for publication of the legal advice, and there were two votes in Parliament last year calling for it to be published. Only now, at the very last possible moment, when a metaphorical gun is held to the head of the Deputy First Minister and he is threatened with a vote of no confidence does he finally agree to release some legal advice.

We have not yet seen the documents that Mr Swinney refers to. However, last night, Mr Salmond's lawyers told us that the material that the Scottish Government proposes to release is, in their words,

"highly selective and based on what will cause the least embarrassment to the Government".

Can the Deputy First Minister therefore assure us that the committee's request for publication of all relevant documents will be met, or will he continue to cover up the truth?

John Swinney: I will first say that, if I heard Mr Fraser correctly—I might have misheard him, and if so, I will apologise—he said that a gun had been metaphorically held to my head. I do not think that that is appropriate terminology for one member of Parliament to use to another. Nor was the language that other Conservative MSPs used appropriate—it is wholly inappropriate for one human being to express something in that way to another human being, never mind one member of Parliament to another. I simply say that to get it off my chest.

My second point is that Mr Fraser, as well as being a member of Parliament, is a trained solicitor so, from his professional background, he knows the importance of the principle of legal

professional privilege. He knows how central it is to the foundations of the Scottish legal system and to the relationship between clients and advisers, and that, for Government, in litigation, it is central. The Government has wrestled with that difficult issue and we have concluded that, in the public interest, it is right to act in the way that we are now acting.

Finally, Mr Fraser has raised comments made by the solicitors for the former First Minister. I simply encourage Mr Fraser to wait until he sees the information that we publish, and then I am sure that he can apply the independent judgment with which we normally associate him to the material that he sees before him.

Murdo Fraser: Frankly, we can do without Mr Swinney's manufactured outrage. He and his Government have behaved disgracefully in this whole affair, and he should be apologising to the Parliament for his conduct throughout the episode.

The legal advice that we are now being offered will not be made available to the committee before the First Minister comes to give us evidence at 9 o'clock tomorrow morning. How does the Deputy First Minister propose that members of the committee will be able to pursue with the First Minister or indeed anybody else in the Government questions that might arise from the legal advice, given that it is being produced so late in the day?

John Swinney: The information will be available later on this afternoon, so unless Mr Fraser goes to his bed at 5 o'clock, he can read it tonight.

Neil Findlay (Lothian) (Lab): Friday's evidence session was extraordinary, to say the least, and it threw up many questions. I wonder whether the cabinet secretary can answer this question. Which of these is the most serious: a failure to declare a £950 campaign donation; a muddle over an office sublet; or withholding up to 40 documents that have been requested by the police under a search warrant?

John Swinney: It is not for me to offer legal advice across the parliamentary chamber. What is important is that the Government has fulfilled its obligations in providing information to the committee, and we will complete that task this afternoon.

Covid-19

The Presiding Officer (Ken Macintosh): The next item of business is a statement by the First Minister, Nicola Sturgeon, on Covid-19. As always, the First Minister will take questions following her statement.

14:21

The First Minister (Nicola Sturgeon): Last week, I updated Parliament on the Scottish Government's strategic framework. When I update Parliament next week, I hope to be able to confirm some changes to the level 4 restrictions. Between now and then, and in the light of the positive data that I will report on today, we will consider whether it might be possible to accelerate exit from lockdown in any way—consistent, of course, with the care and caution that we know continue to be necessary.

Later today, the public health minister will support resumption of competitive football in Scottish Professional Football League's leagues 1 and 2, the Scottish Women's Premier League's league 1 and, for the purposes of playing Scottish cup ties, for certain Scottish Highland Football League teams. I hope that that news will be welcomed by football fans across the country.

However, the focus of my statement today is education. In particular, I will update Parliament on plans to get all children back to school full time as soon as possible.

First, however, I will give a brief summary of today's statistics. The total number of positive cases that were reported yesterday was 542, which was 4.4 per cent of the tests that were carried out. The total number of cases is now 203,012; 784 people are in hospital, which is 40 fewer than yesterday; and 71 people are in intensive care, which is the same number as yesterday. I am sorry to say, however, that in the past 24 hours a further 33 deaths have been registered, and the total number of deaths under the daily measurement is now 7,164. Again, I send my condolences to everyone who has lost a loved one.

Yesterday, we marked the anniversary of the first case of Covid being confirmed in Scotland. The Scottish Government is currently talking to health charities and family organisations about how we intend to remember all those who have lost their lives, and to mark the many sacrifices that people have made. We intend to say more about that soon.

I will now give a short update on the vaccination programme. As at 8.30 this morning, 1,634,361 people in Scotland had received a first dose of the

vaccine, which is an increase of 22,783 since yesterday. There is good and increasing evidence that vaccination is already reducing the number of deaths, particularly in care homes. In time, as a growing proportion of the population gains protection through vaccination, it should also start to have an impact on hospitalisations and on transmission rates.

There was further positive news yesterday with the report from Public Health England that a first dose of the Oxford-AstraZeneca vaccine reduces the chance of needing hospital treatment by more than 80 per cent. That confirms research that was published last week in Scotland by the University of Edinburgh.

We remain on course to offer a first dose to everyone over 50, all unpaid carers and all adults with an underlying health condition by mid-April. We understand that we might face some supply issues next week, which could affect appointments, but we are working hard to avoid that. I stress that such issues will not affect the mid-April target.

In addition to the progress on vaccination, we are making good progress in suppressing the virus. I said last week that the decline in case numbers had appeared to slow down and that that was a concern. However, I am pleased to report this week that more recent data has been much more encouraging, and strongly suggests that case numbers are still declining.

This time last week, we were recording an average of 815 new cases a day. That has now fallen to 657 new cases a day on average, which is the lowest level since the first week of October last year. The average test positivity rate has also fallen and is now below 5 per cent. Hospital admissions are also falling. In the first half of January, more than 1,000 Covid patients a week were being admitted to hospital. In the week to 23 February, that number had fallen to 468. The number of people in intensive care has also continued to decline.

The sacrifices that everyone is making are undoubtedly having an impact. Collectively, we are suppressing the virus and, as a result, lives are being saved. There is more reason to be optimistic now than perhaps there has been at any time since early autumn last year. That said, we know that we need to take care to avoid sending progress into reverse: 657 new cases a day might be the lowest level for five months, but it is still 13 times higher than the numbers that were being recorded in mid-August. The reduction in hospital admissions is very encouraging, but hundreds of people every week are still falling seriously ill.

We know that the new variant, which now accounts for more than 85 per cent of new cases,

is highly infectious. We were reminded over the weekend of the significant risk that we face of other new variants—such as the P1 Brazilian variant—being imported into the country.

The news—on vaccines and on suppression—is overwhelmingly positive, but we must be sensible, which can be harder to do when things appear to be going in the right direction. We must continue to be sensible in the decisions that we take over the next few weeks if we want to make sure that we keep going in the right direction. That provides context for the decisions that we have taken this week, which Cabinet has confirmed this morning, about our next steps in enabling children to return to school. Those decisions follow consultation with the Convention of Scottish Local Authorities and local authorities, discussions with the Covid-19 education recovery group, and scientific advice from the advisory sub-group on education and children's issues. That advice will be published tomorrow.

Children in primaries 1 to 3 are already back at school full time. We continue to monitor the impacts of that, although it is too early to be certain of them. Some secondary school students have returned to take part in essential practical work for national qualifications, and childcare and early education premises are also now open for children below school age.

The next phase of reopening education will take place on 15 March. I confirm that, from that date—15 March—unless new evidence or new circumstances force us to reconsider, which of course we hope will not be the case, all children in primaries 4 to 7 will go back to school full time. All primary school children will also be able to return to regulated childcare, including after-school and breakfast clubs.

We will also take the next steps in a phased return to secondary school from 15 March, with a clear expectation that all secondary school pupils will be back in school full time following the Easter holidays. However, it is intended that all secondary school pupils will return to spend some time in school from 15 March until the Easter break.

Students in the senior phase of secondary school—years 4 to 6—who are taking national qualifications will have priority for face-to-face lessons in school. That will ensure that they can have their hard work fairly recognised with qualifications under the alternative certification model.

However, although years 4 to 6 may have priority, we expect that all children in secondary school will receive some in-school education each week until the Easter break and will then return full time following that. That will allow pupils to get used to being back in school and to start seeing

friends again. I am sure that everyone would agree that that is important for the wellbeing of young people, as well as for education.

Because there will be a blended-learning model, before Easter we will also continue to ensure that remote learning is of the highest standard possible. Reports from Education Scotland inspectors have shown that delivery of remote learning improved greatly between the first and second lockdowns. I am immensely grateful to all the teachers and other education professionals who have done so much to build on the experience of the first lockdown. We will work with Education Scotland to ensure that enhanced online resources continue to be available over the coming month, and we will work with local authorities to support young people's wellbeing in other ways, for example by providing more opportunities for outdoor learning.

Over the next few days, Education Scotland will publish guidance for local authorities on the phased return, and local authorities will have flexibility in how they implement the phased return to allow them to take account of local factors in deciding how to make the return as safe as possible. However, we want to ensure that local authorities are able to maximise the amount of time that secondary school pupils can safely spend in school in the period up to the Easter holidays.

Obviously, we recognise that the safety of staff and children must continue to be a key priority. All local authorities will, therefore, at least until the Easter break—this is one of the limitations—continue to observe the current requirement for 2m physical distancing in secondary schools. When secondary schools return, face coverings will need to be worn at all times.

The advisory sub-group on education and children's issues has noted the continuing importance of ventilation. We have provided local authorities with £375 million of education recovery funding to date, and many councils are using some of that funding to monitor and improve ventilation in schools.

In addition, we will continue to offer twice-weekly lateral flow testing for all school staff in primary, secondary and special schools, and all secondary school pupils in years 4, 5 and 6. I encourage use of the tests by as many staff and senior phase pupils as possible when they return. It is another important way to ensure that schools remain as safe as possible.

The final point that I want to make on schools is simply to say thank you—first to all school leadership teams and all school staff, including, of course, all teachers, for everything that that has been done to support our children and young

people in the past few months. I know that everyone is looking forward to having children back in the classroom as soon as possible.

I also want to thank parents across the country. I can only imagine how difficult all this disruption continues to be, but I hope and I believe that the end of it is now firmly in sight.

I offer my thanks to children and young people, too. I know how hard it must be to be separated from friends and teachers, but you have all responded magnificently to all the difficulties of the past year. I hope that you are looking forward to getting back to school later this month, and I hope that you will start to feel life becoming much more normal very soon.

The phased approach to school return can be frustrating, I know, but it is necessary and it is firmly based on the expert advice that we have received. It is the best and the most sustainable and enduring way to get as many children as possible back to school, as safely as possible.

There is one further issue that I want to highlight briefly. I confirm that we are clarifying guidance on an issue that is directly relevant to parents of newborn children. There are currently a number of essential purposes, such as essential care, that enable us to go into someone else's house. We are amending guidance on that today to make it clear that essential purposes include support for the welfare and wellbeing of parents of children who are under the age of one. I hope that that gives clarity and will enable vital support for parents of very young children.

As we come out of this lockdown—which is, I hope, the last lockdown—we are prioritising, as we said we would, the education and wellbeing of our children. In addition, although we remain cautious—as we have to be, in the face of a dangerous and highly infectious virus—I hope that people will take heart from the data that I have reported. It shows real, significant and sustained progress in getting the virus back under control.

Next week, I hope to confirm to Parliament the other changes to the level 4 restrictions that will take effect from 15 March. The week after that, I am scheduled to set out a firmer timetable for the period after 26 April. As I said at the outset of this statement, and as I said last week, we will consider between now and then whether the data allows us to bring forward any relaxation of the rules. I have always said that if we can go further and faster, we will not hesitate to do so. All of us want to move on as quickly as possible and, as a priority, to see friends and family again. That will be very much the focus of our considerations over the next week; I hope that the day for that is now not too far away.

To make sure that we do not see a reverse in our progress that would put that in jeopardy, it is really important that, for now, we all abide by the lockdown rules, so please continue to stick to their letter and their spirit. Stay at home except for essential purposes. Do not meet people from other households indoors. Follow the FACTS advice when you are out and about. Work from home if you can, and if you are an employer, please continue to support your employees to do that.

If we do all that, we can and will make it easier for children to return to school and for us all to return to more normality soon. We will protect ourselves, our communities and our national health service, and we will keep the virus under control while vaccinations do their work. For the moment, please continue to stick with it, stick together and stay at home.

Ruth Davidson (Edinburgh Central) (Con): I thank the First Minister for advance notice of her statement. I also take this first parliamentary opportunity to welcome Anas Sarwar to his new role as Labour leader. It is the fifth time that I have been able to welcome a new Labour leader in my time here. I truly wish him well and I extend all offers to work together constructively when it is in Scotland's interest to do so in the weeks ahead—even if it is only weeks that I have.

The news this week that the Oxford-AstraZeneca vaccine can reduce hospital admissions by 80 per cent after one dose is welcome indeed. The fact that infection rates, hospitalisation rates and fatalities are all down significantly should be of huge reassurance to us all.

This week has also been a week of milestones, with more than 20 million people across the United Kingdom and 1.5 million people across Scotland receiving their first vaccination. Of course, vaccinations do not help just those who receive the jab; they help us all. With just over a quarter of adults in Edinburgh now having been vaccinated and up to nearly half in Dumfries and Galloway, the trend is clear: the greater the roll-out, the greater the reductions in case numbers and the severity of cases. It is therefore right that the Scottish Government should reconsider its reopening plan for the country with respect to the improved results that we are seeing.

I welcome the fact that Scottish Conservative calls for an earlier return to school for many pupils have been listened to. That is hugely welcome for young people's mental health and wellbeing, social development and educational attainment, but getting all pupils to return while still observing Covid rules poses some logistical questions. Face coverings and social distancing are now concepts that we take for granted in many areas of our lives. However, teachers and headteachers are rightly

asking what support they will receive if their school estate does not allow for the 2m social distancing in classrooms that the Government requires in secondary schools. If they cannot fit all pupils into their usual classrooms with the 2m rule and there are no extra classrooms or staff to man the split or composite classes that have been created, what support and solutions will be made available for them?

The First Minister: All the developments that I narrated earlier on and which have just been reiterated are very welcome. I do not want to overstate this, because I do not think that doing so is fair to people—I have tried not to give people false promises—but I think that we have every reason now to believe that the exit from lockdown might be quicker and might come sooner than we believed would be the case just a few weeks ago. However, we know that the worst thing that we could do and what would make that less likely would be moving too quickly right now and jeopardising the situation that is now beginning to emerge in such a positive way. That is why we need to be careful. That caution, as well as the determination to get children back to normal, lies behind the decisions on schools that I have outlined today.

We continue to work with schools to ensure that, although it is not possible to have all young people back to school as normal, there is good provision of remote learning for the period between now and Easter. There will be a blended learning approach for secondary schools, and we continue to work with schools and local authorities to ensure that that is of the quality that young people and their parents expect.

We have given local authorities significant funding to help with practical arrangements in schools. In my opening remarks, I mentioned ventilation. That funding will cover a range of other things.

The key to this, as it was last August, when we managed to support the full-time return to school for all pupils and to keep schools open virtually for the remainder of last year, is to get the prevalence of the virus as low as possible so that as much normality in schools becomes possible and some of the restrictions can be eased to allow normality to open up. The additional factor that we have now that we did not have last August, of course, is what we hope will be the suppressive effect of the vaccine.

We monitor these things on an on-going basis, and we take advice and work with local authorities and schools to facilitate things. I hope that, by the time we come out of the Easter break, we will have made further progress that will allow much greater normality in our schools than has been possible up until now.

Anas Sarwar (Glasgow) (Lab): I thank Ruth Davidson for her very kind comments, and I look forward to welcoming in a matter of weeks the second Conservative leader—perhaps even the third Conservative leader—in my short spell as Labour leader.

I thank the First Minister for advance sight of her statement and extend my condolences to all those who have lost loved ones. This has been a difficult year for us all, and our thoughts and condolences go out to all those who have lost a loved one.

As the First Minister said, it is 12 months since the first Covid-19 case was identified in Scotland. In that time, we have seen our NHS staff, our social care staff and all our front-line workers continue to go above and beyond. We give our heartfelt thanks to every single one of them and their families.

The vaccine roll-out is the light at the end of the tunnel, and it is great to see the evidence of its efficacy giving us all hope. However, as the lockdown restrictions begin to lift, I urge the Scottish Government to focus also on our recovery. I will support all efforts by the Government to bring our communities together and to rebuild our nation. That must be the collective priority for everyone across the Parliament.

Parents throughout the country are worried about their children's education and mental health. Can the First Minister confirm when her Government will set out details of a national recovery plan for Scotland's pupils and our education system? Figures published today on child and adolescent mental health services show that more than 1,500 children on waiting lists have waited more than a year to be seen by a specialist and, in the last quarter, 25 per cent—one in four children—had their referral rejected. What more can the Scottish Government do to give support to children who need it right now, particularly in crisis services?

Finally, the Scottish Government has a target of 400,000 vaccinations a week, which is a target that I have welcomed and I support, but the numbers from the last week in February show an average of around 29,000 vaccinations per day and yesterday fewer than 23,000 people were vaccinated. Today, the First Minister has suggested that vaccinations could slow even further. When will that target of 400,000 vaccinations per week be met so that we can collectively get out of this crisis?

The First Minister: I, too, take the opportunity to welcome Anas Sarwar to his position. I do not want to brag and I would have to count, but I think that I am probably well above five when it comes to Labour leaders that I have faced across the

chamber. In all seriousness, there is a historic nature to Anas Sarwar's election as leader of the Scottish Labour Party and it speaks well of the diversity of our country, so for that reason, if for no other reason, I wish him well in the job. *[Applause.]*

Anas and I will not just face off across the chamber as respective leaders of our parties, as we are also opponents in the constituency of Glasgow Southside, so we have just proved again over the past few days that Glasgow Southside is the centre of the universe, which I know everybody in the chamber will agree with as much as Anas and I do. I wish him—I was going to say that I wish him all the best, but I wish him a modicum of success in the weeks ahead.

In answer to Anas Sarwar's question on a national recovery plan for education, I say that the work to support recovery in education is already under way and I have set out the steps that we are taking to support local authorities—for example, the provision of tutoring support through e-Sgoil, the money that we have made available for additional teachers and the extra funding for local authorities that they can use flexibly based on what they consider is most appropriate—and we will keep that under review. The Deputy First Minister and I have said that supporting children to come through and catch up from the experience of the past year—not only educationally but in a whole range of ways—will be a long-term project.

Similarly on mental health, we have already published a mental health recovery plan and the Minister for Mental Health will continue to keep Parliament updated. Before the pandemic, transforming and redesigning the provision of child and adolescent mental health services was a priority; one of the things that we had made progress on was mental health counsellors being available for all secondary schools. That work needs to pick up and intensify as a result of the experience of the pandemic.

Finally, on vaccination, we exceeded 400,000 vaccinations a week when we had the supplies to do so. *[The First Minister has corrected this contribution. See end of report.]* The constraining factor right now is supply, which is not in our control. The dip in daily vaccination rates in the past couple of weeks, which we flagged in advance, was entirely down to the supply. The numbers across the four nations show that same dip. We expect that there might be another dip in supply next week, but we do not expect that to affect the mid-April targets. I am not complacent about this—it takes a lot of work by a lot of people across the entire country—but we are able to go as fast as we have the supplies to vaccinate people. The constraining factor is the supplies, and that is why we continue to talk regularly to the

pharmaceutical companies to get as long term a line of sight on their manufacturing and supply prospects as we can. We will vaccinate people just as fast as we have the vaccine to do so.

Alison Johnstone (Lothian) (Green): I, too, welcome Anas Sarwar to his new role as Labour leader.

The Scottish Greens have long called for action to be taken to make our schools safe and particularly for regular testing for staff and senior pupils. Parliament voted in support of our proposals before Christmas and I welcome the fact that they have finally been delivered. Another proposal that we and the Educational Institute of Scotland have made is that teachers and school staff be prioritised for vaccination. So far, that has been accepted only for some additional support needs staff, but even that is not yet being delivered across Scotland as planned; for example, I understand that special school teachers in Lothian have been turned down for vaccination. When will all ASN staff be vaccinated and will the Government take action to ensure that that is delivered?

The First Minister: I will certainly look into the claim that there is a particular problem in Lothian. Directors of education have been asked to identify staff who fall into that category, so that they can be vaccinated as quickly as possible. I say to members across the chamber that, if there are particular issues in particular parts of the country, they should make us aware of them so that we can immediately get on to them and try to resolve them. I will come back to Alison Johnstone on that point, or ask the Cabinet Secretary for Health and Sport to do so.

More broadly, we are following the advice and recommendations of the Joint Committee on Vaccination and Immunisation. That is the right and only thing to do. While supplies of the vaccine are still constrained to some extent, we have to make choices about who gets vaccinated and following the expert advice is the right way to make those choices. We are following the initial prioritisation plan which, as I have said before, we will work to do as quickly as possible. Then we will move into the rest of the population, which the JCVI recommends should continue to be done on an age basis, and teachers will be done in line with that priority.

Many teachers will already have been vaccinated if they fall into one of the categories that have already had priority; many will be being vaccinated right now, because they fall within the category of people with underlying health conditions; and we are working to do everybody over the age of 50 by mid-April. I know that that is not every teacher, but we will then move down the age range to have everybody in the adult

population vaccinated by the end of July. As soon as we start to depart from the expert advice, we start to make choices that are political, not expert driven. Given the importance and sensitivity of the matter, it is important that we stick to the clinical advice.

Willie Rennie (North East Fife) (LD): I welcome the changes for newborn babies, for which we on the Liberal Democrat benches have been arguing for some time.

Perhaps it was unwise for the First Minister rather to sneer at other Governments for making up dates when the dates that she set last week have not lasted seven days. The three-week review has changed to a weekly review and, although I want schools back as soon as possible, the result of that last-minute change is that there is no guidance ready and teachers have been left to clear up this issue and make it work. If two thirds of the class will be at home because of the 2m physical distancing, how will teachers juggle the additional workload? There are no more hours in the day. Teachers are exhausted. They have been working incredibly hard with the remote learning. Is this the way to reward them?

The First Minister: I will come on to the point about teachers directly in a second but, with the greatest respect, Willie Rennie's overall characterisation is just not correct. We have set dates and we are sticking to those dates, but we said last week that, if the data allows it, we will accelerate. That is the right and proper way to do it. I said last week that we hoped that all primary school children would be back from 15 March. We had to confirm that today, which I have done, and I think that I said last week that we wanted to try to get as many secondary school pupils back, as much as possible, into school and we have been working to confirm what I have just confirmed today.

I said last week, I think, that I would confirm next week the other changes that we hope to make on 15 March and that the week after that we would set out more timelines for the period after 26 April. I have just confirmed all of that today, so that has not changed. What has changed, which is a good thing, is that the data is slightly more promising than it was when I stood here last week. Last week, we were looking at a plateauing of cases, which now seem to be back firmly into decline. That allows us to assess whether there are more things that we can do, earlier than we previously anticipated. That is the way we have always done this and it is the right way to proceed.

I have every respect and huge gratitude for what teachers have done over the past year. I do not doubt for a minute that they are exhausted, in the way that many people working across many different sectors of our society will be, and we owe

them a huge amount. I think that most teachers want to see children back in school as quickly as possible. We have to do that in a phased way to make it safe. We listen very carefully to the views of teachers through the EIS, for example, and the education recovery group and we come to a balanced decision.

I cannot imagine that there are many people across the country right now who do not think that it is right to prioritise the wellbeing and education of young people—I am not suggesting that Willie Rennie is doing that—but we need to be able to take decisions as quickly as we can and try to get to a maximalist position with young people's education. That involves all of us—particularly those who are on the front line of education—adapting to accommodate that, but that is better than having a period when young people are out of school more than they need to be.

Ruth Maguire (Cunninghame South) (SNP): I listened carefully to the First Minister's response to Alison Johnstone, but I will still raise an issue that has been raised with me locally, because it is worth looking at the specifics. The concern has been expressed to me that some classroom assistants who provide close personal care for children with additional support needs are not being included in the vaccination programme. One worker told me that they feel that the threshold for vulnerability is too high and that, by not being vaccinated, they are putting in harm's way the child who is in their care.

Will the First Minister say a little more about how vulnerability and risk are being assessed? Will the guidelines be checked to ensure that they do not have a gap?

The First Minister: Of course we are happy to look at the guidance if there is a sense that it does not cover sufficient numbers or categories of people. The guidance was issued on 29 January and was shared with all local authority chief executives. On the inclusion of some education staff in cohort 2, the guidance clarified that staff who work very closely with the children and young people who have the most complex additional support needs should be vaccinated under the order of priority.

The guidance sets out that

"Staff should be offered the vaccination if they are supporting ... children and young people who have ... complex healthcare needs which require the co-ordination and provision of support from education, health ... or social care services within school settings ... Staff who are eligible will undertake regular healthcare and social care duties with multiple children/young people, and moving and handling, all of which mean they"

often

"work in close proximity for prolonged periods of time providing a range of interventions, including personal and intimate care".

The most recent letter from the chief medical officer to health boards, which was issued on 5 February, included the same detail about how to identify eligible staff.

There is clear guidance, but I am happy to ask the health secretary to look into particular concerns that Ruth Maguire or any other member has. If any member wants to pass more detail to the health secretary, I encourage them to do so.

Liam Kerr (North East Scotland) (Con): No one doubts the strain that Covid-19 has put on services, including those in the Scottish Prison Service. Last summer, the Government decided to release several hundred prisoners early as a response to the pandemic, but figures that are just out show that more than 40 per cent of those who were released are already back in jail. I warned at the time that the Government needed to put in place a robust monitoring strategy to protect the public. Why did it not do that? Given the statistics that she has just set out, will the First Minister confirm whether the Government intends to release further prisoners early?

The First Minister: I will ask the justice secretary to write with the details of the monitoring that is in place. I do not say this flippantly, and I am happy to look into the detail but, although we should take no pleasure if a proportion of prisoners are back after being released, it might suggest that people are being monitored and that appropriate actions are being taken. We might not see that if nobody was bothering about what prisoners who had been released were doing. I will ask the justice secretary to write with more detail.

Some of what has been done throughout the pandemic has been inescapable—they have been actions that no Government would want to take. All Governments across the UK—and, I suspect, many around the world—have had to do similar things in relation to prisoners. As we face the new, more infectious variant, one risk that is materialising is institutional spread, which has manifested itself in recent prison outbreaks.

This is not easy and it is far from over in vulnerable institutional settings. Decisions that we had to take in the past might also require to be taken in the future as we try to get through this with transmission in situations of vulnerability as limited as it can be.

Bruce Crawford (Stirling) (SNP): The First Minister knows that the tourism industry is a crucial part of my Stirling constituency's economy and that a large part of the sector is made up of small self-catering, guest house and bed and breakfast operators. For some such operators,

their business provides their only income. Some are struggling financially. Some people might receive strategic framework grants, but I ask on behalf of such operators for the Scottish Government to consider providing a one-off top-up grant to ease the huge pressure that they are under.

The First Minister: Tourism is central to the Scottish economy, and I know that it is particularly central to constituencies such as Bruce Crawford's. Although many small accommodation providers will already be receiving support via the strategic framework business fund, I am pleased to say that we have also agreed the expansion of a scheme to provide equivalent support to such providers who pay council tax. That is in recognition of the on-going challenges that businesses such as B and Bs, guest houses and self-catering accommodation face. It is intended to ensure that we reach as wide a range of businesses as possible. It is planned to release details of the expansion by the end of this week. Beyond that, we will continue to review the support that is in place and will work with businesses to explore all options.

Jackie Baillie (Dumbarton) (Lab): Public Health Scotland statistics show that teachers have a 47 per cent greater chance of getting Covid than the general population. We all want to get our children back to school as soon as possible, but all teachers and all school support staff also need to be safe, especially if we want to ensure continuity of education. Will the First Minister ensure that all teachers are vaccinated before 15 March, given the data from the experts at Public Health Scotland?

The First Minister: I am not going to get into a debate about interpretation of the data. There is a range of data about the risk of transmission in schools, among teachers and among young people. It is important not to oversimplify it. Suffice it to say that the safety of teachers and everyone who works in a school environment is paramount. That is why we are taking a phased approach to the return of schools and not taking the decision to have all secondary school pupils back full time from 15 March. In our judgment, and that of our expert advisers, to do so would involve taking risks that would not be appropriate.

As for the question on vaccination, much as I would dearly love to stand here and agree to every request that is made for priority vaccination, if I were to accede to that request I would be driving a coach and horses through the JCVI's expert clinical advice. We would also be doing so in a way that no other Government across the UK is doing. While we have limited supplies of vaccines, and so cannot vaccinate everybody at once, we have to choose the prioritisation basis according to

the best clinical advice. As people will know, such advice is for vaccination of the first cohorts—groups 1 to 9—and the JCVI's advice is to continue to do so progressively, based on people's ages. Many teachers will have been vaccinated already, and many others will be vaccinated over the next couple of weeks. Those in the younger age groups will be vaccinated as we move to cover the whole adult population by the end of July.

I do not make this comment in relation to teachers in particular, but every time that we take somebody who is younger and fitter, and who is therefore at lower clinical risk from the virus, and vaccinate them ahead of somebody who is at greater clinical risk, we make political choices that are not backed up by clinical advice.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Will the First Minister provide an update on the number of care home residents who have received their second dose of the vaccine? Is the supply of vaccines likely to affect that?

The First Minister: The latest figures that we have show that just under 14,500 care home residents have now received their second dose, which means that roughly 48 per cent of residents in care homes for older people have completed the two-dose schedule. On the Scottish Government website, we are now publishing weekly statistics on supply so that people will also have transparency about the supply that is available.

We prioritised care homes not just in the sense that people there were the first group that we vaccinated; on our behalf, the vaccinators also spent a lot of time and effort on maximising the uptake of vaccine there. We are starting to see the benefit of that, given that the sharpest falls in mortality due to Covid have been in care homes as the vaccine starts to have effect. Completing the second doses as quickly as possible will therefore give residents of and staff working in care homes an added layer of reassurance.

Donald Cameron (Highlands and Islands) (Con): Several parents from island communities such as Mull and Islay have contacted me to seek an earlier full-time opening of schools on those islands than is currently planned. Has the First Minister given any consideration to that, beyond what has just been announced, given the relatively low levels of Covid-19 cases there? Will the Scottish Government consider the potential for a more general easing of restrictions on our islands in light of their particular circumstances?

The First Minister: I point to what I said in my statement, because it has particular relevance to the legitimate question that is raised. I said that Education Scotland will issue guidance on the

phased returns of secondary schools later this week, but we want local authorities to have a degree of flexibility in that guidance, in order for them to maximise the time that secondary school pupils spend in school between now and Easter.

In smaller authorities—*island communities*, for example—there might be a small number of pupils who go to a particular school. If all of them could go back full time while the 2m distancing continued to be respected, a local authority should have flexibility over that.

The position of the Government is that we want secondary school pupils to have as much time physically in school as it is possible to give them in the period between now and Easter, but that position has to be consistent with the safety measures that still require to be in place. In some parts of the country, that will involve a greater degree of in-person school education than would be the case in other parts.

John Mason (Glasgow Shettleston) (SNP): Many people want the schools to open as soon as possible, but some parents, pupils and teachers are nervous about the risks that might be in school. Can the First Minister offer any reassurance to parents, pupils and teachers in that position about personal protective equipment, testing and so on?

The First Minister: The main words of reassurance that I want to give, again, is that we take all decisions carefully. My position, which I suspect is that of most—if not all—parents across the country, is that parents would want to get children back to school full time tomorrow if it were safe to do so. However, it would not be safe, so we have to do that return on a phased basis, which is the main thing that we are doing to ensure that safety is prioritised.

Beyond that, we are in regular contact with unions and parent representative bodies about measures to reduce risks in schools. The Covid education recovery group, which the Deputy First Minister chairs, meets weekly. The guidance for schools is developed with input from all those stakeholders and others, and it sets out clear requirements for infection control measures and the use of PPE in appropriate circumstances. As I said in my statement, we have introduced twice-weekly at-home asymptomatic testing, which is available to all school staff and senior phase pupils and is another layer of assurance.

Every step that can be taken to ensure that the school environment is as safe as possible will be taken. As I said earlier, I am grateful to everybody in the school community for all the work that they are doing to put those plans in place.

Pauline McNeill (Glasgow) (Lab): There are many reports that vaccinators who work the same

shifts at vaccine centres have vastly different rates of pay. Nurses with years of experience in vaccination are, in some cases, paid up to a third less for the same work. One nurse wrote to me and said that

“not only do contractors book shifts before nurses, as we don’t get direct access to the system, in my last shift I worked with dentists and optometrists, I was much faster but I was paid a lot less.”

A general practitioner also wrote to me to say that he had the same concerns and that the unfairness in pay rates was “harming solidarity among staff”. Is the First Minister able to take any action to ensure that pay rates are reflective of a person’s skills? Can she do anything to order health boards to ensure that there is fairness to nursing staff during the vaccination programme?

The First Minister: The issue has been raised with me and it is something that I have asked to be considered. I cannot give a definitive answer right now, but I recognise the sense of unfairness. In summary—apologies if I am not getting all the details right—the rate at which a vaccinator will be paid is based on the rate of pay in the job that they do. Obviously—I am not making any comment on the fairness or unfairness of that fact—certain workers in health and social care roles are paid more than others, which is reflected in the rate of pay that they have for vaccination.

Given the particular circumstances of vaccination, there is a question mark in my mind as to whether that is fair. Given that the issue has been raised with me, I have asked for it to be considered. Once it has been and I can offer more detail, I am happy to come back to Pauline McNeill and the chamber.

Shona Robison (Dundee City East) (SNP): I also welcome the clarification in the First Minister’s statement for parents of newborn babies. What discussions has the Scottish Government had with councils and out-of-school care providers to ensure that those vital services will be able to resume when it is safe for them to do so?

The First Minister: The rules already allow informal childcare to be provided where there is an essential childcare need, which we understand is one of the reasons why other Governments have made changes in that regard too. As I set out in my statement, we will make clear that there is an extension of essential purposes, and will continue to work with providers to make sure that that is reflected in practice with regard to formal childcare, and that the required support is made available. I hope that answers Shona Robison’s question.

Liz Smith (Mid Scotland and Fife) (Con): Last week, the Scottish Government made a welcome announcement that non-contact sports for 12 to

17-year-olds can resume on 15 March. Will the First Minister confirm that schools will be able to open all their sports and games fields facilities on 15 March to allow that to happen?

The First Minister: The answer that I want to give—and I think it is the correct answer—is yes, but I will double check that there are no caveats or restrictions. We want to be able to facilitate the resumption to the full, because it is one of the important ways in which we can try to redress the wellbeing imbalance that is being created for too many young people across the country.

Clare Adamson (Motherwell and Wishaw) (SNP): My office has been contacted by third sector support workers who provide a variety of services for vulnerable people, including food preparation and delivery. Those workers in my constituency of Motherwell and Wishaw are not being identified as vaccine priorities by the health board. Will the First Minister ensure that NHS boards' understanding of how such workers should be prioritised is consistent both with the Joint Committee on Vaccination and Immunisation guidance and across Scotland?

The First Minister: I am happy to look into the matter to make sure that I can come back with the answer that it is consistent across Scotland—it certainly should be broadly consistent. The Cabinet Secretary for Health and Sport will look into that matter a bit more.

The decisions are all being guided by the JCVI prioritisation list. There are some issues. For example, we have just been talking with people who work closely with children with multiple complex health needs, for whom we have defined a particular category in order to include them. We have taken a similar decision for people with mild to moderate learning disabilities—previously, only people with complex learning disabilities were included.

We are trying to flex each cohort sensibly, and as much as possible. However, as far as we can, we have to stick to the list, so that we are genuinely vaccinating those with greatest clinical need as early as possible in the prioritisation list. Perhaps the most important point to make in relation to the questions about vaccinations is that, for the initial JCVI prioritisation list, everyone will have been offered first doses by mid-April—that is, everybody above the age of 50 and everybody with an underlying health condition. That is a significant proportion of the adult population. By the end of July, supplies permitting, all adults will have been offered a first dose.

Michelle Ballantyne (South Scotland) (Reform): One of my constituents, who is a merchant seafarer who left Scotland to join his cargo ship before the quarantine rules were

introduced, now finds himself unable to continue his job unless he accepts not returning to his home and family, and pays most of his salary in quarantine costs between ships.

Today, he arrived at Edinburgh airport to be told that he could not be quarantined in Edinburgh, but will be bussed to Paisley. That has only added to his deteriorating mental health due to the stress of a lack of shore leave since the outbreak of the pandemic, and the stress of the impact of the quarantine rules. He has been running an 80-metre loop of his ship's deck to help to manage his wellbeing, and the prospect of being locked up for 10 days without exercise or fresh air is now devastating.

Is the First Minister aware that there appears to be no rooms for managed quarantine in Edinburgh, and will she give permission for my constituent, who has now been forced out of his job by the decision not to allow him to quarantine at home, to at least run in the fresh air during his 10-day forced quarantine, in order to prevent his mental health and wellbeing from deteriorating further?

The First Minister: I will not comment on the individual case, because I do not have all the details. If Michelle Ballantyne wants to send them to my office this afternoon, I will make sure that they are looked into.

I will also look into the issue of whether there is an inadequacy of rooms at Edinburgh airport, which requires people to go to Paisley. I imagine that that would mean that they go to hotels in the vicinity of Glasgow airport. I am not aware of such an inadequacy but I am happy to look into it.

I ask Michelle Ballantyne—I say this sincerely—to consider that it is for people in positions of responsibility such as ours not to describe managed quarantine as being locked up with no fresh air or exercise. Managed quarantine is a vital public health intervention. People are entitled to fresh air and exercise. The reason that we are insisting on quarantine was well demonstrated at the weekend, when we identified the first cases in Scotland of the Brazilian variant. We worry that, as variants come in, they will undermine the vaccine and all the good work that everybody has been doing. Quarantine is there for a reason. Nobody wants to ask people to quarantine for one day, two days, 10 days or whatever, but it is an essential part of the protective measures that we need to put in place. We all have a responsibility to explain that to our constituents and to encourage people to see the need for it. Nobody is expecting anybody to be happy about any of this right now, but we need to explain and help people to understand the reasons for it.

The circumstances of Michelle Ballantyne's constituent sound very distressing. I have huge sympathy for that, so I am happy to look into the case. However, it is not for me, as First Minister, to give people permission not to comply with such measures. It is really important that we do these things properly and that decisions are based on the right considerations.

Rhoda Grant (Highlands and Islands) (Lab): Businesses that pay business rates can claim £2,000 a month from the strategic business fund, which follows from grants that have already been paid. That has been necessary for their survival. However, businesses that do not pay business rates have similar overheads but have received nothing. They hope to access one-off discretionary grants of £2,000 from local government to compensate them for a year of disruption and closure. Many such businesses have already closed their doors permanently due to lack of support. For many months, I have repeatedly raised the issue with the First Minister and cabinet secretaries, and I make no apology for raising it again. When will the First Minister offer such businesses a safety net?

The First Minister: That is an important point. I understand how difficult it is for all businesses and, particularly, for businesses in the category that have been described. That is why we established the discretionary funding route for local authorities. Since then, we have significantly increased the money that goes to local authorities to give them the ability to flexibly provide for businesses that fall through the cracks of the other support schemes. In addition to that, we will continue to look at how we fill the cracks and, within the resources that we have, ensure that we help as many individuals and businesses as we can.

The most important thing is to get businesses trading again as quickly as possible, which is why it is so important to continue to suppress the virus and get people vaccinated. We need to get the economy opened and businesses making money through their normal trading, rather than relying on the support that Government is providing.

The Presiding Officer: That is the end of the statement. I apologise to members whom I was not able to call.

There will be a short pause while some of the seats and desks are cleaned to allow ministers and others to change over.

Scottish Parliamentary Elections 2021

The Deputy Presiding Officer (Christine Grahame): The next item of business is a statement by Graeme Dey on the Scottish parliamentary elections 2021. The minister will take questions at the end of his statement, so there should be no interventions or interruptions.

15:14

The Minister for Parliamentary Business and Veterans (Graeme Dey): Last December, Parliament unanimously approved legislation that sought to ensure the safe holding of the Scottish Parliament election on 6 May 2021. I am pleased to have the opportunity to provide an update to members on developments since then.

I appreciate that some have expressed genuine concern about the safe holding of the election, and I do not wish to minimise or underestimate those concerns. I want to provide reassurance that all views are being heard and that positive action has been and continues to be taken to ensure the safe delivery of the election.

It is as a result of the hard work of electoral professionals over the winter that I am confident that the election can go ahead on 6 May. That is also the view of Malcolm Burr, convener of the Electoral Management Board for Scotland.

One of the steps taken—the Scottish General Election (Coronavirus) Act 2021—was the result of close working between all parties in the Parliament and our electoral community. Among its provisions, the act ensures the ability to postpone the election if required. However, I am pleased to say that that does not seem necessary at present.

It is fundamental for a democracy to hold scheduled elections, provided that it is safe to do so. This Parliament has sat for five years—a year longer than originally intended—and many countries have already held elections successfully during the pandemic. It is also the case that eight local government by-elections were held in Scotland during October and November. Ahead of those elections, the Electoral Management Board issued guidance that was developed with the assistance of Public Health Scotland. Those elections went well, and the Electoral Commission has used the lessons that were learned in the guidance that it has published for the vote in May.

A critical part of our preparations is making sure that voters know how they can safely cast their votes. Returning officers are taking steps to ensure that polling places are safe environments, with physical distancing, face masks, one-way systems and enhanced cleaning arrangements.

In addition, electoral registration officers are working hard so that those who do not wish to vote in person are able to seek and obtain an absent vote. Our legislation last December moved the deadline for applying for a postal vote to 6 April, so that the expected increase in applications could be processed in time. The Government thereafter provided the resources that were needed for the electoral authorities to write to every household in Scotland to explain who was registered at the address, who held postal votes there and how anyone who was not covered could register or could access postal voting.

Electoral Commission research suggests that we might see an increase in postal voting from 17 per cent of the electorate to around 40 per cent, and we have made resources available to allow electoral registration officers to deal with that level of increase and a little beyond it. It is not yet clear what the actual increase will be, but electoral registration officers are already reporting a significant rise in applications following a recent television advertising campaign and the notification letter from EROs. In addition, the chief medical officer has written to all shielding households to encourage those who are shielding and their families to consider obtaining a postal vote.

As of 19 January, EROs across Scotland had received around 70,000 requests for postal vote application forms from electors. Completed application forms are now being returned and the initial data from EROs confirms a significant increase in postal vote applications in February. The full figures are not yet available, but indications are that at least 60,000 people were granted a postal vote during February. It is also clear that in at least 10 local authority areas at least 20 per cent of their electorate have been issued with a postal vote.

We have made it possible for anyone who is unable to vote in person, due to testing positive or having to self-isolate, to apply for a proxy vote. That option is available until 5 pm on the day of poll. In addition, legislation that is before the Parliament at the moment will allow someone who has already appointed a proxy to change that appointed proxy if the original is no longer able to vote on their behalf.

Those changes to both postal and proxy voting are intended to help anyone who wishes to vote in May's election to do so, no matter their personal circumstances. I will summarise: anyone can apply for a postal vote before the 6 April deadline, and those who find themselves unable to vote in person due to coronavirus advice can apply for a proxy to be appointed up until 5 pm on polling day.

Of course, I emphasise that returning officers are carrying out risk assessments and that polling

stations will be set up on the basis of advice provided by the Electoral Commission in conjunction with Public Health Scotland, so it will be safe to vote in person.

In addition to the Electoral Commission's detailed guidance on running a Covid-secure election, the convener of the EMB has been exercising his power to issue directions to returning officers—a power that the Parliament bestowed on him last June by means of the Scottish Elections (Reform) Act 2020.

The convener has directed that no more than 800 electors are to be allocated to a single polling station and that counts should occur in the daytime. He has also set out a risk assessment approach for returning officers to follow and confirmed that the power under the Scottish General Election (Coronavirus) Act 2021 to allow polling over multiple days is not required.

In relation to the count, it seems inevitable that the results of the election will take longer to arrive. Ensuring physical distancing while allowing the process to be scrutinised means that not all constituencies will be counted simultaneously. It is expected that most counting will occur over the Friday and Saturday following polling day.

Returning officers will be talking to candidates locally about arrangements, and those discussions are important to achieving a shared understanding of what will happen in practice.

I now turn to the important topic of campaigning. I know that parties have not been leafleting or campaigning door to door during lockdown. Alternatives to face-to-face campaigning can be employed, but, clearly, we would all like to know when it will be possible to undertake usual—or as close to usual as possible—campaign activity.

The Electoral Commission is preparing guidance for candidates and campaigners, and its guidance will align with what is permitted under the necessary public health restrictions.

I can confirm that, under the stay-at-home regulations, candidates and agents are permitted to travel to the constituency as necessary, as that is work or volunteering that cannot be done from home. It has been suggested that the leadership of each party should also be able to travel to any constituency. We are looking at that, although we should bear it in mind that the regulations currently prevent all of us from leaving home and travelling between local authorities for work that can be done from home.

The update to the strategic framework that was published last week sets out a plan for the gradual easing of the current measures when the epidemiological conditions allow that to be done safely. The update includes a likely phasing of the

easing of restrictions, at intervals of least three weeks, to allow assessment of data and progress in suppression of the virus.

In line with that, I advise Parliament that leafleting can commence from 15 March, subject to the restrictions on social gatherings in level 4 areas easing to allow up to four people from two different households to meet outdoors.

Guidance will be issued to keep everyone safe. I am sure that candidates and campaigners will accept the need to strictly observe the need for mitigation measures such as physical distancing, the wearing of face masks, ensuring hand hygiene and not car sharing. Guidance will also be issued on safe arrangements for liaising with volunteers and minimising the handling of materials.

Face-to-face campaigning on the doorstep cannot commence at the same time as leafleting. Careful consideration has been given to the role of, and risks associated with, canvassing during an on-going pandemic; where allowing doorstep campaigning would sit with other non-election restrictions; and how the public might react to having political campaigners at their door.

However, I recognise that there is an appetite for doorstep campaigning to be permitted in due course. In the light of discussion with clinical advisers, and providing that the stay-at-home restrictions are able to be lifted, face-to-face doorstep campaigning can be permitted from 5 April, subject to the virus being sufficiently suppressed.

That decision will be based on whether the infection rate as an average across Scotland has fallen to 50 per 100,000 or fewer—the number that the World Health Organization considers as evidence that the pandemic is sufficiently under control. Alongside that, the test positivity rate must sit below 5 per cent. If the infection rate in a specific council area were to exceed 100 per 100,000, canvassing would have to be suspended for safety reasons in that local authority area until the rate fell below that lower number. For members' information, I note that the cumulative seven-day incidence per 100,000 of the population by specimen date to 27 February is 79.6; and the latest seven-day average test positivity rate to 27 February is 3.9 per cent.

Once the restrictions permit it, it will be a judgment call for parties as to whether they should pursue such activity, whether it will be welcomed by the public and in what type of locality. They also need to be conscious of striking the right balance between ensuring that only one person approaches a doorstep and providing reassurance for canvassers in having a colleague close by for safety. The numbers of people who can be together at any one point must be in line with the

broader restrictions on social interaction that are in place at the time.

I hope that that approach balances political engagement with protecting public health.

I am afraid that activities such as street stalls, physical hustings and giving voters a lift to polling stations cannot proceed, given the circumstances that we find ourselves in. Those limitations have been discussed in recent weeks with the business managers of all parties, and I believe that all parties are supportive of them.

I hope that this statement has provided reassurance to members on the enormous amount of work that is under way across our electoral community to ensure that the election in May can be conducted safely in an adjusted form.

I conclude by offering sincere thanks to all those involved in the preparations for polling and the counting of votes, and to the representatives of the parties that sit in the Parliament who have engaged entirely constructively, both on the shaping of the guidance and on more general planning throughout the process that we have gone through over recent months.

The approach to those discussions has demonstrated a collective willingness to be responsible in our approach to campaigning, and I look forward to seeing that maintained in the heat of the campaign.

The Deputy Presiding Officer: The minister will now take questions on the issues that have been raised. I intend to allow about 20 minutes to get everybody in—I know that members are all interested in this subject.

Miles Briggs (Lothian) (Con): I thank the minister for advance sight of his statement, and I welcome the clarity with which he outlined the situation. This year's Scottish Parliament election will be an event unlike any other, but I am sure that we will all welcome the opportunity to get back out speaking to voters as soon as it is safe to do so.

While it is important that campaigns are able to operate as much as possible, we need to ensure that we do not compromise any of the public health achievements of recent weeks and months.

I have a couple of specific questions for the minister. When will the guidance that he mentioned be published, so that political parties have the time to safely put in place advice to all campaigners? If we are going to have a fair election, it is vital that strict purdah rules also cover ministers. Does the minister agree with that, in which case will he confirm that Government statements and briefings will be led by public officials when the Parliament rises on 24 March?

Graeme Dey: Guidance will be issued as soon as possible. Purdah rules will be followed, as they always are. The First Minister touched on the point that Miles Briggs has raised at First Minister's questions last week, I think, and further detail on that will be forthcoming. I point out to Miles Briggs that the most important thing about the briefings is the assurance that the First Minister provides to the public, as we are still in the midst of a pandemic.

Sarah Boyack (Lothian) (Lab): I thank the minister for advance notice of his statement. I agree that our top priority must be public health and safety for everyone involved in the election, including staff and voters. Can the minister say what modelling is being done on the impact of the election campaign on the prevalence of Covid and on the likelihood of people to vote? Will he be giving us more clarity on postal votes?

You referenced 10 local authorities across the country. Councillors have raised concerns with me about safety at polling stations. For example, what happens if someone cannot or will not wear a mask? Can you clarify that the guidance will address issues such as canvassing tenements and flats from 5 April? Do we not need clarity on those issues, rather than leaving it up to different political parties to make that judgment?

The Deputy Presiding Officer: I remind members not to use the term "you". I know that I am flailing against the wind with that after five years, but I keep trying.

Graeme Dey: Presiding Officer, I thought that you were going to remind the member about asking multiple questions within a single question. I have lost track, and I apologise. I will come back to Sarah Boyack if required.

We will update the postal vote numbers on a weekly basis from 15 March.

On people not wearing masks at polling stations, I take it that the member means those entering polling stations. Additional members of staff will be on duty at polling places to encourage people to do that. Sarah Boyack makes a valid point on that, however, and the police will have a role to play in the election in that regard.

As for what buildings can and cannot be canvassed, that is for the parties to determine. I do not think that it is for us to be proscriptive in saying that it is not possible to canvass residents of such-and-such a building or whatever. I am confident that the parties will exercise common sense in their approach to that.

I apologise: if there are any other questions that I have not picked up, I will come back to Sarah Boyack on them.

The Deputy Presiding Officer: I remind the minister and those on the front bench that Ms Boyack is entitled to ask a certain number of questions within her time if she wishes—that is just to correct the record for you, minister.

Patrick Harvie (Glasgow) (Green): As well as objective safety, the perception of safety is important. That will apply to political parties as they make judgments on the point that was just made about canvassing in enclosed spaces such as tenement closes, and it is also relevant to voters who turn up to vote in person. What action will be taken to build public confidence, so that people have a high degree of confidence in the safety of the voting process? The perception is as important as the reality.

Graeme Dey: Patrick Harvie made a good point about the perception of safety. Let me first deal with the issue in the context of political parties. Self-evidently, it would be a bad idea for parties to descend on an area en masse, having car shared—that kind of approach is completely unacceptable in the current climate. As I said, I am confident that the parties will adhere to the rules.

Patrick Harvie made a good point about public confidence. The larger the number of postal votes that are issued and taken up, the fewer individuals will go to polling stations. If polling stations are seen to be not particularly busy, that will give people confidence.

There is clearly a job to be done, between now and election day, to boost public confidence in going out to vote on the day. Eleven council by-elections will take place in the next few weeks, which will give clear evidence of the safety that surrounds voting. It is incumbent on political parties and on politicians to encourage the public to be confident that it is possible to go and cast their vote in person if that is what they require to do.

Willie Rennie (North East Fife) (LD): I am grateful for the minister's approach to the issue; we have worked together constructively throughout and we are content with what he has set out today. It is important to have safe voting and a safe campaign if we are to have a valid election.

May I press the minister on the Covid briefings? If the First Minister felt compelled, last week, to answer a question about Alex Salmond during a Covid briefing, how will she avoid answering questions about the election campaign if she continues to front those briefings?

Graeme Dey: I think that Willie Rennie knows full well that the First Minister would be able to negotiate such a situation quite comfortably. I am a little surprised by the obsession with public health briefings that have proved essential

throughout the past year. I have great respect for Willie Rennie, but if he is implying that the First Minister would somehow take advantage of the situation, that is beneath him.

The Deputy Presiding Officer: A lot of members want to ask questions. We must have short questions and short answers. I do not think that I will get to everybody, but I will try to do so.

Bill Kidd (Glasgow Anniesland) (SNP): I thank the minister for his statement. Local authorities will need to make a range of changes to polling places to ensure that they are Covid safe. Can the minister provide further information about the steps that the Scottish Government is taking to support local authorities with the costs of introducing safety measures?

Graeme Dey: That has been done. A total sum of, I think, £10 million has been set aside for the delivery of the election. All reasonable asks have been met and there is a contingency to meet further reasonable requests that relate to delivering the election.

Oliver Mundell (Dumfriesshire) (Con): These are difficult decisions, which require a careful balance between protecting public health and enabling the democratic process to take place. I know that the minister appreciates that. Does he accept that giving the green light to any form of campaigning will cause concern to some people, who—understandably—remain anxious? Will he reassure the Parliament that any further relaxation of campaign rules will be mindful of the need for public confidence in the on-going restrictions? Will he reassure us that he will seek to avoid creating any perception that different rules apply to politicians?

Graeme Dey: I agree entirely with Oliver Mundell's point. It is important that the public see what we are agreeing today in the right light. There will be people who are concerned about the issue. As I said, it is incumbent on the parties to behave in a way that does not disquiet the public, and I have every confidence that they can do so. Mr Mundell made a valid point, which serves to remind us all of the public's concerns. We should be mindful of those concerns as we enter the campaign.

Annabelle Ewing (Cowdenbeath) (SNP): The minister mentioned in his statement that it will be possible for anyone who is unable to vote in person due to testing positive for Covid-19 or having to self-isolate to apply for a proxy vote, and that that will be possible up until 5 pm on the day of the poll. That is an important measure, but will the minister advise me what the Scottish Government will do to ensure that people are aware of the facility and explain the mechanics of how to make such an application?

Graeme Dey: Information to that end will be provided on every polling card. The Electoral Commission is making voters aware of the matter through its public awareness campaign and its booklet on the Scottish Parliament elections, which will be delivered to every household in the week commencing 22 March. Returning officers and electoral registration officers will publicise the availability of emergency proxies through social media and other press nearer the time. All round, we will be able to address the matter that the member rightly raises.

Colin Smyth (South Scotland) (Lab): Deciding to hold the election in May rather than wait a few weeks until the end of July, when everyone will be vaccinated, means that cross-local authority travel restrictions will still be in place. How does the minister justify telling the public that, for health reasons, they cannot visit their loved ones, even in the garden, if they happen to live in another council area, but that election candidates will be able to travel—in some cases, for regional candidates, it will be from one side of the country to the other—to knock on anyone's door and ask for their vote? That is one rule for politicians and another for the public. For parties simply to forgo democratic engagement on the doorstep is not the solution.

Graeme Dey: I am a little disappointed to hear Colin Smyth's question, given that his party has engaged constructively in getting us to this point. I point out to him that we are talking about facilitating an election agent and candidate travelling to a constituency where they might be standing or working and where they do not happen to live; we are not talking about mass transference of activists across Scotland. We are talking about individuals travelling to take part in a major democratic event.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): Many countries around the world have held elections during the pandemic. Can the minister confirm that the Scottish Government has been looking at what lessons can be learned from those elections and considering putting those lessons in place?

Graeme Dey: During the pandemic, 83 national elections or referenda have been held around the globe, and a number of the measures that we will deploy have been deployed in them. Perhaps more relevant, however, have been the lessons that we have learned from our domestic by-elections that have taken place. Quite a lot has been derived from those. Measures such as having an additional member of staff at the polling station to direct voters and limiting the number of votes in each box are examples of things that we have learned from those by-elections.

John Scott (Ayr) (Con): I welcome the arrangements that have been made for polling day under which only 800 people will be allowed at each polling station. Some polling stations would usually expect more people and some would expect less. Will local authorities make an effort to direct voters to different polling stations and to draw voters' attention to different polling stations, where voters will be required to vote at a polling station that is not the one that they would usually vote at?

Graeme Dey: We need to draw a distinction between polling places and polling stations. We are looking at extending the number of rooms in the school or other building that people will be directed to. John Scott is right that some changes to venues will take place across the country but, in essence, the approach is about limiting the number of people who enter a particular part of a building to cast their votes. That is what we are predominantly talking about.

Maureen Watt (Aberdeen South and North Kincardine) (SNP): Can the minister provide any further information on steps that the Government is taking to raise awareness of postal voting, particularly among the elderly, vulnerable and less mobile, given that it will not be possible for anyone other than, possibly, family to give them a lift to the polling station?

Graeme Dey: Extensive work has already been done to raise awareness of the option of postal voting, and the proxy voting aspect has been developed as well. The CMO has written to everyone on the shielding list. I think that we have covered the bases as far as possible. However, the opportunity is there for the parties to take their share of the responsibility and increase awareness of postal voting. We have done a reasonable job thus far, but I am happy to hear from members of all parties if they have further ideas that they think that we should take on board.

James Kelly (Glasgow) (Lab): For the election to proceed, the public will need to be confident about the safety of the polling places and the protection that will be afforded across constituencies. Will there be an open and transparent assessment of any issues that have arisen in by-elections? Will the minister update Parliament on any problems that are found to have cropped up?

Graeme Dey: It is a fair point to make. Lessons from by-elections are always assessed on an on-going basis. I will be happy to arrange a briefing with the Electoral Management Board, further to the one that we had a few weeks ago, to provide members with answers to such questions and to let them know whether any further issues have been identified through the by-election process and what measures we can take in response.

Ruth Maguire (Cunninghame South) (SNP): Safety is of paramount importance. What measures are being taken to ensure the protection of members of the local authority workforce who will be involved in the operation of the election on polling day and at the counts?

Graeme Dey: Ruth Maguire makes a very good point. The safety of election workers is paramount and extensive planning has been done on social distancing and other measures.

Another thing that we have been looking at, which I will share with members, is the possibility of providing further reassurance by carrying out asymptomatic testing of everyone who might be present at a count. That has been welcomed in principle by the EMB, but there are a number of issues to be considered, not least that of returning officers wanting that to take place the evening before the count so that—rightly—they can replace any workers who test positive.

Countering that is the fact that it is believed that lateral flow testing is of less case-finding value if it is conducted the evening before someone goes to their workplace than if it is done a short time before they attend. The other point is that such testing must be nationwide. The EMB is taking soundings from all 32 returning officers at the moment, and we will consider the matter further when we have received the relevant responses.

The Deputy Presiding Officer: That concludes questions on the statement. I thank members and the minister, as we managed to get all the questions in.

There will be a short pause before we move on to the next item of business.

Business Motion

15:43

The Presiding Officer (Ken Macintosh): The next item of business is consideration of business motion S5M-24259, in the name of Graeme Dey, on behalf of the Parliamentary Bureau, setting out a timetable for the stage 3 consideration of the Defamation and Malicious Publication (Scotland) Bill. I invite Graeme Dey to move the motion.

Motion moved,

That the Parliament agrees that, during stage 3 of the Defamation and Malicious Publication (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limit indicated, that time limit being calculated from when the stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the stage being called) or otherwise not in progress:

Groups 1 to 5: 45 minutes.—[*Graeme Dey*]

Motion agreed to.

Defamation and Malicious Publication (Scotland) Bill: Stage 3

15:44

The Presiding Officer (Ken Macintosh): The next item of business is stage 3 consideration of the Defamation and Malicious Publication (Scotland) Bill. In dealing with the amendments, members should have with them the bill as amended at stage 2, the marshalled list and the list of groupings.

The division bell will sound and proceedings will be suspended for five minutes for the first division of the afternoon, if there is a division. The period of voting for each division will be one minute. Members who wish to speak in the debate on any group of amendments should press their request-to-speak button as I call that group.

Members should now turn to the marshalled list.

Section 1—Actionability of defamatory statements

The Presiding Officer: Group 1 is on the serious harm threshold test. Amendment 5, in the name of Andy Wightman, is grouped with amendments 6 and 7.

15:45

Andy Wightman (Lothian) (Ind): At stages 1 and 2, I expressed the view that the serious harm threshold is not justified. That is contrary to the view that I once held that the threshold was justified, but I take that view as a legislator considering the evidence that has been presented and in the interests of ensuring that the people of Scotland have a remedy available to them if they feel that their reputation has been harmed. In the Justice 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, nor in response to my amendments at stage 2.

My amendments have the effect of removing the serious harm test in section 1 and, while maintaining a threshold test for actionability, modifying it to “actual” harm rather than “serious” harm. I do that for two reasons. First, as I indicated, I do not believe that a threshold of serious harm is justified by the evidence. 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 the muddle that there was in English law as a consequence of the distinct wrongs of slander and libel—a muddle that, as Professor Blackie pointed out in stage 1 evidence, we do not have in Scotland. The Scottish Law Commission concluded that a threshold was desirable but spent very little time considering at what height the bar should be set.

My second reason is that the bill introduces, at section 1(4)(a), a statutory definition of defamation that

“a statement about a person is defamatory if it causes harm to the person’s reputation (that is, if it tends to lower the person’s reputation in the estimation of ordinary persons)”.

It is defamatory if it causes harm. We have never had that before, relying until now on the famous *Sim v Stretch* test in common law. The Scottish Law Commission never recommended such a statutory definition in its reports or its final draft bill, and therefore we are 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 can do about it unless they can demonstrate that the harm is serious.

If Parliament agrees that that is a problem, there are two ways of dealing with it. First, we could amend section 1(4)(a) to insert the word “serious” in front of “harm”, so as to bring the civil wrong and the actionability thresholds into alignment. Secondly, we could pass my amendments 5, 6 and 7, which retain the statutory definition but amend the threshold test to one of “actual” as opposed to “serious” harm, and thus we would allow everyone who feels that their reputation has been harmed, according to section 1, and according to the bill that we will pass this evening, to have access to justice but to have to demonstrate to the court that the harm is or is likely to be actual harm, and not merely presumed, as is the situation today.

I move amendment 5.

John Finnie (Highlands and Islands) (Green): I wish to speak in support of my colleague Andy Wightman’s comments. At the outset, Mr Wightman said that he had reviewed his position. That is a strength, not a weakness, and it has caused me to review my approach. Mr Wightman has talked about the scrutiny that went on at stage 1. In the stage 2 debate, he used the term “appropriate qualifier”. A threshold is needed. I support the view that it should be actual harm rather than serious harm. The *Lachaux* case is referred to in one of our briefings, and the explanatory notes to the bill say:

“It is anticipated that the Scottish courts will treat *Lachaux* as persuasive authority and follow a similar approach.”

I find Mr Wightman’s arguments persuasive, not just in that respect but in respect of creating an offence and immediately limiting access to it, because there are not many other remedies. For obvious reasons, I support the amendments in Mr Wightman’s name and encourage colleagues to do likewise.

Adam Tomkins (Glasgow) (Con): I have the greatest respect for Andy Wightman’s knowledge and experience of the law of defamation, but I am afraid that I do not agree with his arguments today, which are identical to his arguments at stage 2, when his amendments were either not pressed or, if they were pressed, were defeated—I cannot now remember which.

The reason why I do not support or agree with Andy Wightman’s argument is that the bill does something really important. It does not just modernise the law of defamation so that it is fit for purpose; it shifts the balance between the way in which we protect freedom of speech and the way in which we protect the right to protect one’s reputation and the right to privacy. It shifts that balance subtly but importantly in favour of free speech. One of the key ways in which it does that is by inserting the serious harm test in section 1.

I would be very reluctant indeed to see that shift go backwards. Anybody who knows anything about defamation law in this country—as I said, Andy Wightman knows plenty about it—knows that it does not protect freedom of expression sufficiently robustly. Such things are very important, as is recognised in the evidence on that point that the Justice Committee took at stage 1. For example, Andrew Tickell, from Scottish PEN, said that the serious harm test was

“appropriate in terms of free expression.”

Another example is the evidence that the committee took from the National Union of Journalists:

“If harm has been done to someone’s reputation, it is in everyone’s interests that that is addressed quickly. Having a serious harm threshold allows clarity at an earlier stage”—[*Official Report, Justice Committee, 25 August 2020; c 9.*]

to ensure that that is done. It has got nothing to do with keeping pace with the law of England and Wales, where the change was made a few years ago, and everything to do with ensuring that our Scots law of defamation holds the correct balance between free expression and protection of the right to reputation. In my judgment, the serious harm test is an important part of the way in which the bill achieves that.

The Minister for Community Safety (Ash Denham): The amendments in this group would have the same effect as amendments 30, 31 and 36, which Andy Wightman lodged at stage 2 and which were rejected by the committee. The threshold test of serious harm is an important reform of the current Scots law of defamation and is central to rebalancing the law of defamation. Indeed, Scottish PEN described the threshold test as

“critical to the heart of the bill”.—[*Official Report, Justice Committee*, 25 August 2020; c 9.]

Overall, 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 threshold test was recommended by the Scottish Law Commission for a number of reasons and I am certain that the commission considered the need for the test and the level at which it is set very carefully.

Amendments 5 and 6 would replace the serious harm test with one of actual harm. That would set the bar too low, as it would mean that any evidence of harm, no matter how little, would be enough to meet the test. The amendments would signal to our courts that Parliament intends something different from the serious harm test. We would not have 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 Defamation Act 2013 in England and Wales. The result would likely be a long period of doubt and uncertainty about what the test of actual harm means, which is the exact opposite of what the bill is trying to achieve.

It is certain, however, that Andy Wightman means the level of actual harm to be lower than serious harm. Why should the people of Scotland have less protection for their freedom of expression than people in England and Wales have?

Andy Wightman: The minister makes a good point, but my rejoinder would be to ask why we are legislating to create a statutory definition about causing harm but not allowing anyone to take action if the harm that has been caused does not meet the serious harm threshold.

Ash Denham: The two things are different. We have the definition, and the serious harm threshold is for actionability. If someone can prove that they have been harmed, they will be able to take that forward in the courts. If you have been harmed, it is important that you are able to show the court how you have been harmed. The serious harm threshold test is extremely important for the overall balance of the bill.

Amendment 6 would have the effect of creating two different thresholds: one for individuals and another for companies and partnerships that trade for profit. Individuals would need to show actual harm and companies would need to show serious financial loss. Not every company is a multinational with an annual turnover in the millions of pounds, however. If the company was an individual or a charity, it could easily show actual harm, but instead it would have to show serious financial loss. Why would the law treat those companies differently? Most companies in Scotland are small or micro-enterprises, and reputation will be vitally important for them.

Andy Wightman has also raised a concern about the law defining a harm but then saying that, if a person has not been seriously harmed, they cannot pursue a civil remedy. I point out to him that the use of thresholds is common in both criminal law and civil law to indicate that a particular level of conduct or damage is required before a particular legal remedy or consequence is appropriate. I will give a couple of examples of that.

First, part 2 of the Adoption and Children (Scotland) Act 2007 concerns the making of permanence orders, whereby parental rights and responsibilities are vested in a local authority. The act states that the court must be satisfied that

“the child’s residence with the person is, or is likely to be, seriously detrimental to the welfare of the child.”

Secondly, the Parliament recently considered and agreed to section 38 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. That section sets out a serious failure test that must be met in order to raise successful judicial review proceedings in relevant circumstances. Again, that sets the threshold not just at actual failure but at serious failure.

Those are just a couple of examples, but there are more. It is common for the law to recognise that there may be a wrong but that it does not reach a high enough level to warrant successful court proceedings.

Setting the threshold test 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.

The crucial importance of freedom of expression justifies a sensible threshold. Andy Wightman’s amendments would nudge the threshold upwards only slightly from what we currently have. However, in my opinion, that is not high enough.

I ask Andy Wightman not to press amendments 5, 6 and 7. If he does so, I ask members to vote with me in opposing them.

Andy Wightman: I thank those who have contributed to the debate.

I respect Mr Tomkins's arguments about shifting the balance. I agree with that; indeed, I agree with the minister on that point. However, in my view, shifting to "actual" harm and doing away with the presumption shifts that.

With respect, Mr Tomkins did not address my critique of creating a new statutory wrong and creating a threshold for actionability in the same section. The minister talked about adoption legislation, for example. It is one thing to set on an on-going basis various criteria and thresholds for actionability, but it is quite another to create a new statutory wrong in a piece of legislation and say in the very same section that there is nothing that can be done about it.

My concern about the bill has been that those who suffer harm—a statutory wrong that we will probably pass tonight—do not have a remedy available to them. That causes me a problem. Nevertheless, I understand the arguments that have been put at stages 1, 2 and 3. I do not expect that my amendment will get much further, but at least I have managed to put the arguments on the record, and Parliament will be able to test them.

The Presiding Officer: Can I assume from that that you are pressing amendment 5, Mr Wightman?

Andy Wightman: Yes.

The Presiding Officer: The question is, that amendment 5 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division. Members will need to access the voting app, so I will suspend Parliament for five minutes to call some members to the chamber and the others to access the voting app.

15:58

Meeting suspended.

16:06

On resuming—

The Presiding Officer: We are now back in session and we move straight to the vote on amendment 5. There will be a one-minute division.

The vote is now closed. Please let me know if you were not able to vote.

For

Baillie, Jackie (Dumbarton) (Lab)
 Baker, Claire (Mid Scotland and Fife) (Lab)
 Bibby, Neil (West Scotland) (Lab)
 Boyack, Sarah (Lothian) (Lab)
 Cole-Hamilton, Alex (Edinburgh Western) (LD)
 Dornan, James (Glasgow Cathcart) (SNP)
 Fee, Mary (West Scotland) (Lab)
 Findlay, Neil (Lothian) (Lab)
 Finnie, John (Highlands and Islands) (Green)
 Grant, Rhoda (Highlands and Islands) (Lab)
 Gray, Iain (East Lothian) (Lab)
 Greer, Ross (West Scotland) (Green)
 Griffin, Mark (Central Scotland) (Lab)
 Harvie, Patrick (Glasgow) (Green)
 Johnson, Daniel (Edinburgh Southern) (Lab)
 Johnstone, Alison (Lothian) (Green)
 Kelly, James (Glasgow) (Lab)
 Lamont, Johann (Glasgow) (Lab)
 Lennon, Monica (Central Scotland) (Lab)
 Leonard, Richard (Central Scotland) (Lab)
 Macdonald, Lewis (North East Scotland) (Lab)
 Marra, Jenny (North East Scotland) (Lab)
 McArthur, Liam (Orkney Islands) (LD)
 McNeill, Pauline (Glasgow) (Lab)
 Rennie, Willie (North East Fife) (LD)
 Rowley, Alex (Mid Scotland and Fife) (Lab)
 Ruskell, Mark (Mid Scotland and Fife) (Green)
 Sarwar, Anas (Glasgow) (Lab)
 Smith, Elaine (Central Scotland) (Lab)
 Smyth, Colin (South Scotland) (Lab)
 Wightman, Andy (Lothian) (Ind)
 Wishart, Beatrice (Shetland Islands) (LD)

Against

Adam, George (Paisley) (SNP)
 Adamson, Clare (Motherwell and Wishaw) (SNP)
 Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
 Arthur, Tom (Renfrewshire South) (SNP)
 Balfour, Jeremy (Lothian) (Con)
 Ballantyne, Michelle (South Scotland) (Reform)
 Beattie, Colin (Midlothian North and Musselburgh) (SNP)
 Bowman, Bill (North East Scotland) (Con)
 Brown, Keith (Clackmannanshire and Dunblane) (SNP)
 Burnett, Alexander (Aberdeenshire West) (Con)
 Cameron, Donald (Highlands and Islands) (Con)
 Campbell, Aileen (Clydesdale) (SNP)
 Carlaw, Jackson (Eastwood) (Con)
 Carson, Finlay (Galloway and West Dumfries) (Con)
 Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
 Constance, Angela (Almond Valley) (SNP)
 Corry, Maurice (West Scotland) (Con)
 Crawford, Bruce (Stirling) (SNP)
 Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
 Davidson, Ruth (Edinburgh Central) (Con)
 Denham, Ash (Edinburgh Eastern) (SNP)
 Dey, Graeme (Angus South) (SNP)
 Doris, Bob (Glasgow Maryhill and Springburn) (SNP)
 Ewing, Annabelle (Cowdenbeath) (SNP)
 Ewing, Fergus (Inverness and Nairn) (SNP)
 Fabiani, Linda (East Kilbride) (SNP)
 FitzPatrick, Joe (Dundee City West) (SNP)
 Forbes, Kate (Skye, Lochaber and Badenoch) (SNP)
 Fraser, Murdo (Mid Scotland and Fife) (Con)
 Freeman, Jeane (Carrick, Cumnock and Doon Valley) (SNP)
 Gibson, Kenneth (Cunninghame North) (SNP)
 Gilruth, Jenny (Mid Fife and Glenrothes) (SNP)
 Golden, Maurice (West Scotland) (Con)
 Gougeon, Mairi (Angus North and Mearns) (SNP)
 Grahame, Christine (Midlothian South, Tweeddale and

Lauderdale) (SNP)
 Greene, Jamie (West Scotland) (Con)
 Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)
 Harper, Emma (South Scotland) (SNP)
 Harris, Alison (Central Scotland) (Con)
 Haughey, Clare (Rutherglen) (SNP)
 Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
 Hyslop, Fiona (Linlithgow) (SNP)
 Halcro Johnston, Jamie (Highlands and Islands) (Con)
 Kerr, Liam (North East Scotland) (Con)
 Kidd, Bill (Glasgow Anniesland) (SNP)
 Lindhurst, Gordon (Lothian) (Con)
 Lochhead, Richard (Moray) (SNP)
 Lockhart, Dean (Mid Scotland and Fife) (Con)
 Lyle, Richard (Uddingston and Bellshill) (SNP)
 MacDonald, Angus (Falkirk East) (SNP)
 MacDonald, Gordon (Edinburgh Pentlands) (SNP)
 MacGregor, Fulton (Coatbridge and Chryston) (SNP)
 Mackay, Rona (Strathkelvin and Bearsden) (SNP)
 Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
 Maguire, Ruth (Cunninghame South) (SNP)
 Martin, Gillian (Aberdeenshire East) (SNP)
 Mason, John (Glasgow Shettleston) (SNP)
 Mason, Tom (North East Scotland) (Con)
 Matheson, Michael (Falkirk West) (SNP)
 McAlpine, Joan (South Scotland) (SNP)
 McKee, Ivan (Glasgow Provan) (SNP)
 McMillan, Stuart (Greenock and Inverclyde) (SNP)
 Mitchell, Margaret (Central Scotland) (Con)
 Mountain, Edward (Highlands and Islands) (Con)
 Mundell, Oliver (Dumfriesshire) (Con)
 Neil, Alex (Airdrie and Shotts) (SNP)
 Paterson, Gil (Clydebank and Milngavie) (SNP)
 Robison, Shona (Dundee City East) (SNP)
 Ross, Gail (Caithness, Sutherland and Ross) (SNP)
 Russell, Michael (Argyll and Bute) (SNP)
 Scott, John (Ayr) (Con)
 Simpson, Graham (Central Scotland) (Con)
 Smith, Liz (Mid Scotland and Fife) (Con)
 Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
 Stewart, Alexander (Mid Scotland and Fife) (Con)
 Stewart, Kevin (Aberdeen Central) (SNP)
 Swinney, John (Perthshire North) (SNP)
 Todd, Maree (Highlands and Islands) (SNP)
 Tomkins, Adam (Glasgow) (Con)
 Torrance, David (Kirkcaldy) (SNP)
 Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
 Wells, Annie (Glasgow) (Con)
 Wheelhouse, Paul (South Scotland) (SNP)
 White, Sandra (Glasgow Kelvin) (SNP)
 Whittle, Brian (South Scotland) (Con)
 Yousaf, Humza (Glasgow Pollok) (SNP)

The Presiding Officer: The result of the division is: For 32, Against 86, Abstentions 0.

Amendment 5 disagreed to.

Amendment 6 not moved.

Section 3—Restriction on proceedings against secondary publishers

The Presiding Officer: Group 2 is on secondary publication: regulation-making power. Amendment 1, in the name of Liam Kerr, is the only amendment in the group.

Liam Kerr (North East Scotland) (Con): Colleagues will recall that I lodged a similar

amendment at stage 2 that sought to limit the delegated powers of ministers to technical amendments, while allowing flexibility to modernise the law in line with technological developments. I will explain what I mean by that.

Section 3(6) enables the Scottish ministers to make regulations to

“modify subsections (3) or (4) to add, amend or remove activities or methods of disseminating or processing material”,

which can be undertaken by a person without them being classified as

“the author, editor or publisher”

or, in the case of

“an employee or agent of such a person”,

being “responsible for” its

“content or the decision to publish it.”

The underlying purpose of amendment 1 is to restrict the regulation-making power in section 3(6) so that it can be used only in consequence of technological developments.

In the committee’s debate at stage 2, it was felt that the proposed power would be too restrictive, so I did not press my amendment, pending discussion with the minister and her officials to ensure that any amendment captured the policy intention more accurately.

I am grateful to the minister and her officials for their assistance, and my redrafted amendment permits regulations to be made only when the Scottish ministers consider it appropriate to take account of two situations. The first involves technological developments—including technologies ceasing to be used—that relate to the dissemination or processing of material. The second involves

“changes in how material is disseminated or processed as a result of such developments”.

Any such regulations would be subject to the affirmative procedure. Stakeholders would have the opportunity to express their views on any proposed change and, ultimately, Parliament would decide whether a proposed change was appropriate. Amendment 1 is good and I seek Parliament’s support for it.

I move amendment 1.

Ash Denham: Someone who is not the author, editor or primary publisher of a defamatory statement should not be liable for it, except to the extent that they are responsible for a statement’s content or for the decision to publish it. Section 3 gives effect to that purpose and limits the circumstances in which a defamation action can be brought against a secondary publisher. The Scottish ministers are given regulation-making

powers to adjust the subsections that lay out the activities that a person can carry out without being classed as an author, editor or publisher.

The Scottish Government made it clear in its delegated powers memorandum that the reason for taking that power is to future proof the provision to deal with technological changes. Any regulation-making power should not be too expansive, particularly as any regulations that the Scottish ministers make in connection with section 3 will have a significant impact on freedom of expression.

Amendment 1 ensures that the Scottish ministers' power is not so wide that it will unduly restrict freedom of expression without Parliament's consent but that it is wide enough to allow the Scottish ministers to account for necessary changes. It is worth remembering that any proposed regulations will be consulted on and will be subject to the affirmative procedure. Stakeholders will have an opportunity to express their views on any proposed change and, ultimately, it will be for the Scottish Parliament to decide whether a proposed change is appropriate.

The amendment achieves the proper balance between making sure that those who need the section's protection are given it in good time and making sure that the Scottish ministers' powers to restrict freedom of expression are not unnecessarily wide. I am grateful to Liam Kerr for agreeing to work with the Scottish Government to prepare the amendment and I encourage members to join me in supporting it.

Amendment 1 agreed to.

Section 5—Defence of truth

Amendment 7 not moved.

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

The Presiding Officer: Group 3 is on the powers of the court. Amendment 8, in the name of Fulton MacGregor, is grouped with amendment 9.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Amendments 8 and 9, in my name, follow on from an amendment that I lodged at stage 2. I thank the minister for her commitment to work with me ahead of today.

The aim of amendments 8 and 9 is to achieve a proportionate balance of the protection of reputation, the right to freedom of expression and the court's power to make orders to a website operator in the early stages of defamation proceedings.

Section 30 provides for the fact that it might not always be possible for the author of material that

is the subject of defamation proceedings or proceedings under part 2 in relation to malicious publication to prevent further distribution of the material or orchestrate its removal. To address that, section 30(1) empowers the court to order the removal of material that is the subject of defamation or malicious publication proceedings from any website on which it appears and to order a person

“who was not the author, editor or publisher”

of the material

“to stop distributing, selling or exhibiting material containing the statement”.

Section 30 allows the court to order a website operator to remove a statement that is the subject of a complaint. When a court has had the chance to consider the arguments from both sides and come to a full conclusion, an order to remove a statement that has been found to be defamatory is entirely reasonable.

However, the explanatory notes to the bill set out that the exercise of that 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.”

16:15

The court's power to order removal before a full decision has taken place seems unnecessary, given the alternative measures that amendment 8 seeks to introduce. In evidence sessions held by the Justice Committee, concerns were raised by media groups including the Society of Authors, Scottish PEN, the BBC and *The Ferret*, through legal academics, and from civil society organisations such as the Open Rights Group. I thank all those organisations, particularly Matthew Rice of the latter group, for their input in the development of my amendments.

In seeking to achieve a proportionate balance in the early stages of defamation disputes in the court system, amendment 8 proposes to amend section 30 by introducing a power for the court to order a website operator

“to include on the website a prominent notice that the statement is subject to the proceedings”.

Such a notice must be in a place or on a forum that ensures that a person accessing the statement is made aware of the notice every time that they access the statement.

I should make it clear that amendment 8 seeks to leave intact the power of the court to order the operator, by interdict, to remove the statement at the end of the proceedings. It is focused primarily

on when the proceedings are on-going, at which time it would be appropriate to exercise such a power.

Additionally, nothing in amendment 8 would prevent a website operator itself from removing the statement complained of, and they would be entitled to do that throughout any potential defamation dispute. I believe that the addition of a notice power for the court meets the bill's policy objectives to strike an

“appropriate balance between freedom of expression and the protection of individual reputation; and clarify the law and improve its accessibility.”

I move amendment 8

John Finnie: Mr MacGregor mentioned the Open Rights Group, much of whose work I commend. Indeed, it was via that route that I was lobbied by a constituent who was concerned that

“As things stood you were guilty until proven innocent.”

I commend the words that they went on to say about Mr MacGregor's amendments:

“These safeguards will better balance the right of freedom of expression online with the need to fairly protect reputation.”

For those reasons, I hope that other members will join Scottish Greens in supporting Mr MacGregor's worthy amendments.

Ash Denham: An important feature of the bill is the range of new powers given to the courts that will help to repair unfair damage done to an individual's reputation. Ordinarily a court would have awarded damages but, if the Parliament agrees, a court will be able to allow a statement to be read in court, order that a summary of its judgment be published, and order the removal of material from a website.

Section 30 grants courts the power to order the removal of material that is the subject of defamation or part 2 proceedings from any website on which it appears. That is an effective remedy that will, in relevant circumstances, help to prevent on-going unfair damage to an individual's reputation. A similar power has been conferred on courts in England and Wales by the Defamation Act 2013, and the bill that is before us seeks to grant Scottish courts the same.

There may, however, be situations in which a court decides that removing a statement altogether does not properly balance the rights of protection of reputation and freedom of expression. It could be that the proper balance favours continued publication of the statement complained of, but with a notice affixed to it that lets those accessing it know that it is subject to defamation or malicious publication proceedings. For example, that could be where proceedings are

on-going and a court has not yet made a final determination.

The notice permitted by amendment 8 would be attached on the website to the statement complained of, and must be prominent. That means that it cannot be hidden away on some other web page, or set out in tiny print, and therefore easily overlooked by users viewing the allegedly defamatory statement. It must also be visible to each individual user every time that they access the statement, for so long as the proceedings are on-going or for such other time period as may be ordered by the court.

Amendment 8, lodged by Fulton MacGregor, will make all that clear should a court decide to use that power. It is another remedy that a court can use to assist in restoring a person's unfairly damaged reputation, and is added to the others that the Scottish Government has introduced. Having it on the face of the bill would mean that an individual would know that it is one of a number of remedies that they could seek from a court in order to protect and restore their damaged reputation.

I hope that members will join me in supporting amendment 8.

The Presiding Officer: Does Mr MacGregor wish to wind up?

Fulton MacGregor: I thank the minister and her officials again. The amendment that is before members today has not changed substantially from the stage 2 amendment, but, by working with the minister and her officials, we have perhaps been able to find more balance and alleviate any slight concerns that were raised at stage 2.

Amendment 8 agreed to.

Amendment 9 moved—[Fulton MacGregor]— and agreed to.

Section 33—Interruption of limitation period: mediation

The Presiding Officer: Group 4 is entitled “EU exit technical amendments”. Amendment 2, in the name of the minister, is grouped with amendment 4.

Ash Denham: Amendments 2 and 4 are technical amendments that arise out of the United Kingdom's departure from the European Union.

Amendment 2 removes a reference to section 19F of the Prescription and Limitation (Scotland) Act 1973. That section was recently repealed by regulations that have now come into effect following the end of the transition period after the UK left the EU.

On amendment 4, a false and defamatory statement is presumed to be made with malice, and that presumption is rebutted if the statement is subject to qualified privilege. In the event of qualified privilege attaching, it is for the pursuer to prove malice. Qualified privilege arises both at common law and under statute. Part 2 of the schedule lists a number of communications that are privileged, and one such communication refers to “another member State”. As the UK is no longer a member of the EU, amendment 4 will rectify that provision. The amendment will maintain the current position under the law and no restriction of freedom of expression should result.

I ask members to support both the amendments in the group.

I move amendment 2.

Amendment 2 agreed to.

After section 33

The Presiding Officer: Group 5 is on “Interruption of limitation period: media complaints and expert determination”. Amendment 3, in the name of Liam Kerr, is the only amendment in the group.

Liam Kerr: This is similar to another amendment that I lodged but did not press at stage 2 and that has been revised and improved for stage 3.

Section 33 currently makes provision for mediation, which is helpful, and it will pause limitation during that period. Several witnesses felt that that interruption ought to be extended to other forms of dispute resolution such as arbitration, expert determination and maybe press complaints or investigation by ombudsmen bodies.

Amendment 3 provides that the limitation period of one year will not run during any period of time in which parties engage in certain forms of alternative dispute resolution. Those alternative methods, which I understand the explanatory notes will reflect, are expert determination and a complaints process such as press or ombudsmen complaints. The insertion of a new section into the bill will achieve that aim. I seek to define the two processes in subsection (4) of proposed new section 19CC of the Prescription and Limitation (Scotland) Act 1973. Subsection (2) sets out to provide clarity as to when parties enter and exit such a dispute resolution process.

Given that those processes are not necessarily structured or formal, and given that press complaints bodies are not defined in statute and so are liable to change without a means being provided to update the act short of primary legislation, subsection (5) would grant the Scottish ministers the power to amend the definitions in

subsection (4) in response to any future changes in the processes or types of bodies that handle media complaints. Any regulations that the Scottish ministers might make would be subject to the affirmative procedure, in accordance with subsection (6).

Amendment 3 has benefited from the advice and assistance of the minister and her officials, for which I am grateful. As earlier, I will be grateful for Parliament’s support.

I move amendment 3.

Ash Denham: I know that a number of members have, over a number of years, taken a keen interest in methods of dispute resolution that do not involve a court. The bill as introduced made provision for mediation in section 33, and Mr Kerr’s amendments extend the coverage of alternative methods of dispute resolution to include expert determination and media complaints processes.

Given the nature of defamation, alternative forms of dispute resolution can be especially useful for resolving disputes. Whether that is done by way of mediation, arbitration, formal complaints processes or expert determination, it seems only right that parties are not penalised for seeking to repair unfair damage without resorting to a court. It also seems right that we give those same parties the time to pursue the options without the threat of running out of time to raise court proceedings in actions of defamation and malicious publication. There is no need to force a party to lodge court proceedings in order to protect their legal rights solely because they are looking for other means to resolve a dispute.

I am grateful to Mr Kerr for agreeing to work with the Scottish Government on the definitions and drafting, and I believe that we have a robust provision that extends the ways in which a defamation or malicious publication dispute can be resolved without the same expense and wait that are involved in a court process.

I support amendment 3, and I hope that members will join me.

Amendment 3 agreed to.

Schedule—Statements having qualified privilege

Amendment 4 moved—[Ash Denham]—and agreed to.

The Presiding Officer: That ends the consideration of amendments.

As members will be aware, at this point in proceedings, I am required under the standing orders to decide whether, in my view, any provision of the bill relates to a protected subject

matter—that is, whether it modifies the electoral system and franchise for Scottish Parliament elections. In my view, the bill does no such thing, so it does not require a supermajority to be passed at stage 3.

We will have a short pause before we move on to the debate on the bill.

Defamation and Malicious Publication (Scotland) Bill

The Deputy Presiding Officer (Lewis Macdonald): The next item of business is a debate on motion S5M-24257, in the name of Ash Denham, on the Defamation and Malicious Publication (Scotland) Bill. I invite members who wish to speak in the debate to press their request-to-speak buttons now.

16:28

The Minister for Community Safety (Ash Denham): I am pleased to open the debate on the Defamation and Malicious Publication (Scotland) Bill. I thank members of the Justice Committee and its clerks for their work on the bill.

The bill is largely the outcome of work that was undertaken by the Scottish Law Commission, and it takes forward every substantive recommendation that the commission made. I also thank the commission for its valuable work.

It has been mentioned already today, but it is important to reiterate why the law of defamation is significant. The law deals with two competing fundamental human rights: freedom of expression and protection of reputation. As lawmakers, we have to find an appropriate balance between the two, and I believe that the bill gets the balance right. Overall, the aim has been to make sure that our law of defamation is fit for the 21st century, with a clear and accessible framework that balances those two rights. The bill updates defamation law and simplifies it in some key areas by replacing and restating the existing law.

One important reform is that, before a successful defamation action can be raised, a damaging statement must be published to someone other than the person who is the subject of it. Defamation law should be about protecting reputation, but, as the law currently stands, it protects more than that. If we are to say that freedom of expression is to be restricted in order to protect reputation, it is vital to ensure that defamation law is not overextended to protect other interests.

The threshold test of serious harm has been greatly discussed at each stage of the bill's progress through Parliament. The test will give much-needed confidence to those who are told that they have published a defamatory statement. Scottish PEN described the threshold test as critical and at the heart of the bill. The courts should not be asked to settle defamation litigation when there is little or no harm caused to individual reputation. The consequences for freedom of

expression in such a situation should not be underestimated.

Section 2 places on a statutory footing the common-law principle that public authorities cannot raise defamation litigation. A public authority should use the ballot box, not defamation law, to protect its reputation. There has been no decided case on whether the principle applies in Scotland, but legal professionals work on the assumption that it does. If Parliament agrees to the bill, section 2 will put that beyond doubt.

The approach taken on secondary publishers will help to ensure that defamation law is focused on the source of a defamatory statement. Under the present law, secondary publishers are not actively responsible for the content that they host but they can be held liable, and we have heard how liability can lead to secondary publishers taking a cautious approach to content. The law as it stands encourages secondary publishers to remove content, thereby interfering in the exercise of an individual's free expression. Ultimately, that should be a matter for a court, not secondary publishers, to determine.

Another significant aspect of the bill is that it brings together the main defences to a defamation action. The Scottish Government has taken the opportunity to reform the defences where necessary. For instance, on the defence of honest opinion, one innovative change has been to extend the need to show facts underpinning the opinion to be true, privileged or reasonably believed to be true. Having the defences of truth, honest opinion and publication on a matter of public interest all set out in one place will help defenders to better understand the law, instead of leaving the defences uncodified.

In a defamation action, the usual remedy that is sought and granted by a court is an award of damages, and the bill will widen the range of remedies that are available to those whose reputation has been unfairly damaged. A pursuer will be able to ask a court to remove or affix a notice to a defamatory statement; ask to make a statement in court; or ask that a summary of the court's judgment be published. Ultimately, for most, the purpose of a defamation court action is to vindicate unfairly damaged reputation, so having new types of remedy to achieve that is a welcome reform.

I will briefly mention the equally important reforms to the law of malicious publication that will be brought about by the bill. The Scottish Law Commission gave a great deal of consideration to the common-law action of verbal injury and the new statutory cause of action of malicious publication that replaces it. The law treats malicious publication actions differently from defamation actions. In a malicious publication

action, the law does not presume that the statement complained about is one of fact, is false or was made with malice; each of those elements must be proved by the pursuer. In particular, the test of malice has been strengthened as the bill has progressed—I thank the Justice Committee for its work on that. Malicious publication actions fill a gap in the law that would be left open if defamation was left as the only actionable form of wrong.

The law of defamation in Scotland is due for reform—the latest substantive changes were made more than a generation ago—and it is no longer fit for purpose. Any reform must find a balance between the two competing rights at the centre of any defamation action: the right to protection of reputation and the right to freedom of expression. The bill achieves a more appropriate balance.

Throughout the bill process, I have listened to the views of members across the chamber, and the Scottish Government has lodged a number of amendments in response to concerns or has supported amendments after collaborative work with individual MSPs.

If agreed to by the Parliament, the reforms that will be brought about by the bill will modernise and simplify our laws of defamation and malicious publication.

I move,

That the Parliament agrees that the Defamation and Malicious Publication (Scotland) Bill be passed.

16:34

Liam Kerr (North East Scotland) (Con):
During the stage 1 debate on the bill, I said:

“at the moment, large parts of my week are set aside for reading, questioning and commenting on matters of freedom of speech”.—[*Official Report*, 5 November 2020; c 57.]

That has not changed—nor should it, as, of course, freedom of expression remains one of our most important fundamental rights, with which we interfere at our peril.

In these times, when technological developments and social media have allowed pretty much anyone to be a publisher, it is imperative both that free speech is protected and that any threats that are caused to it by laws are avoided; however, as the bill acknowledges, there is also the perhaps sometimes competing right to protect one's reputation. The bill seeks to strike the balance between those two rights.

There is no doubt that striking that balance is not straightforward. The Scottish Law Commission recognised that, as it sought to put the Scots law of defamation on a statutory footing that is fit for

the 21st century. As the minister set out, the bill seeks to implement the substantive recommendations of the SLC's report, particularly in so far as it recommended changes to the common-law rules on verbal injury, a change in the presumption of trial by jury for defamation cases and that public authorities should not be able to initiate defamation proceedings. Many more recommendations were made and included in the defamation bill. It is the view of the Scottish Conservatives that the Defamation and Malicious Publication (Scotland) Bill broadly achieves the balance that is required. We will therefore vote in favour of it at decision time.

Although that balance is achieved, it is fair to say, as Adam Tomkins did earlier, that it has been shifted towards freedom of speech, in so far as it introduces a test of serious harm to the pursuer's reputation. For a defamation action to succeed, a pursuer will have to show not merely harm but "serious harm" to their reputation. There has been a very interesting debate around that test, which is possibly the most contentious aspect of the bill. According to the policy memorandum, which itself picks up on the Scottish Law Commission's work, the test was introduced because of a

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

It also brings Scots law into line with the position in England and Wales, which led some during the Justice Committee's evidence-taking to suggest that it is

"an English solution to an English problem."—[*Official Report, Justice Committee*, 1 September 2020; c 13.]

I have found those arguments interesting, because it seems to me that, if there is a lack of authority, arguably the Law Society of Scotland has a point that an extra hurdle could deter claims and thus lead to even less such authority being developed. Although ensuring the ability to dispose of trivial claims feels like the right thing to do, the Faculty of Advocates suggested that

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

thus far "been troubled by" such "trivial claims". However, I have listened carefully to the media respondents in particular, who have said that a serious harm test adds clarity, prevents cases that are without merit from going forward and, crucially, gives them reassurance in publication so as to avoid a "chilling effect". I find that final point particularly persuasive so, although I see merit in both sides of the debate and am pleased that all views have been heard and considered, on balance I align with the view of the committee—and, I think, of the Parliament—to favour retention of the serious harm test.

I was also somewhat exercised by the sections on malicious publication, which I felt throughout had perhaps not been given quite the same level of attention as others. I was concerned principally about the definition of "malice", the applicability of defences and a de minimis level of damage akin to the serious harm test. I have been satisfied on all of those, since the minister has acknowledged my concerns and has either worked with me to amend the definition to ensure that any statement must be both "false and malicious" in order to be defamatory, or with her officials has engaged with me in challenging yet constructive debate on the merits or otherwise of my amendments. On that point, incidentally, I think it right and proper to acknowledge the approach of the minister and her officials to the bill; when dealing with me, at least, that has certainly been respectful, constructive and productive throughout.

I had other concerns, principally on limitation, and have observed other colleagues' challenges. However, concerns that were raised by stakeholders have been, for the most part, addressed either at stage 2 or earlier today. On my concern about limitation, I am content that my amendment was agreed to earlier today, ensuring that not only mediation will stop the clock but that other forms of conciliation could do so.

For that reason, it is my view that the bill strikes the right balance between freedom of expression and protection of individual reputations. Accordingly, the Scottish Conservatives will vote to pass the bill at decision time tonight.

16:39

Neil Bibby (West Scotland) (Lab): I take this opportunity to thank the Scottish Law Commission for all its work on the bill. I also pay tribute to the members of the Justice Committee for all their scrutiny of the bill to ensure that defamation law in Scotland is fit for the 21st century.

As all members have said this afternoon, it is important that, with the legislation, we strike the proper balance between the freedom of expression and the protection of one's reputation, which has not always been the case in Scotland's defamation laws.

By modernising defamation law and including it in statute, rather than relying on common law, we ensure that the law is accessible and that the requirements on individual speech with regard to defamation are made clear. However, by including the definition of defamation in statute, we must ensure that the ability of the courts to develop law through case law is not stifled. Of course, in this digital age, with more and more publications online, technology and communication methods will continue to evolve; so, too, must defamation

law, to ensure that it remains fit for purpose. I welcome the Scottish Government's assurances that it will address that, and welcome the other changes that the minister has made to address other concerns and issues throughout the bill's passage.

I am aware that there has been much discussion during the bill's passage about the introduction of the serious harm test, which is a significant change to the current Scots law on defamation, but one that is similar to the legislative change that was made through the Defamation Act 2013 in England and Wales. As I said, we need to ensure that we strike the proper balance between freedom of expression and the protection of one's reputation. As it stands, current defamation law can have a chilling effect on media scrutiny and freedom of speech, as those with sufficient resources can bring vexatious cases and make litigation threats. We need to prevent vexatious cases from being brought, but I recognise the concern that the serious harm test takes us past that point. The amendments lodged by Andy Wightman to counteract the chilling effect were unsuccessful. I state for the record that Scottish Labour supported those amendments.

The legislation also codifies the Derbyshire principle, whereby public bodies cannot bring defamation actions. I noted that, at stage 2, further clarity was added to the bill on what bodies would be caught under the definition of a public authority. However, Scottish Labour believes that that did not go far enough and is disappointed that the proposals to include private and charitable organisations that deliver public services in the Derbyshire principle were not supported by the Government or the Justice Committee. In such cases, it is vital that the public interest defence be rigorously applied, to ensure that that does not add to the chilling effect in relation to discussions about or criticism of public activities being administered by private bodies.

Scottish Labour also believes that actions available to the courts prior to a case being decided must be proportionate. We supported Fulton MacGregor's amendments, which removed the powers afforded by the bill for courts to order that material subject to legal proceedings be removed. That will instead be replaced with the ability to attach a prominent notice to such materials or publications identifying that they are subject to legal action.

The bill is necessary to modernise Scotland's defamation laws and make them fit for purpose. The bill can also rebalance the law to limit the chilling effect and promote freedom of expression. Scottish Labour can and will support the bill at decision time.

16:44

John Finnie (Highlands and Islands) (Green):

It is appropriate that I join others in thanking those who have brought us to this point. We have heard that every one of the Scottish Law Commission's substantive recommendations was progressed. The Justice Committee met the commission. I thank it for its work, not just on this matter, but in relation to other matters.

I also thank the minister and her officials. I can vouch for the manner of engagement to which others have referred. I met the minister, along with Andy Wightman. Although our meetings did not quite bring the result that others did, differing views were genuinely held, and I thank the minister for how she went about that. I also thank the committee and other parliamentary staff, who worked tirelessly for us, and the witnesses, who gave evidence both in person and in writing—and indeed all those who provided briefings.

I do not think that anyone would dispute that the bill has had detailed scrutiny. We have had some very good debate, and everyone entered it with the same goal: to make good legislation.

The briefing from the Scottish Parliament information centre was one of the initial papers that we had on the bill, and it covers the pivotal issue of the balancing of rights, which has been referred to throughout our consideration of the bill—and which will continue to be referred to. There is a note in that briefing that is worth repeating:

“Scots law was grappling with issues around freedom of expression, individual privacy and protection of reputation well before human rights came into the frame. However, the requirement to uphold the rights contained in the European Convention on Human Rights brought an additional dimension to this balancing act.”

As we know, we can only pass legislation that is compatible with the convention. As with many things, and most legislation, the bill has involved striking a balance between competing factors: the appropriate balance between the right to freedom of expression contained in article 10 of the convention and the right to respect for private life in article 8. It is the conclusion of the Scottish Green Party that that balance has been struck. For that reason, we will be supporting the proposed legislation at decision time tonight.

That particular balance is not unique to the Defamation and Malicious Publication (Scotland) Bill. The Justice Committee is presently wrestling with the reality of reflecting both those important rights—freedom of expression and the right to respect for private life—in the Hate Crime and Public Order (Scotland) Bill, in which both those issues are starkly in play.

As the SPICe briefing notes, under the ECHR:

“The right to freedom of expression protects the right to hold and exchange information and opinions”.

To state the obvious, the bill is not new law; it is a matter of moving to a statutory definition and clarifying the law. As the SPICe briefing also says:

“much of the current law is obscure and based on judges’ decisions in previous court cases.”

It goes on:

“The Bill aims to make the law easier to understand”.

We will see how that goes. Many people have difficulty understanding the law. The briefing says that the bill

“strengthens existing defences e.g. in relation to publication in the public interest.”

We have again debated thresholds today, and the change under the bill from there being no express harm threshold in the law, to serious harm to reputation being required. The Law Society of Scotland, perhaps for different reasons from Mr Wightman and me, continues to have reservations about that element. It is clear that much of the law is opinion, even emphasis and exceptions, rather than fact. We saw that in the discussions on Mr Wightman’s amendments. I say again: differing views are genuinely held.

A further parallel with the Hate Crime and Public Order (Scotland) Bill comes with the potential for a chilling effect. The consensus among the committee was that the bill alters the balance of the debate in favour of freedom of speech, which is important in a vibrant democracy.

The common law is largely focused on print publications, and some rules do not readily transfer. We saw a very good amendment covering that from Mr Kerr, both future proofing how information is processed and, importantly, acknowledging that such decisions could be important and worthy of widest possible discussion, and hence applying the affirmative procedure.

That the statement complained of must have been published to someone other than the person who is the subject of the statement, is a welcome improvement.

There are a number of important features in the bill that should be welcomed. The minister will know that I rambled long and hard about the Derbyshire principle and my concerns that, with so many of our public services delivered by private organisations, we do not have a nice level playing field. In particular, we do not have that in relation to the huge sums of money that go out in respect of ferry services, with CalMac as the public provider versus Serco. Under the bill, delivering public services from time to time does not make Serco a public authority, yet it has a 15-year contract. Where is the political accountability in

that? I point out that the Court of Session held that Serco, which had been contracted to provide housing to asylum seekers, was not a public authority.

I commend references to alternative dispute resolution, which is important. We spend a lot of time putting laws in place but in an ideal world we do not want them to be enforced in practice; we want people to find other methods of doing that. References to alternative dispute resolution are therefore always welcome.

I thank the minister for her engagement and I thank colleagues for their work. We have a good bill. As I said, the Green Party will support it at decision time.

16:50

Liam McArthur (Orkney Islands) (LD): I warmly welcome Neil Bibby to his new role. I do not know whether we can look forward to seeing him at the next meeting of the Justice Committee, which will probably be the committee’s final meeting of the session, but I wish him well.

I confirm Scottish Liberal Democrats’ support for the bill and I thank everyone who helped the Justice Committee in our scrutiny of it—in particular, the Scottish Law Commission, which bears the greatest responsibility for development of the proposals, as other members have said.

This is a very technical area of the law—let someone show me an area that is not—that was overdue for updating and codifying, not least to make it more accessible to people who might have reason to use it. Although the Government’s intention was to update and codify the law, it has also taken the opportunity to reset, however modestly, the balance between protecting reputation on one hand, and freedom of speech on the other. The minister recognised that the scales are being tipped slightly more in favour of freedom of speech.

We heard calls in evidence for more radical moves in that direction, from witnesses who are concerned about the chilling effect of legal threats from people who have thin skins and thick wallets. On the other side of the argument, there were appeals against what was seen as an erosion of privacy rights and an attempt to impose English solutions to an English problem of defamation.

As I said at stage 1, I think that the Government has got the balance broadly right, although on a personal level I am grateful to Andy Wightman for his contribution on the serious harm threshold. Given his lived experience of the law of defamation, Mr Wightman’s insights were interesting and helpful, even if, ultimately, his

argument for setting the threshold at “actual harm” has proved to be unsuccessful this afternoon.

The bill sensibly includes a statutory definition of defamation as well as a codification of potential defences, both of which are welcome developments that should aid accessibility. However, as the committee rightly made clear, it is important that those and other relevant aspects of the bill allow sufficient flexibility to adapt over time and draw on case law.

The committee called for greater clarity around the way in which the Derbyshire principle is expressed. John Finnie referred to that. It remains to be seen whether the bill goes far enough in that regard. I appreciate that some of the options that the committee considered could well have been unduly arbitrary and might have led to unintended and unwelcome consequences.

Exclusion of secondary publishers from liability is another element of the bill that is worthy of support. Although we were right to resist attempts to amend the bill to allow, in effect, take-down notices prior to any evidence being heard, I hope that the modest changes that have been agreed to today, which make it clear that a statement is subject to proceedings, offer reassurance and additional clarity.

Finally, on the question of limitation, the reduction to one year of the period for bringing a case is the right move, particularly in the digital age. Although there will be instances in which the court will be able to exercise discretion—mediation or other forms of dispute resolution can and should be encouraged, as John Finnie rightly pointed out—the change to limitation should address another area in which chilling occurs through the mere threat of legal action.

The bill will be judged on its success in striking an appropriate balance between the rights of protecting reputation and freedom of expression. I believe that it gets that balance just about right, so I commend the minister and her officials for how they engaged with the committee and stakeholders.

The Scottish Liberal Democrats will support the bill at decision time.

The Deputy Presiding Officer: There is just one speaker in the open debate. I call Rona Mackay.

16:54

Rona Mackay (Strathkelvin and Bearsden) (SNP): The Defamation and Malicious Publication (Scotland) Bill, which I hope we will pass today, is vital in ensuring that the law of defamation is fit for 21st century Scotland. I thank the Scottish Law Commission and all our witnesses who gave

evidence, and I thank the excellent clerking and bill teams, who managed to make a somewhat technical bill easier for members of the Justice Committee to understand.

Today’s fast-changing and wide-ranging methods of communication demand a clear and accessible framework that more appropriately balances the protection of individual reputation and freedom of expression. Throughout our scrutiny of the bill, we heard that complex and costly defamation litigation can lead to a chilling effect on freedom of expression, whereby people are discouraged from publishing because they fear the threat of legal action.

The widespread use of social media, blog posts and so-called citizen journalists means that defamation law does not affect only big media companies. It has become easier to spread unsubstantiated rumours or to deliberately damage someone’s reputation, and that has put website operators on the front line of the battle over freedom of expression. We took evidence from individuals, media companies, legal stakeholders and content creators, who were extremely helpful in outlining their experience of defamation law. There is no doubt but that the existing law is patchy, goes back decades and does not strike the right balance between freedom of speech and protection of reputation, particularly with regard to online publication. The most recent legislative changes occurred in 2013, and before that in 1996.

As others have done, I thank the minister for working collaboratively with all committee members and stakeholders to reach consensus on the bill. Some areas of contention were raised during the evidence sessions. Those related to public services, raising the threshold for bringing defamation actions, the serious harm test, the single publication rule and the one-year time limit on raising court action. The amendments that have been agreed to today should give confidence to publishers that litigation will be allowed to proceed in our courts only in cases in which real harm has been done to an individual’s reputation.

It is vital to take account of the changing landscape in publishing. Traditional journalists—I was one of them—undergo training, and editors have access to legal advice, but that is rarely the case for those who publish online. Defamation law has been developed with a focus on print publications, and some of the rules are difficult to adapt to online publication. The bill seeks to address concerns in that area by increasing protection to internet intermediaries who are secondary publishers. The bill makes provision for the courts to require a website to remove content and to require other people or bodies to stop distributing or showing material. My colleague

Fulton MacGregor's amendments in that area were helpful.

It is impossible to fully future proof the law in the area, due to the ever-changing nature of technology, which is why Liam Kerr's amendments in that regard were helpful.

The bill prohibits public bodies from raising a defamation action, as John Finnie outlined. It is vital that public bodies such as local authorities, the Scottish Parliament and the Scottish ministers should be open to public scrutiny and uninhibited criticism, but that is not because a public body does not have a reputation or is beyond scrutiny; it is because defamation law is not the appropriate way to defend that reputation. As the minister said, that should be done at the ballot box.

Of course, private bodies cannot do that, so it is only right that we do not prohibit them from raising defamation actions, but that does not mean that the bill fails to protect those who criticise and scrutinise companies. To protect their legitimate free speech, those people will be able to rely on the new defence of publication on a matter of public interest, the reformed defence of honest opinion and the serious harm threshold test.

When someone suffers serious harm to their reputation, they usually should know that soon after a defamatory statement is published. That is why the bill reduces to one year the time limit within which legal action can be raised. In this day and age, it is no longer appropriate to have the limitation clock beginning again each and every time an article is downloaded or accessed online. That is just not practical.

We know that the current length of the limitation period can be used to chill freedom of expression, and we heard evidence on that during our scrutiny. It can be used to discourage investigative journalists, because the fear or threat that defamation proceedings could be raised many years down the road blocks free expression. That is not to say that the one-year limit is absolute, because there is flexibility in the bill that can take into account any—[Inaudible.]—subsequent publication. [Inaudible.]—discretion to disapply the time limit where there is—[Inaudible.]—to do so.

I warmly welcome the bill and commend everyone who had a part in shaping it. I believe that it strikes the right balance between freedom of expression and protecting an individual's reputation, and I urge members to pass it at stage 3.

The Deputy Presiding Officer: We move to the closing speeches.

16:59

James Kelly (Glasgow) (Lab): As other members have, I thank the Justice Committee for the work that it has done on the bill. As a former member of the committee, I am very aware of the workload that it has taken on over the recent period, especially in relation to the Hate Crime and Public Order (Scotland) Bill, and it is to the committee's credit that we have been able to improve the Defamation and Malicious Publication (Scotland) Bill as it has moved to stage 3. It is important, too, to recognise the role of the Scottish Law Commission, which produced the report that showed that there was a need for legislation in the area.

As Liam McArthur said, the Defamation and Malicious Publication (Scotland) Bill will be seen by some as quite a technical bill, but it is very much needed; the law needed to be updated and made more modern. The changes that were made in England and Wales were helpful, and it was useful to learn from that experience.

Throughout discussion of the bill, there have been two pulling forces, so to speak. It is clearly important to defend freedom of speech, but it is important that that does not stray into enabling people to be defamatory. That is unacceptable, and there should be legal provisions in place to ensure that people who are defamed are able to take appropriate action in the courts. On the various issues, the Government and the committee have tussled with the balance between freedom of speech and not allowing people to defame others. I think that they have got it broadly right. For example, the changes that were made to the bill around the serious harm test will ensure that the balance is correct, in that respect.

However, I agree with Liam McArthur that Andy Wightman's proposed changes would have provided further clarity. As ever, Mr Wightman interacted very seriously with the committee on the bill. He brings a lot of experience to this and other areas of legislation that the Parliament deals with, and I want to put it on record that he is highly respected across all parties.

Among the issues that were discussed was appropriate defences. I think that it is important to codify that in law, and it was correct to allow people to have the defences of honest opinion and public interest.

I share Neil Bibby's view that public bodies that operate in a charitable environment should be subject to the Derbyshire principle, so it is regrettable that the relevant amendments were not accepted at stage 2.

To sum up, I say that the bill will add to the legislative toolkit by giving appropriate protection, in the social media age, to people who are

defamed, and by ensuring that it will be easier to bring an action through the courts.

17:03

Adam Tomkins (Glasgow) (Con): As we have heard, the bill, which originated in the work of the Scottish Law Commission, puts the Scots law of defamation on a statutory footing that is fit for the 21st century. In doing so, it addresses and balances two competing rights—the right to freedom of expression and the right to protect one’s reputation, which is often seen as an aspect of the right to privacy.

Taken as a whole, the bill gets that balance right. It does so by shifting—perhaps only subtly, but it shifts it nonetheless—the balance that we have in the current law. The bill shifts the balance in favour of freedom of speech. It says, for example, that for a defamation action to succeed—we debated this issue earlier—a pursuer will have to show not merely harm but serious harm to their reputation.

The bill also says that defamation actions will generally have to be commenced within one year of the harm occurring, rather than within the current three-year period. Some commentators have expressed concern about that shift in favour of greater freedom of speech, but most have welcomed it. In particular, and unsurprisingly I suppose, media organisations have welcomed it strongly. They have said that it addresses the chilling effect that the current law of defamation can sometimes cast over journalists, publishers and writers when actions are brought—or indeed even threatened—by pursuers.

I very much welcome that shift in favour of free speech. Free speech matters, now as much as ever. We can never take free speech for granted and we must always be on our guard to protect it. It matters for democracy. It matters for anyone who cares about the truth and it matters too, of course, for individual self-fulfilment and liberty. Free speech acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in government and is an essential condition of an intellectually healthy society. I am glad to support any bill that advances freedom of speech, however subtly, as this bill does. Likewise, any bill that threatened free speech would be one that I would want to scrutinise very carefully indeed. We may come back to some of those points next week when we debate once again the notorious Hate Crime and Public Order (Scotland) Bill. I am not the only one this afternoon to have drawn parallels between the defamation bill and the hate crime bill.

As a result of the admirable work of the Scottish Law Commission, the defamation bill has not

needed a great deal of amendment as it has progressed through its legislative stages. One area that was improved at stage 2, however, is the so-called Derbyshire principle. Named after an English case that was decided by the House of Lords in the early 1990s, that is the principle that local authorities may not sue in defamation. If someone is an elected official, the place where they seek to protect their reputation is at the ballot box, not in the defamation courts. As Lord Keith said, in the Derbyshire case,

“It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism.”

The bill puts that principle, which is a judge-made rule of the common law, on a statutory footing. As originally drafted, there were some concerns about how that was proposed to be done. In particular, the question was whether private bodies that are carrying out functions of a public nature should also be barred, as local authorities are, from suing in defamation. I am pleased that that issue was fixed at stage 2—and has not needed to be revisited at stage 3 this afternoon—by incorporating into the bill the same basic approach to the question of the scope of public authorities that we find in the Human Rights Act 1998. It is a good, workable solution, and it will make sense in the context of the bill.

Placing the modern law of defamation on a statutory footing should aid the accessibility of the law, but it should in no sense freeze its on-going development in the case law of the courts. The single most important and liberalising reform to defamation in recent years—the creation of the new defence of publication in the public interest in the Reynolds case—came in case law and not in statute. I welcome the bill and will support it at decision time this evening. I do so in both the hope and the expectation that this legislation will assist the courts as the law of defamation and malicious publication continues to be developed by them.

This is a really good bill. It makes welcome and valuable changes to Scots law. I thank the Law Commission, the minister and all my colleagues on the Justice Committee for their work on the bill and look forward to voting for it in a few minutes’ time.

The Deputy Presiding Officer: I call Ash Denham to wind up the debate—a generous six minutes, minister.

17:08

Ash Denham: I begin by thanking everyone for their contributions to the debate. I have listened to what has been said and welcome the general support that has been given across the chamber for the aims of the bill. In closing, I want to touch

briefly on some of the provisions that we have discussed.

Reputation plays an important part in informing many of our day-to-day decisions. In my view, it is helpful to have a simple and clear definition of what defamation is. The definition is a simple restatement in modern language of the common-law test, which is now 85 years old. It is a restatement of the current law and not a departure from it.

The serious harm threshold has been the subject of quite a bit of debate as the bill has progressed. It came up at stages 1 and 2 and has done so again at stage 3. Some say that it is a solution to a problem that does not exist in Scotland and that it will deter legitimate claims. However, to measure the issue by the number of cases that proceed to court is to miss the problem. The possibility of litigation deters legitimate speech. A number of stakeholders gave evidence of their direct experiences as examples.

The law of defamation places a considerable burden on an author, editor or publisher to defend what they have published. If Parliament agrees to pass the bill, the serious harm test will shift part of the burden back toward the pursuer, who will, in relevant circumstances, have to prove a minimum level of damage to their reputation. To my mind, that is a more appropriate balance than the current law allows for. As Liam Kerr and Neil Bibby mentioned in their speeches, the test avoids the chilling effect that we heard about through submissions to the committee in the early stages of the bill's passage through Parliament.

The threshold of serious harm means that the people of Scotland will have the same level of protection for freedom of expression that people in England and Wales currently have.

The so-called Derbyshire principle came up in the debate, and I note John Finnie's comments on it. The bill was, of course, amended at stage 2 to add clarity on the Derbyshire principle, which Adam Tomkins set out quite well in his speech.

Some members have said that private companies that deliver public services should be prohibited from raising defamation actions. The argument is that, because public authorities are prohibited, those companies that take public money should be, too. However, public authorities are not prohibited from raising an action under section 2 because they are in charge of public money. They are prohibited because, in a democratic system, the ballot box is the appropriate place for a public authority's reputation to be evaluated and, where appropriate, repaired. A private company cannot use the ballot box to repair damage to its reputation. We should not remove rights that are currently enjoyed by a

company or a charity—as Neil Bibby spoke about—simply because it chooses to contract with a public authority.

That is not to say that the bill does not offer enhanced protections for those who wish to criticise the private delivery of public services. The bill sets out the threshold test of serious harm, as we have discussed; the defences of honest opinion and publication on a matter of public interest; the reduced limitation period, which Rona Mackay mentioned in her speech; and the single publication rule. All those provisions will, in some way, help.

John Finnie and Adam Tomkins noted the delicate balancing act that is required between two competing rights that are represented in articles 8 and 10 of the ECHR. I am very pleased that the Parliament believes that the correct balance has been struck.

Other provisions that have been discussed and are worth mentioning in brief include provisions to encourage the use of alternative methods of dispute resolution, the wider range of remedies available to restore damaged reputation, and the provisions on malicious publication that are the result of substantial work undertaken by the Scottish Law Commission. I would like to thank once again the Scottish Law Commission for the time and effort that it put into reviewing the current law of defamation and verbal injury, its significant consultation work and its final recommendations. The bill is a reflection of those efforts.

Defamation law in Scotland dates back more than 100 years. The Scottish Law Commission noted two cases in its discussion paper, which were *Duke of Brunswick v Harmer*, which took place in 1849—the year when the Buchanan Street railway station was opened—and *MacKellar v Duke of Sutherland*, which took place in 1859. After those, one of the leading cases in Scots law was *Mackay v McCankie*, in 1883, which held that a defamation can arise if an imputation is communicated merely to the person who is the subject of it. Around that time, telephones were just starting to be used.

The last time that the law was substantively updated was in 1996. That is a year that I do remember. The internet was just getting going; it was in its early stages. I still did not have a mobile phone—obviously, I was not an early adopter; I got one for the first time a year later. There was no Facebook and no Twitter, and I remember that people seemed to spend a lot of time sending faxes.

With the development and widespread use of modern technology, defamation law now has the potential to impact a far greater number of people than even a generation ago, and it is no longer

only the media that are likely to be affected. Individuals can now create content with their phone, and social media have fundamentally changed the way in which we communicate with one another.

The 21st century and the technological developments in it require us to respond to the changing nature of our communication. The bill creates a clear and accessible framework that reflects the reality of modern Scotland. It introduces effective remedies for protecting reputation and stronger protections for freedom of expression.

I commend the motion in my name.

Code of Conduct Rule Changes

The Deputy Presiding Officer (Lewis Macdonald): The next item of business is a debate on motion S5M-24177, in the name of Bill Kidd, on behalf of the Standards, Procedures and Public Appointments Committee, on code of conduct rule changes—treatment of others.

17:17

Bill Kidd (Glasgow Anniesland) (SNP): The report “Code of Conduct Rule changes—Treatment of Others” and the proposals that are contained in it to revise the code of conduct for MSPs represent a concluding step in the considerable work that has been undertaken by my committee and the Parliament as a whole to address sexual harassment and sexist behaviour.

The Standards, Procedures and Public Appointments Committee believes that members, as elected representatives, should be held to high standards of conduct under the code. Accordingly, we altered the code over a year ago to make it clear that members must not behave in a manner that involves bullying, harassment—including sexual harassment—or any other inappropriate behaviour towards one another or towards their own or other staff or contractors working in and for the Parliament.

The change that is set out in the report will extend that standard of behaviour to others whom MSPs might come into contact with in their capacity as MSPs. It is only right that individuals such as Government staff, constituents and cross-party group members, for example, have the same protection under the code that Scottish Parliamentary Corporate Body staff and MSPs’ staff have.

We consulted on the latest change and received very positive support, particularly from groups that represent women’s interests. I thank the Minister for Parliamentary Business and Veterans for his supportive response to the consultation.

The committee gave a great deal of thought to balancing that measure with members’ rights to freedom of political expression. I remind members that the code does not interfere with members’ private lives.

The new standard of conduct towards those individuals will apply from the start of session 6 and will have no retrospective effect.

On behalf of the committee, I move,

That the Parliament notes the Standards, Procedures and Public Appointments Committee’s 1st report 2021 (Session 5), *Code of Conduct Rule changes - Treatment of Others* (SP Paper 940), and agrees that the changes to the Code of Conduct for Members of the Scottish Parliament

set out in Annexe A of the report be made with effect from 6 May 2021.

The Deputy Presiding Officer: The question on the motion will be put at decision time.

Reimbursement of Members' Expenses Scheme

The Presiding Officer (Ken Macintosh): The next item of business is consideration of Scottish Parliamentary Corporate Body motion S5M-24232, on the reimbursement of members' expenses scheme.

17:19

Liam McArthur (Orkney Islands) (LD): On behalf of the corporate body, I speak to the motion to replace the current reimbursement of members' expenses scheme. We are making the change now in order that the new scheme is in place for the start of session 6.

The new scheme is the result of two separate reviews. The first looked at office costs and other provisions within the scheme, and the second focused on staff costs. On behalf of the corporate body, the Presiding Officer wrote to all members following those reviews earlier in the session to explain the detail of the proposed changes. Members had the opportunity to feed into the reviews and I am grateful to those who helped us with our considerations.

As colleagues will not need reminding, a strong Parliament depends on having members who are equipped to fulfil their role, both in representing their constituents and in holding the Government of the day to account. The changes will ensure that members continue to be properly supported in carrying out those important functions.

If agreed to, from the start of session 6, the staff cost provision limit will be increased to £133,200 per year. That will enable members to employ up to the equivalent of four full-time staff in a flexible way to suit individual office needs. The changes also include a new start-up provision, which is separate from the office cost provision, to help members set up their local office.

The scheme will also be simplified by reducing the four current provisions, which are office cost, surgery advertising, telecommunications, and members' stationery and postage, into two new provisions, which are an office cost provision and an engagement provision. More flexibility has also been given to members, allowing up to £5,000 to be flexed between the two new provisions. That recognises that members work in different ways.

The corporate body also recognised that some additional support was needed in other areas—for example, the annual limit on staff travel of 74 journeys has been removed, and members with a disability or caring responsibilities who would normally fall into group 2 for Edinburgh

accommodation can now apply to the SPCB to be considered as falling into group 3.

Additional temporary resources can be applied for where a member is absent long term, and the winding-up provision has been amended to recognise the support that is required when a member's status changes following an election, rather than only when a member ceases to be a member.

I hope those brief comments are helpful to members.

I move,

That the Parliament, recognising that the Scottish Parliamentary Corporate Body (the SPCB) carried out a review of the Reimbursement of Members' Expenses Scheme approved by Resolution of the Parliament of 12 June 2008 (as last amended by a Resolution of the Parliament on 24 April 2020)—

(a) in exercise of the powers conferred by section 81(2), (5)(b) and 85(5) of the Scotland Act 1998—

(i) confers functions on the SPCB to reimburse members in respect of expenses and cost incurred in each financial year in accordance with the Reimbursement of Members' Expenses Scheme (the Scheme) annexed as Annex 1 to this Resolution and confers other functions on the SPCB as specified in the Scheme;

(ii) determines that the various limits on expenses or costs under the Scheme are as set out in the Schedule of Rates annexed as Annex 2 to this Resolution and that such limits are applicable until the SPCB exercises its power under the Scheme to uprate or vary them;

(iii) confers other functions on the SPCB as specified in the Scheme; and

(iv) approves the Scheme;

(b) determines that the Scheme shall come into effect on 6 May 2021;

(c) rescinds, with effect from 6 May 2021, the Resolution of the Parliament of 12 June 2008 (as last amended on 24 April 2020).

The Presiding Officer: We are running slightly ahead of schedule, so I am minded to accept a motion without notice under standing order rule 11.2.4, that decision time be brought forward to now. I invite Graeme Dey to move such a motion.

Motion moved,

That, under Rule 11.2.4, Decision Time be brought forward to 5.23 pm.—[*Graeme Dey*]

Motion agreed to.

Decision Time

17:23

The Presiding Officer (Ken Macintosh): There are three questions this evening. Because the first question is on an act of Parliament, members will have to vote, so I ask all members to refresh the voting app, including members who have voted previously. In fact, because there might be some members who did not vote on amendments earlier and are joining us now, the best thing to do is to have a short suspension to allow members who have not done so to access the app and to allow those who have already accessed the app to refresh it. We will resume in a few moments.

17:23

Meeting suspended.

17:28

On resuming—

The Presiding Officer: We are now back in session and will move straight to the vote.

The question is, that motion S5M-24257, in the name of Ash Denham, on the Defamation and Malicious Publication (Scotland) Bill at stage 3, be agreed to. This will be a one-minute division.

That vote is now closed. Please let me know if you were not able to vote.

For

Adam, George (Paisley) (SNP)
 Adamson, Clare (Motherwell and Wishaw) (SNP)
 Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
 Arthur, Tom (Renfrewshire South) (SNP)
 Baillie, Jackie (Dumbarton) (Lab)
 Baker, Claire (Mid Scotland and Fife) (Lab)
 Balfour, Jeremy (Lothian) (Con)
 Ballantyne, Michelle (South Scotland) (Reform)
 Beamish, Claudia (South Scotland) (Lab)
 Beattie, Colin (Midlothian North and Musselburgh) (SNP)
 Bibby, Neil (West Scotland) (Lab)
 Bowman, Bill (North East Scotland) (Con)
 Boyack, Sarah (Lothian) (Lab)
 Brown, Keith (Clackmannanshire and Dunblane) (SNP)
 Burnett, Alexander (Aberdeenshire West) (Con)
 Cameron, Donald (Highlands and Islands) (Con)
 Campbell, Aileen (Clydesdale) (SNP)
 Carlaw, Jackson (Eastwood) (Con)
 Carson, Finlay (Galloway and West Dumfries) (Con)
 Chapman, Peter (North East Scotland) (Con)
 Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
 Cole-Hamilton, Alex (Edinburgh Western) (LD)
 Constance, Angela (Almond Valley) (SNP)
 Corry, Maurice (West Scotland) (Con)
 Crawford, Bruce (Stirling) (SNP)
 Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
 Davidson, Ruth (Edinburgh Central) (Con)
 Denham, Ash (Edinburgh Eastern) (SNP)
 Dey, Graeme (Angus South) (SNP)

Doris, Bob (Glasgow Maryhill and Springburn) (SNP)
 Dornan, James (Glasgow Cathcart) (SNP)
 Ewing, Annabelle (Cowdenbeath) (SNP)
 Ewing, Fergus (Inverness and Nairn) (SNP)
 Fabiani, Linda (East Kilbride) (SNP)
 Fee, Mary (West Scotland) (Lab)
 Findlay, Neil (Lothian) (Lab)
 Finnie, John (Highlands and Islands) (Green)
 FitzPatrick, Joe (Dundee City West) (SNP)
 Forbes, Kate (Skye, Lochaber and Badenoch) (SNP)
 Fraser, Murdo (Mid Scotland and Fife) (Con)
 Freeman, Jeane (Carrick, Cumnock and Doon Valley) (SNP)
 Gibson, Kenneth (Cunninghame North) (SNP)
 Gilruth, Jenny (Mid Fife and Glenrothes) (SNP)
 Golden, Maurice (West Scotland) (Con)
 Gougeon, Mairi (Angus North and Mearns) (SNP)
 Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
 Grant, Rhoda (Highlands and Islands) (Lab)
 Gray, Iain (East Lothian) (Lab)
 Greene, Jamie (West Scotland) (Con)
 Greer, Ross (West Scotland) (Green)
 Griffin, Mark (Central Scotland) (Lab)
 Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)
 Harris, Alison (Central Scotland) (Con)
 Harvie, Patrick (Glasgow) (Green)
 Haughey, Clare (Rutherglen) (SNP)
 Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
 Hyslop, Fiona (Linlithgow) (SNP)
 Johnson, Daniel (Edinburgh Southern) (Lab)
 Johnstone, Alison (Lothian) (Green)
 Kelly, James (Glasgow) (Lab)
 Kerr, Liam (North East Scotland) (Con)
 Kidd, Bill (Glasgow Anniesland) (SNP)
 Lennon, Monica (Central Scotland) (Lab)
 Leonard, Richard (Central Scotland) (Lab)
 Lindhurst, Gordon (Lothian) (Con)
 Lochhead, Richard (Moray) (SNP)
 Lockhart, Dean (Mid Scotland and Fife) (Con)
 Lyle, Richard (Uddingston and Bellshill) (SNP)
 MacDonald, Angus (Falkirk East) (SNP)
 MacDonald, Gordon (Edinburgh Pentlands) (SNP)
 Macdonald, Lewis (North East Scotland) (Lab)
 MacGregor, Fulton (Coatbridge and Chryston) (SNP)
 Mackay, Rona (Strathkelvin and Bearsden) (SNP)
 Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
 Maguire, Ruth (Cunninghame South) (SNP)
 Marra, Jenny (North East Scotland) (Lab)
 Martin, Gillian (Aberdeenshire East) (SNP)
 Mason, John (Glasgow Shettleston) (SNP)
 Mason, Tom (North East Scotland) (Con)
 Matheson, Michael (Falkirk West) (SNP)
 McAlpine, Joan (South Scotland) (SNP)
 McArthur, Liam (Orkney Islands) (LD)
 McKee, Ivan (Glasgow Provan) (SNP)
 McMillan, Stuart (Greenock and Inverclyde) (SNP)
 McNeill, Pauline (Glasgow) (Lab)
 Mitchell, Margaret (Central Scotland) (Con)
 Mountain, Edward (Highlands and Islands) (Con)
 Mundell, Oliver (Dumfriesshire) (Con)
 Neil, Alex (Airdrie and Shotts) (SNP)
 Paterson, Gil (Clydebank and Milngavie) (SNP)
 Rennie, Willie (North East Fife) (LD)
 Robison, Shona (Dundee City East) (SNP)
 Ross, Gail (Caithness, Sutherland and Ross) (SNP)
 Rowley, Alex (Mid Scotland and Fife) (Lab)
 Rumbles, Mike (North East Scotland) (LD)
 Ruskell, Mark (Mid Scotland and Fife) (Green)
 Russell, Michael (Argyll and Bute) (SNP)
 Sarwar, Anas (Glasgow) (Lab)

Scott, John (Ayr) (Con)
 Smith, Elaine (Central Scotland) (Lab)
 Smith, Liz (Mid Scotland and Fife) (Con)
 Smyth, Colin (South Scotland) (Lab)
 Somerville, Shirley-Anne (Dunfermline) (SNP)
 Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
 Stewart, Alexander (Mid Scotland and Fife) (Con)
 Stewart, Kevin (Aberdeen Central) (SNP)
 Swinney, John (Perthshire North) (SNP)
 Todd, Maree (Highlands and Islands) (SNP)
 Tomkins, Adam (Glasgow) (Con)
 Torrance, David (Kirkcaldy) (SNP)
 Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
 Wells, Annie (Glasgow) (Con)
 Wheelhouse, Paul (South Scotland) (SNP)
 White, Sandra (Glasgow Kelvin) (SNP)
 Whittle, Brian (South Scotland) (Con)
 Wightman, Andy (Lothian) (Ind)
 Wishart, Beatrice (Shetland Islands) (LD)
 Yousaf, Humza (Glasgow Pollok) (SNP)

The Presiding Officer: The result of the division on motion S5M-24257, in the name of Ash Denham, on the Defamation and Malicious Publication (Scotland) Bill, is: For 118, Against 0, Abstentions 0.

Motion agreed to,

That the Parliament agrees that the Defamation and Malicious Publication (Scotland) Bill be passed.

The Presiding Officer: Therefore, the Defamation and Malicious Publication (Scotland) Bill is passed. [Applause.]

The Presiding Officer: The next question is, that motion S5M-24177, in the name of Bill Kidd, on behalf of the Standards, Procedures and Public Appointments Committee, on code of conduct rule changes—treatment of others, be agreed to.

Motion agreed to,

That the Parliament notes the Standards, Procedures and Public Appointments Committee's 1st report 2021 (Session 5), *Code of Conduct Rule changes - Treatment of Others* (SP Paper 940), and agrees that the changes to the Code of Conduct for Members of the Scottish Parliament set out in Annex A of the report be made with effect from 6 May 2021.

The Presiding Officer: The final question is, that motion S5M-24232, in the name of Liam McArthur, on behalf of the Scottish Parliamentary Corporate Body, on the reimbursement of members' expenses scheme, be agreed to.

Motion agreed to,

That the Parliament, recognising that the Scottish Parliamentary Corporate Body (the SPCB) carried out a review of the Reimbursement of Members' Expenses Scheme approved by Resolution of the Parliament of 12 June 2008 (as last amended by a Resolution of the Parliament on 24 April 2020)—

(a) in exercise of the powers conferred by section 81(2), (5)(b) and 85(5) of the Scotland Act 1998—

(i) confers functions on the SPCB to reimburse members in respect of expenses and cost incurred in

each financial year in accordance with the Reimbursement of Members' Expenses Scheme (the Scheme) annexed as Annex 1 to this Resolution and confers other functions on the SPCB as specified in the Scheme;

(ii) determines that the various limits on expenses or costs under the Scheme are as set out in the Schedule of Rates annexed as Annex 2 to this Resolution and that such limits are applicable until the SPCB exercises its power under the Scheme to uprate or vary them;

(iii) confers other functions on the SPCB as specified in the Scheme; and

(iv) approves the Scheme;

(b) determines that the Scheme shall come into effect on 6 May 2021;

(c) rescinds, with effect from 6 May 2021, the Resolution of the Parliament of 12 June 2008 (as last amended on 24 April 2020).

The Presiding Officer: That concludes decision time. Before members' business, we will take a short pause while members change seats. I encourage all members to observe social distancing rules, wear their masks and follow the one-way systems when leaving the chamber.

Eating Disorder Awareness Week 2021

The Deputy Presiding Officer (Christine Grahame): The final item of business is a members' business debate on motion S5M-24181, in the name of Rona Mackay, on eating disorder awareness week 2021. The debate will be concluded without any question being put.

Motion debated,

That the Parliament notes that 1 to 7 March 2021 is Eating Disorder Awareness Week; understands that more people lose their lives from eating disorders than any other psychiatric condition; recognises that people and organisations throughout Scotland and across the world, will mark the week by raising awareness and understanding of the issue; believes that the vast majority of people with these conditions are treated in the community; welcomes, therefore, the announcement of £120 million for a mental health recovery and renewal fund, with a focus on additional support for mental health in primary care settings and enhanced community support; notes the publication of the Mental Welfare Commission for Scotland's report into the care, treatment and support for people with an eating disorder, which forms the foundation of a review of services; believes that this review will be a crucial first step in a programme of work to improve these services, and guided by the review's findings, looks forward to work in the next parliamentary session to improve support for people living with an eating disorder.

17:33

Rona Mackay (Strathkelvin and Bearsden) (SNP): I am very pleased to be leading the debate on eating disorders during eating disorders awareness week, and I thank members from all parties for supporting my motion. We debate the topic annually in the Parliament, because we must promote awareness and provide an update on the steps that we are taking to tackle the devastation that these conditions cause. I pay tribute to Emma Harper, who has led this debate in the past few years, and I look forward to hearing her speech tonight.

During the pandemic, much attention has—rightly—been placed on issues involving mental health. We are all experiencing anxiety and stress like never before, which manifests in many different ways.

The organisation Beat is an expert body that is renowned for its research on, and campaigning for awareness and recognition of, eating disorders. I urge everyone to visit its website, as it offers a wealth of information that is impossible to relay fully in a short debate such as this. Beat tells us that, in a survey of people with an eating disorder that was conducted during the first lockdown, nine out of 10 respondents said that their symptoms had got worse as a result of the pandemic. One young woman said:

"I was doing well but I just know this is going to lead to a relapse and I'm terrified."

Referrals for children and young people to eating disorders services in Scotland were rising significantly before the pandemic. Now they are rising even faster. Child and adolescent mental health services are reporting unprecedented referral rates. Demand from Scotland to access Beat's support services was 283 per cent higher in 2020 than in 2019. Let that sink in for a moment. Clinicians across the country are reporting that far more patients are presenting at a stage where they are already severely ill or in crisis.

Eating disorders are serious mental illnesses. Around 1.25 million people in the United Kingdom suffer from one, and they affect people of any age, gender, ethnicity or background. They have major impacts on individuals, the national health service, social care and, of course, families.

I want to mention former MSP Dennis Robertson and his family. The 10th anniversary of the passing of Dennis's daughter Caroline from an eating disorder was on 25 February. I do not know Dennis, but colleagues have told me of his courage and dignity as his family went through one of the worst experiences most of us could ever imagine.

Dennis Robertson held a members' business debate in every year of the previous parliamentary session. He also held two conferences on eating disorders in Parliament, bringing together families, clinicians and policy makers for the first time. I think that we all know that Caroline would be very proud of him. The thoughts of the Parliament and those beyond it are with Dennis and his family.

The theme of this year's campaign is binge eating. The disorder affects one in 50 of us in our lifetimes, making it the most common, but perhaps the least understood, eating disorder. People with a binge eating disorder regularly feel out of control when they eat and feel distressed afterwards. It is not about being greedy or lacking in willpower; it is, in fact, a serious mental illness. It can affect anyone of any age, gender, ethnicity or background. In 2020, 30 per cent of contacts from Scotland's Beat helpline were about binge eating disorder.

People with the disorder experience significant shame and often suffer alone without seeking help due to the fear of how others might react. That is a prime example of how, if we are to achieve our vision to end the pain and suffering of eating disorders, we need to change the conversation about binge eating. We must challenge harmful stereotypes about the disorder, so that people living with this serious mental illness can find kindness and compassion when they bravely reach out for help.

Eating disorders can be fatal and can cause serious physical health problems. The overall quality of life of people suffering the condition is estimated to be as low as in symptomatic coronary heart disease or severe depression. Without early intervention—which is crucial—many people become unable to participate in education or employment. However, recovery is possible. Access to the right treatment and support is life changing, and early intervention provides the best chance for recovery.

I welcome the announcement of £120 million for a mental health recovery and renewal fund, and the publication of the Mental Welfare Commission for Scotland's report on the care, treatment and support for people with an eating disorder, which forms the foundation of a review of services. It has never been more needed. Currently, those who are able to access treatment experience an average three-and-a-half-year gap between the onset of an eating disorder and start of treatment, due to delays in identification, referral and waiting times. Surely that is wrong.

The provision of treatment for binge eating disorder is patchy in Scotland. Only five health boards provide specific treatment for under-18-year-olds with the condition, and 11 health boards provide specific treatment for adults with binge eating disorder, much of which is offered through weight management services. The Scottish Government and NHS Scotland health boards should ensure that there is equitable access to evidence-based treatment for binge eating disorder, and I believe that that should be a core part of implementing the review of Scottish eating disorder services from 2021 onwards.

Only two health boards in Scotland have specialist CAMHS eating disorder services, and eating disorder services for children and adolescents sit in generic CAMHS units for the other health boards. Some 10 health boards reported having specialist adult eating disorder services, and one health board has specialist eating disorder services across all ages.

Research has shown that, in many cases, intensive day-patient and intensive home-based treatments can be as effective as in-patient admission, and they are generally more acceptable to patients and their families. Despite those advantages, a freedom of information request by Beat found that three of the 11 mainland health boards in Scotland do not provide suitably intensive day or home-based treatment for patients of any age. That must be addressed urgently.

As we see light at the end of the tunnel and begin to see recovery from the Covid-19 pandemic, I would like sufferers of an eating disorder, and their families, to have the same

optimism that eating disorders will get attention, resources and treatment pathways that are in line with those that all other serious illnesses get. For everyone suffering now, and for those who have suffered in the past, that is the very least that we can do.

I look forward to hearing other members' contributions and the minister summing up tonight.

17:40

Kenneth Gibson (Cunninghame North) (SNP): I congratulate my colleague Rona Mackay on securing debating time on this important matter. In early March 2008, I led a debate on eating disorders and the devastating impact that they have on the 100,000 people in Scotland who it is estimated suffer from these illnesses—many in secret, undoubtedly. Today's debate presents us with an ideal opportunity to recognise the efforts of the people and organisations across Scotland who work hard to raise awareness and treat eating disorders effectively. I also want to look at the progress that has been made over the past 13 years.

In 2008, I highlighted how Scotland trailed the rest of the western world in the treatment of eating disorders. I noted that we had no specific advice for general practitioners, and only two private clinics in Edinburgh and Glasgow provided specialist care, at a cost of around £3,000 per patient per week.

I am, therefore, heartened that, in 2009, the first specialist adult national health service in-patient unit opened in Aberdeen, with a second one opening in West Lothian four years later, while some specialist adult eating disorder NHS beds were also made available in Glasgow.

A number of services have been developed to provide alternatives to hospital admission or to provide shorter admissions, where possible, such as the anorexia nervosa intensive treatment teams in Lothian and Fife, the day programme in Aberdeen, a specialist team in Glasgow and the connect-eating disorders service, which cares for all children and young people with eating disorders in the NHS Glasgow and Clyde area.

People under the age of 18 with eating disorders continue to be treated in general child and adolescent mental health care services, where clinician expertise and patient outcomes have been improved by the introduction of evidence-based family therapies.

That is all significant and important progress, not least because experts remind us that it is possible for all patients to make a full recovery from eating disorders. However, there is not one specific cure, and it is important that a diverse

range of services is available to patients. As Rona Mackay has just explained, the services can be patchy across the country.

Unfortunately, that is also the case when it comes to treating binge eating disorders, which are the theme of this week's awareness week. Beat, an eating disorder charity, found that provision of treatment for binge eating disorders is still patchy in Scotland, and only five health boards provide specific treatment for under-18s with binge eating disorder. I am hopeful that the record £12 million of funding for the mental health recovery and renewal fund that was announced by the minister will help to ensure that there is more equitable access to evidence-based treatment for binge eating disorders. That would also be a core focus of the implantation of the Scottish eating disorder service review, which is designed to assess and improve support for people who are living with an eating disorder and will be informed by the Mental Health Commission's first ever themed report on eating disorder services.

Among other things, the commission's report still sees opportunities to improve GP training and implement new and improved protocols to follow and monitor. For example, only one third of GPs who responded to the commission's questions said that they were aware of integrated core pathways for services that look after people with eating disorders in their area.

It is now more important than ever to have a full picture of the current system of support that is available for people with an eating disorder. The negative impact of the pandemic is evident through the scale of demand for many charities' services, including those that are provided by Beat, demand for which was 278 per cent higher in 2020 than in 2019.

We have come a long way since the 1990s, when there were no official in-patient or specialist services for people with eating disorders, and we have also made some significant progress on eating disorders over the past 13 years. However, the challenge that we face, exacerbated by the pandemic, is huge, not least with regard to preventing eating disorders from arising in the first place.

We must ensure that resources that have been made available by the Scottish Government for mental health will further improve services for people with eating disorders and support early intervention and community services. I look forward to hearing the minister's response to this debate in that regard.

Again, I thank Rona Mackay for bringing the debate to the chamber.

17:44

Brian Whittle (South Scotland) (Con): I add my congratulations to Rona Mackay on bringing this debate to the chamber. It is a subject that is being revisited, but it is always well worth the attention that it receives.

The last time that I spoke on this topic, I mentioned that eating disorders are far more common than most of us recognise. I doubt that many people in the chamber do not know someone who suffers from an eating disorder. However, I was interested to hear Rona Mackay say that it is a disorder that is not well understood. That got me thinking back to my journey of understanding with regard to where eating disorders come from. With that in mind, I will mention a name that the older ones in the chamber—by that, obviously, I mean Kenny Gibson—might remember: Lena Zavaroni, who won “Opportunity Knocks” with her fantastic, big voice. She is the first person in connection with whom I heard the word “anorexia” and, of course, she ended up dying from that condition.

The next time that I heard of it was during my athletics career, when the word was attached to a female distance runner. I could never quite understand how someone could suffer from not eating enough and be an international-class distance runner. I remember some of the language the coaches used to use back then. I heard one coach quite vehemently say to one of his athletes that they should go away and not come back until they had lost weight because they had “a fat backside”. When I took my coaching exams, one of the things that were brought to the fore in the senior exam was the responsibilities of a coach in terms of the language that they use when discussing such issues with athletes.

Parents also have those responsibilities with regard to the language that they use with their children. One of the challenges that people face at the moment is an unrealistic expectation of the shape that they are supposed to be, because of what they see in the general media and on social media. I have three daughters, 10 years apart, and I can see the evolution of that debate. I think that the situation is quite dangerous.

It is all very well to consider the issue when it is far away and concerns other people but, when it comes into our own families, it is extraordinarily distressing. I discovered that someone close to me, in my family, suffered from bulimia, which is, obviously, an overeating disorder. They had been driven towards bulimia by the societal pressure on them to conform to a particular shape.

I think that, as Rona Mackay indicates, eating disorders are a symptom of something else. As she said, eating disorders are not well understood,

because they still have a serious stigma attached to them, which means that they tend to be hidden conditions.

Eating disorders are a mental health issue. As Rona Mackay said, we are starting to get our heads around that. I saw a report that said that eating disorders had grown enormously during the period of the pandemic, and that doctors are treating eating disorders at a much higher rate now. When we come out the other side of Covid, we are going to have to be cognisant of the mental health services that are available, both the statutory services and the third sector organisations, which I have spoken about before.

We must recognise that society’s expectations of what we need to look like is putting unrealistic pressure on our youngsters. That must be addressed.

Again, I thank Rona Mackay for bringing the debate to the chamber.

17:49

Emma Harper (South Scotland) (SNP): As co-convenor of the cross-party group on mental health, I welcome the opportunity to speak in this debate on eating disorder awareness week, with the theme of creating a future in which people experiencing a binge-eating disorder are met with understanding and compassion.

I welcome the attendance of representatives from Beat who have attended many of the recent mental health cross-party group meetings and contributed to our discussions. I congratulate my friend and colleague Rona Mackay on securing this debate—I have had the opportunity to lead similar debates in previous years—and I associate myself with her comments on Dennis Robertson, his work on eating disorders and the 10th anniversary, this year, of the loss of his daughter Caroline.

Between 1.25 million and 3.4 million people in the United Kingdom are living with an eating disorder of some type, and the numbers are increasing, partly as a result of the Covid-19 pandemic. The restrictions have presented challenges for the delivery of treatment and services for people who are at risk, and the pandemic has caused additional stress.

Eating disorders vary from anorexia to bulimia and another, very dangerous disorder, diabulimia, which occurs when people with type 1 diabetes deliberately omit to take their insulin to control their weight. I congratulate Diabetes Scotland on its work on diabulimia and encourage anyone who is interested to have a look at the organisation’s advice and support. I remind members that I have type 1 diabetes.

The theme of today's debate is binge eating, which is one of the eating disorders that are largely associated with stigma. Binge eating episodes can involve someone eating much faster than normal, eating until they feel uncomfortably full, eating a large amount of food when they are not hungry and eating alone, through embarrassment.

Research from universities, including the University of the West of Scotland in my South Scotland region, continues to point to the relationship between social media and eating disorders, particularly among young people. Social media is great and can enable people to make worldwide connections and share ideas, knowledge and information, but it can also be a dangerous platform for hate, discrimination and shaming. Dieting ads and frequent exposure to images that might provoke body concerns can be damaging and dangerous for some young people. Ads and posts can lead to the development of eating disorders in some young people and can put others at risk.

Social media interactions are often an extension of an adolescent's life, so awareness of online safety and the issues that young people face online is important for families and friends.

I ask the Scottish Government to keep that in mind when it oversees the development of the proposed guidance on eating disorders. Last year, the Scottish Government announced that eating disorder services will be subject to a national review, which is designed to assess and improve the support that is available to people who live with an eating disorder. The review is to publish its findings in spring this year and aims to provide a full picture of the support that is currently available. It will make several recommendations to inform improvement work throughout the year. I ask that consideration be given to eating disorder support in rural Scotland and to tackling social media issues.

This week, I learned that the dietetic team in NHS Dumfries and Galloway has been working with people who are at risk of developing diabulimia, among other eating disorders. I was interested to hear that D and G is able to raise awareness in relation to young people who might not be picked up or who might be reluctant to access support because of the travel to appointments that is involved because of the area's rurality. I am passionate about ensuring that there are support services in rural Scotland, given my rural South Scotland region.

I welcome the debate and again congratulate Rona Mackay on bringing it to the Parliament.

17:53

The Minister for Mental Health (Clare Haughey): I am pleased to respond on behalf of the Scottish Government. I believe that this is the fourth eating disorder awareness week debate in which I have spoken, either as a back bencher or as Minister for Mental Health, and I welcome this debate to mark eating disorder awareness week 2021.

The debate allows us to raise awareness of eating disorders and their terrible impact not just on those who are diagnosed but on their families and friends. I thank Rona Mackay for lodging the motion this year and for focusing our minds on how significant the subject is. It is now more important than ever that people who require help and support for disordered eating can receive the treatment that they need. The pandemic has not been easy on any of us, but there is growing evidence that people with eating disorders have been particularly impacted.

Like other members, I pay tribute to our former colleague Dennis Robertson. Dennis has continued to ensure that greater awareness is brought to eating disorders. I assure him that raising the profile of eating disorders is a priority for this Government.

Finally, I extend my thanks to all those across the country who work day in and day out to support the recovery of those with an eating disorder and their families. That is now more important than ever, as we recover from the impact that the pandemic has had on our services and also on us as individuals.

This year's theme is binge eating disorder. Binge eating disorder is the most common eating disorder, but perhaps the least understood. It is a disorder that has unhelpful and damaging misconceptions attached to it. We must challenge those misconceptions so that those who live with the illness can have the confidence to seek the help and support that they need.

We know that the Covid-19 pandemic has had a substantial impact on the mental health of the population. We have been through several stages of lockdown, restrictions and recovery. Each of those phases has had widespread impacts on people across the country, including those with diagnosed and undiagnosed eating disorders.

We know that eating disorders thrive in isolation, and that the earlier that someone can access treatment, the better their chance of a full recovery. During the pandemic, there has been a focus on physical activity to stay healthy. It is important to recognise that such messages, however well intentioned, can often cause serious harm to those suffering with an eating disorder.

That is why, during the early stages of the pandemic, we provided Beat, the UK's eating disorder charity, with funding to ensure that its online and telephone services could support as many people as possible during this difficult time. In addition to those services, it provided support through a new moderated online group called the sanctuary, which focuses on supporting sufferers with concerns relating to their eating disorder and Covid-19. With that funding, Beat supported more than 4,000 people between April and November.

Furthermore, we provided funding to deliver additional capacity to NHS Lothian and Beat's national peer support services for young people with an eating disorder and their parents and carers. Through that funding, 150 young people were paired for peer support, resulting in more than 2,300 emails being exchanged between them. Forty-eight carers were paired, resulting in more than 600 phone calls.

That type of support can be incredibly helpful for those who are impacted by an eating disorder. Knowing that someone else feels the same way, and that recovery is possible, can be a lifeline. Digital and non-face-to-face methods of support have also become even more important in the past year, allowing us to stay connected and supported, while staying safe.

Last year, during eating disorder awareness week, I announced that we would take forward a national review of eating disorder services that would build on the work of the Mental Welfare Commission's report. The review began its work last year and will provide its final report and recommendations to me at the end of this month. The review is an important first step in a phased programme of work to improve the outcomes of people who are living with an eating disorder in Scotland. As I announced earlier today, the review's recommendations will be taken forward in phase 2 of this vital work by an implementation group, which will be made up of relevant stakeholders, including those who are experts by experience.

As mentioned in our mental health transition and recovery plan, which was published in October last year, the review has taken into account the effects of the pandemic on access to help and support. It will provide us with a specific recommendation on what support is required as we move towards recovery.

Members will be aware that we recently announced £120 million for our mental health recovery and renewal fund, which will prioritise our on-going work to improve specialist CAMHS services, address long waiting times and clear waiting list backlogs. The funding will also provide significant additional support for mental health in

primary care settings, and we will also invest in enhanced community support.

I reassure members of the Parliament, and members of the public who might be watching, that providing the right support for those with an eating disorder is a priority for this Government.

Members might recall that two years ago, I announced the production of new Scotland-specific guidelines on the management and treatment of eating disorders. The Scottish intercollegiate guidelines network has been leading on those, and I am pleased to say that they are due to be published later this year. The guidelines will cover areas such as referrals, management of risks, and transitions. Along with the review's work, the guidelines will ensure that those who require support will receive it.

The debate has been really interesting. We have heard valuable and interesting speeches from across the chamber. Kenneth Gibson talked about the evolution of services in Scotland. Brian Whittle gave us an interesting personal reflection on his journey to recognising eating disorders and the things that he could do personally as a coach to challenge people and raise awareness, and he raised an important point about stigma. We all have a part to play in challenging stigma around all mental illnesses. Emma Harper spoke passionately about diabulimia, which she has spoken about in previous debates.

I thank Rona Mackay for lodging the motion for the debate. I also reiterate my support and thanks to the staff who have been working tirelessly throughout the past year to support those who have an eating disorder and their families. I assure you that you have this Government's full support.

Meeting closed at 18:00.

Correction

The First Minister has identified an error in her contribution and provided the following correction.

The First Minister (Nicola Sturgeon):

At col 18, paragraph 5—

Original text—

Finally, on vaccination, we exceeded 400,000 vaccinations a week when we had the supplies to do so.

Corrected text—

Finally, on vaccination, we were on course to exceed 400,000 vaccinations a week when we had the supplies to do so.

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

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