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The Scottish Parliament
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Justice Committee
Comataidh a' Cheartais

Defamation and Malicious Publication (Scotland) Bill: Stage 1 Report

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To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

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Introduction

1. The Defamation and Malicious Publication (Scotland) Bill ("the Bill") was introduced in the Parliament, by the Cabinet Secretary for Justice, Humza Yousaf MSP, ("the Cabinet Secretary') on 2 December 2019. The Parliament designated the Justice Committee as the lead committee for Stage 1 consideration of the Bill.

2. Under the Parliament's Standing Orders Rule 9.6.3(a), it is for the lead committee to report to the Parliament on the general principles of the Bill. In doing so, it must take account of views submitted to it by any other committee. The lead committee is also required to report on the Financial Memorandum and Policy Memorandum, which accompany the Bill.

3. The Presiding Officer has decided under Rule 9.12 of Standing Orders that a financial resolution is not required for the Bill.

Glossary of terms

4. The following terms appear in the report as they form part of the vocabulary associated with the legal processes around defamation and malicious publications in Scots law:

   - **1952 Act**: the Defamation Act 1952
   - **1973 Act**: the Prescription and Limitation (Scotland) Act 1973 (c. 52)
   - **1996 Act**: the Defamation Act 1996 (c. 31)
   - **2002 Regulations**: The Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013)
   - **2013 Regulations**: the Defamation (Operators of Websites) Regulations 2013 (SI 2013/3028)
   - **Absolute privilege and qualified privilege**: Absolute privilege covers certain occasions that are deemed so important that those making statements upon them are not liable in defamation, despite that the fact that those statements are not true, or even malicious. Qualified privilege provides a defence to the publisher of a statement in circumstances where s/he had a legal, social or moral duty or interest to make the publication and where the publisher has a corresponding interest in receiving it.
   - **Chilling effect**: The inhibition or discouragement of the legitimate exercise of natural and legal rights - in this case to freedom of expression - by the threat of legal sanction.
   - **Common law**: the traditional law as developed by judges' decisions in individual cases.
   - **Date of accrual**: The date on which the publication first comes to the notice of the person bringing the action. At present, this is the date at which the period of limitation (see below) begins to run.

- **Defamation**: Defamation in Scotland is a civil wrong committed when a person makes a false and damaging charge or claim against the character or reputation of another person. This can give rise to an action for compensatory damages, not a criminal prosecution.

- **Defences**: the Bill would set out four main defences available to a defendant in a defamation action: Truth, Honest Opinion, Publication on a matter of Public Interest and Privilege (Qualified or Absolute).

- **Delict**: a legal term in Scots civil law for the responsibility to make reparation caused by an intentional or negligent breach of a duty of care which inflicts loss or harm and which triggers legal liability for the wrongdoer. Delict can also mean a duty to refrain from committing such breaches.

- **Derbyshire Principle**: A rule in English and Welsh defamation law which prohibits public bodies from bringing defamation actions. This rule originated from a 1993 House of Lords (Law Lords) decision in a case between Derbyshire County Council and the Times Newspapers Ltd and Others.

- **Electronic Commerce Directive**: The EU Directive on Electronic Commerce (2000/31/EC)

- **Internet intermediary**: A service provider who facilitates the use of the internet. The services they may provide include connecting users to the internet, enabling processing of data and hosting of web-based services, including for user generated comments. They can also assist searches, facilitate the sale of goods or services or enable commercial transactions. Examples are internet service providers, search engines and social media platforms.

- **Judgment**: The decision of a court setting out its reasons for the decision.

- **Liability**: A term applied to being legally responsible for a situation.

- **Libel tourism**: A term used to describe the practice adopted by some litigants of seeking to have their legal case heard in the court thought most likely to provide a favourable judgment.

- **Limitation**: A time limit imposed on the commencement of legal proceedings.

- **Legal person**: Any non-human entity that is recognised as having privileges and obligations, for example, the ability to enter into contracts. This includes any organisations including companies, partnerships, local authorities, the Scottish Government, and NGOs.

- **Patrimonial loss**: Economic loss or loss of financial support - as distinct from *solatium* (see below).

- **Pleadings**: A formal written statement of a party's claims or responses to another party's claims in a civil action. The parties' pleadings in a case define the issues to be adjudicated in the action.

- ***Solatium*** : A form of compensatory damages given for injury to feelings or reputation, pain and suffering and loss of expectation of life.

- **Statute/Statutory law**: Laws passed by the Scottish Parliament and the UK Parliament.

General policy objectives

5. According to the Scottish Government, the existing law of defamation in Scotland is piecemeal in nature, and is scattered across various aged common law rules and several statutes enacted by the UK Parliament. The last substantive changes to defamation law in Scotland were made in 1996. In the view of the Scottish Ministers, the current defamation law in Scotland is no longer fit for modern day purposes.

6. The purpose of the Bill is to clarify and strengthen the statutory underpinning of defamation in Scots law. The Bill seeks to do this by placing certain key elements of Scots common law on defamation on a statutory basis. The Bill will also replace and restate, in one place, elements of the existing statutory provisions in Scots law.

7. According to the policy memorandum which accompanies the Bill, the overarching policy objective of the Bill is "to modernise and simplify the law of defamation (and the related action of malicious publication) in Scotland in order to-

    - strike a more appropriate balance between freedom of expression and the protection of individual reputation; and

    - clarify the law and improve its accessibility.

Structure of the Bill

8. The Bill consists of 40 sections, in 3 parts, and 1 schedule. Part 1 of the Bill amends the law of defamation and makes provision in relation to-

    - actionability of defamatory statements and restrictions on bringing proceedings;

    - defences;

    - absolute and qualified privilege;

    - offers to make amends;

    - jurisdiction, and;

    - the removal of the presumption that defamation proceedings are to be tried by jury.

9. Part 1 provides a new definition of defamation and introduces a threshold test of 'serious harm'. Part 1 also places certain key elements of Scots common law on defamation on a statutory basis. The Bill covers defamation actions relating to public authorities and business interests.

10. Part 2 makes a number of provisions to replace common law verbal injuries with three new statutory delicts relating to malicious publication.

11. Part 3 makes provision as to remedies and limitation of defamation actions and actions under Part 2. It seeks to reduce the time period for bringing a defamation action from three years to one year and introduce a rule that the clock starts running from the first occasion a statement is published.

12. Part 3 also set out a number of remedies that a court will have the power to order, as well as miscellaneous provisions dealing with matters such as consequential modification, interpretation, regulations and commencement.

Justice Committee's consideration

13. The Bill was referred to the Committee by the Parliamentary Bureau for Stage 1 consideration on 10 December 2019. On 29 January 2020, the Parliament set a deadline of 22 May 2020 for consideration of the Bill at Stage 1.

14. The Committee undertook a call for written evidence between 17 January and 13 March 2020. [1] The Committee received 39 submissions in response to its call for evidence, and these are available online. [2]

15. The Committee began to take oral evidence on the Bill at its meeting on 17 March 2020 when it took evidence [3] from the following members of the Scottish Government's Bill Team:

    - Michael Paparakis, Policy Manager, Private Law Unit;
    - Jill Clark, Head of Private Law Unit; and,
    - Jo-Anne Tinto, Solicitor, Scottish Government Legal Directorate, Scottish Government.

16. The Committee had intended to continue oral evidence taking throughout March and April and report to Parliament on the general principles of the Bill in time to meet the Stage 1 deadline.

17. As a result of the COVID-19 pandemic, the Committee's consideration of this Bill was halted and, on 14 May, the Parliament set [4] a revised Stage 1 deadline of 7 November 2020 for scrutiny of the Bill by the Committee.

18. The Committee resumed oral evidence taking on the Bill on 25 August when it heard evidence from Dr Andrew Tickell of Scottish PEN, Nick McGowan-Lowe of the National Union of Journalists, and Shelley Jofre and Luke McCullough of BBC Scotland).

19. On 1 September, the Committee heard from Duncan Hamilton of the Faculty of Advocates, John Paul Sheridan of the Law Society of Scotland, and Dr Stephen Bogle and Dr Bobby Lindsay, of the University of Glasgow.

20. On 8 September, the Committee heard from Mark Scodie of TripAdvisor, Dr Andrew Scott of the London School of Economics, Gavin Sutter of Queen Mary University of London and Ally Tibbitt of *The Ferret*.

21. On 15 September, the Committee took evidence from Professor John Blackie of the University of Strathclyde, the fiction author Christopher Brookmyre, and Campbell Deane of Bannatyne Kirkwood France & Co.

22. Finally, on 22 September, the Committee took oral evidence from Ash Denham MSP, Minister for Community Safety, who has ministerial responsibility for the Bill on behalf of the Scottish Ministers.

23. The Committee also undertook some informal discussions, via video conference, with individuals who had experience of defamation actions. A record of the evidence received as a result of these steps is included in Annex B of this report.

Consideration by other committees

24. Both the Delegated Powers and Law Reform Committee and the Finance Committee considered this Bill. Paragraphs 264 and 269 set out the details of this consideration in more detail.

Membership changes

25. During the Committee's consideration of the Bill at Stage 1, the membership of the Committee changed. Jenny Gilruth left the Committee on 19 February 2020 and was replaced by Dr Alasdair Allan on 25 February.

26. Dr Alasdair Allan left the Committee on 1 September 2020 and was replaced that day by Annabelle Ewing.

27. Additionally, Adam Tomkins replaced Margaret Mitchell on the Committee and has also been selected as the Committee's Convener.

Background

Current defamation law in Scotland

28. Defamation is part of the civil law of Scotland and deals with harm to a person's - including a legal person's - reputation. The last major statute reform of defamation law in Scotland was in 1996 with the enactment of the Defamation Act 1996 ('the 1996 Act').

29. The Scottish Government's Bill as introduced to Parliament implements all of the substantive recommendations that the Scottish Law Commission made in their Report on Defamation.

30. One of the central issues that members needed to consider is how to balance freedom of expression with a desire to protect the reputation of individuals. It should be noted that, since the original laws were passed in 1996, the advent of social media has made this particularly difficult to regulate.

31. Various efforts have been made over the years to update and improve the law. A report in 1948 by Lord Porter led to the Defamation Act 1952 ("the 1952 Act"). In Scotland, there remain in force provisions of the 1952 Act principally relating to the defences of truth (referred to as '*veritas'* in the existing law and as truth in the Bill) and fair comment. This report was followed by the Neill Report published in 1991 which in turn led to the Defamation Act 1996 ("the 1996 Act"). The 1996 Act principally introduced the defence of innocent dissemination, the offer of amends procedure and provided definitions of who is responsible for publication in defamation proceedings.

32. European law has also made an impact on the statute book in this area, most notably the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) which covered defences for internet intermediaries who transmit material not created by them. The influence of the European Court of Human Rights and its jurisprudence on the right to respect for private and family life and the right to freedom of expression is a critically important part of the legal framework surrounding defamation.

33. Finally, in 2013, the Defamation Act 2013 ("the 2013 Act") extended qualified privilege against defamation to certain academic and scientific activities. The rest of the 2013 Act's provisions apply only to England and Wales. However, it has been argued that the changes introduced by the 2013 Act in England and Wales have moved the law on defamation forward in that jurisdiction. For example, the 2013 Act addressed some of the issues created by social media, including establishing a new "take down" procedure for England and Wales. This process supports someone who alleges they have been defamed online to discover the identity of the person who has made the statement or have the material removed.

34. The current legal framework of defamation law in Scotland is, however, not comprised solely of these statutory provisions. The common law sets out a range of concepts and principles of defamation law including: what constitutes a defamatory statement; the defences of truth and honest opinion; and how the multiple

publication rule affects liability. The Bill would replace some, but not all, of the common law in this area.

Scottish Law Commission's review

35. In 2017, the Scottish Law Commission ('the Commission'), undertook a project on the reform of defamation law in Scotland. The general background to the Commission's project lies in the work of the Scottish Parliament's Session 4 Justice Committee, and recent reforms made to defamation law in England and Wales, where the law has been substantially updated.

36. The Commission consulted and produced its Report on Defamation [5] in December 2017. 49 recommendations were made, with the Commission also published a draft for a bill on defamation.

37. The Justice Committee was briefed on the Scottish Law Commission recommendations at its meeting on 23 January 2018. [6] It decided to follow up on the issues raised with a further evidence session on 12 June 2018, [7] featuring legal practitioners and academics working in this area. That highlighted that controversy remained in relation to a number of the proposals in the bill.

Scottish Government's consultation

38. Following the publication of the Scottish Law Commission's report in December 2017, the Scottish Government undertook a public consultation [8] . This consultation ran between January and April 2019.

39. The Government's consultation sought public views on a number of the recommendations in the Commission's report, namely:

- The statutory threshold test of serious harm;
- Proceedings against secondary publishers;
- The defence of honest opinion;
- Offers to make amends;
- Malicious publications; and,
- Limitation and the multiple publication rule.

40. The Government's consultation also sought views on issues that were not raised as a part of the Commission's reform project. These included:

- Defining defamation; and
- Making unjustified legal threats an actionable delict.

41. The Government received 41 written submissions as part of this consultation. [9]

The Bill

Part 1: Defamation

Sections 1 to 4: Actionability and restrictions on bringing proceedings

42. Sections 1 to 4 of the Bill clarify and restrict the circumstances in which proceedings can competently be brought in respect of an allegedly defamatory statement.

43. The Scottish Government proposes that defamation law is made more singularly focussed on protecting against harm to reputation and give the courts power to dismiss defamation proceedings where very little damage has been done. In doing so, the policy intention behind this is to alleviate concerns felt by certain publishers in Scotland.

44. The Bill will mean that the statement complained about must have been published to a person other than the one who is the subject of the statement. This marks a change in Scots law as, currently, legal action can be raised even if a statement is conveyed only to the person about whom it is made.

Striking the balance between freedom of expression and the protection of reputation, and the chilling effect

Background

45. At the heart of the debate on the law of defamation in Scotland is the need to strike an equitable balance between two vital yet competing rights. On the one hand, the right to exercise freedom of speech and expression in an open democratic society. On the other hand, the right to privacy and the entitlement to defend a person's reputation and good name against an unjustified attack.

46. How and when the law should set the limits of free speech in society is not a new dilemma. Indeed, the debate on what constitutes 'free speech' is as old as the concept of a democratic society.

47. However, the digital revolution of the last 25 years has seen perhaps the greatest change in the landscape through which people interact and engage since the development of the printing press. Today, almost everyone in a developed society with access to the internet and personalised social media is a creator and publisher of information which can reach a potential mass audience within a very short period of time.

The chilling effect

48. The balance which needs to be struck in the Bill is between the right of an individual to privacy and the protection of their reputation, and the right to free speech and freedom of the press in an open society.

49. One key issue which emerged in evidence focussed on the challenges and the costs of taking a defamation action and the risk which a person may face when looking to defend their reputation of exposure to widespread publicity and comment.

50. Media organisations have been arguing for some time that defamation law (in both Scotland and England) was having what is termed a “chilling effect” on freedom of expression. The law in England was reformed in the Defamation Act 2013, in part to address these concerns.

51. The argument is that those with sufficient resources can use the threat of legal action to quash stories and silence criticism. The law on defamation is uncertain and relies heavily on decisions in previous cases. This makes it difficult to judge the prospects of success of a case. Thus, defenders may be reluctant to meet the significant costs of court action.

52. The National Union of Journalists (NUJ) has highlighted that traditional media organisations are struggling to maintain their financial viability. With less money to invest in investigative journalism, the additional risk of court action may be sufficient to see a story dropped. In addition, many more journalists are working in a freelance capacity, without the backing of a major news organisation. The question is, therefore, how willing are they to run a story against the threat and costs of possible legal action, or do they choose not to; this is in essence, the 'chilling effect'.

53. Mr Gavin Sutter of Queen Mary University of London stated that he thought "the bill is very good, by and large, at balancing, or seeking to balance, those interests." [10] He added that " I think that the cost is central to that weaponisation or chilling effect." [11]

54. Duncan Hamilton of the Faculty of Advocates took a different view on whether the chilling effect was real and whether the Bill struck the right balance between competing interests, arguing that—

> The “chilling effect” is a catchy phrase. It is a real thing in certain circumstances, but the phrase should not be adopted by those who want to say that freedom of expression trumps everything and that any attempt to restrict freedom of expression for any purpose has a chilling effect. One person’s chilling effect is another person’s opportunity to have a remedy as a private individual. [12]

55. His view was shared by John Paul Sheridan of the Law Society of Scotland who told the Committee that—

> Regarding the chilling effect, there is a lot of detail in sections 6 and 7 to define publication in the public interest and honest opinion. From one point of view, those alone provide adequate protection against the chilling effect. [13]

56. Several of the media witnesses we heard from thought the chilling effect was real and framed this debate in the context of the changing financial and operational circumstances which mainstream professional journalism finds itself in modern Scotland.

57. All of the media organisation we took oral evidence from welcomed the reforms proposed in the Bill. While some felt it as a step in the right direction, others argued that the Bill needed to go further in order to protect freedom of expression.

58. In a written submission, Channel 4 said that its " view is that freedom of expression should be embraced and more protection to this freedom should be catered for in the Bill". The company did note, however, that the Bill does attempt to balance the two rights and with the threshold tests and inclusion of the defences, the Bill maintains the position that the law will allow the debate between the two to continue whilst keeping interference to a minimum." [14]

59. It was the NUJ's view that "against the background of the economic pressures of journalism in Scotland, the threat of a defamation case, justified or not, can be enough to decide what makes the news agenda." [15]

60. Nick McGowan-Lowe of the NUJ spoke of the practice of wealthy or influential individuals using defamation law as a means of pressuring media organisations not to publish a specific story. The ever-increasing pressure on the financial viability of mainstream media, and their needs to save money by reducing legal costs, means that—

> "...the threat of legal action is one of a number of series of obstacles deliberately used by those with thin skins and thick wallets, not necessarily with a view to bringing any action but in order to deter or delay the reporting of honest journalism. That is an abuse of the intention of the legislation." [16]

61. Shelley Jofre of BBC Scotland's investigative programme *Disclosure* spoke of a similar trend, telling the Committee that the work of the *Disclosure* team is to hold the rich and the powerful to account, give a voice to the voiceless and produce journalism that delivers change. This, she said "is fundamental to a functioning democracy".

62. However, she stated that the need to "avoid being on the wrong side" of defamation law "runs like a seam through everything" BBC Scotland's investigative journalists do. The chilling effect of the present defamation laws is an ever present factor in their work. While there are very few media outlets left in Scotland with the time or the resources of the BBC, Shelley Jofre said that "during the couple of years that *Disclosure* has been up and running, there have been lots of things "the general public might not know today" if BBC Scotland has yielded to pressure not to broadcast as a result of threats of defamation action. They include—

> "important new evidence in the Sheku Bayoh case, the police investigation of Emma Caldwell's murder, historic allegations of sexual abuse at a children's home, investigations into a rogue national health service surgeon who managed to do untold damage to patients over a number of years, the environmental and human cost of oil platforms from Scotland being broken up for scrap halfway round the world, and the adverse impact of salmon farming in Scotland." [17]

63. In addition, more and more journalists work in a freelance capacity, without the resources of a traditional news organisation to defend them against defamation allegations.

64. Consequently, the chilling effect of the law can have an ever greater impact on small-scale independent and online journalism. Ally Tibbitt of *The Ferret* spoke of the small turnover of his media organisation. Speaking of the chilling effect a threatened defamation action could have on *The Ferret*, he said—

> "Even if we were to win a case that was related to a public interest story that we had been involved in, the legal fees would cost us about a fifth of our annual turnover. Fundamentally, that is why we are very keen on reform of defamation". [18]

65. That even unjustified claims could pose a threat was highlighted by several other media respondents. They noted that even a swift rebuttal to an unjustified claim can result in significant expenditure which is not recoverable.

66. The worry about costs and the suggestion that this chilled a desire to defend legal action was also commented upon by Dr Andrew Tickell representing Scottish PEN. He said—

> ... we are not just talking here about journalists. We are talking about writers, bloggers and anyone who engages in the public sphere and may find themselves subject to these threats. The core of this is ultimately economic—"Can I afford to defend myself?" The answer for most Scots is simply, "No, I cannot afford to defend myself and therefore I will take down the notice. I will cave in to the threats. It is not worth my bother. I cannot run the risk of putting my life and my family or whatever at risk for defamation threats." It is an interaction of all those factors that is particularly relevant and different elements of the bill can intervene quite dramatically at that early stage of the process. [19]

67. The Society of Editors noted that the reforms would bring Scots law into closer alignment with the law in England. In its view, the reforms in the Defamation Act 2013 had gone some way to reversing this "chilling effect" in England. The Society noted that this benefits journalists, but also academics, scientists, campaigners and social media users.

68. Crime fiction author Christopher Brookmyre gave the Committee an insight into how the law of defamation and the possible chilling effect affected him. He noted that—

> I have noticed more and more that I receive editorial notes asking me to change something so that it is not too obviously identifiable with a particular individual, institution or company.
>
> I have had to change the names of fictional companies because they sounded a bit too much like an existing company or organisation, even when the company or organisation was not in the same field. My publishers seemed wary of mischievous or opportunistic litigation. I defer to my publishers' paranoia over my own, because they will have more experience with those issues and will be talking to lawyers about what might be actionable. [20]

69. In a joint submission, Dr Stephen Bogle and Dr Bobby Lindsay of the University of Glasgow noted the requirements in the ECHR to protect both privacy and freedom of expression. They said that governments are given some leeway in how they do this. Their view was that the Bill did not change the balance greatly. Instead, in their

opinion, it tipped it slightly towards supporting the defender in a defamation case and thus towards greater freedom of expression.

70. Campbell Deane of Bannatyne, Kirkwood France & Co thought this was the case too, arguing that there was little in the Bill for the pursuer. He said—

> When the bill was originally talked about, I wrote an article about what is in it for the pursuer. The answer to that is nothing: there is nothing in the bill that would assist a pursuer to litigate. That is not a call to race to litigate in relation to defamation, but it seems that hurdle after hurdle is now being put in play, which achieves very little, apart from potentially increasing expense. [21]

71. In her evidence to the Committee, Ash Denham, Minister for Community Safety stated that she thought that the bill "attempts to strike the balance that we discussed and to reduce costs for all parties by introducing more effective remedies for protecting reputation and stronger protections for freedom of expression".

Conclusions

72. The Committee recognises the strength of feeling behind the views expressed both to support freedom of expression and in relation to the importance of protecting individual reputations. We agree with the Scottish Government's view that the Bill represents a "package" of measures creating an overall balance.

73. Consequently, the Committee has no single over-arching recommendation to alter fundamentally the overall balance of the Bill. The Committee addresses each of the main provisions in turn when concluding and recommending any changes in the sections that follow.

Definitions

74. The Bill provides a statutory definition of defamation which is similar to the existing common law definition. It confirms that a statement is defamatory if it causes harm to a person's reputation (that is, if it tends to lower the person's reputation in the estimation of ordinary persons).

75. Currently, the legal definition of defamation comes from the 1936 case of Sim v Stretch [22] . It is that "the words tend to lower the plaintiff in the estimation of right-thinking members of society generally".

76. The Scottish Law Commission's original proposals did not include a statutory definition. However, the Scottish Government added one due to the support for the idea in its consultation.

77. Duncan Hamilton said that all definitions can be open to criticism but, in his view, he had never encountered a court being unclear about definition and there being a dispute about what it meant. John Paul Sheridan's view was that the changes being suggested by the Scottish Government were fine and the Law Society of Scotland had no difficulty with what was being proposed. [23]

78. Drs Lindsey and Bogle, however, indicated they did have "some concerns", particularly around the use of the phrase "ordinary persons". In their view, this is not a familiar definition in the present law. They also noted that the present law has an "important qualifier" in that it uses the term "reasonable".

79. In his evidence, Gavin Sutter indicated that the proposed definition was "very good" and "long overdue". In his view, however, it could be improved by making it clear that only a living person should be able to sue for defamation. [24]

80. Professor John Blackie of the University of Glasgow did not share some of these views. He believed that we should not have a statutory definition of defamation as proposed in the Bill as this will only cause extra expense. He tied this to the issue of the serious harm test and stated that this approach will be more costly because there will be a lengthy proof of fact thereby adding considerable expense. [25]

81. Luke McCulloch of BBC Scotland said that he thought the proposed definition would provide "clarity" and that combined with various thresholds in the Bill, this may "bat off some of the more frivolous attempts to stop investigative journalism." [26]

82. In his evidence, John McLellan of the Scottish Newspaper Society indicated that one of the problems with having a definition in the Bill is that we are typically dealing with "inexact situations" and the way in which a definition is understood can vary in a particular case. He also said that—

> We had some concerns about the maintenance of the “tends to” element of the definition. I think that there has to be some kind of balance between the right of individuals to defend themselves and the ability to defend such actions. In broad terms, however, we are generally content with what is proposed. [27]

83. In its written evidence, the Senators of the College of Justice welcomed the efforts to being clarity to definitions, stating—

> ... by providing a statutory definition of “defamation” and repealing some if not all of the existing statutory provision relating to the law of defamation in Scotland, the Bill goes some way towards a comprehensive statement of the law. The Senators strongly support Scottish Government’s objective of making the law of defamation accessible. One of the ways of doing that is to provide that as much of the law as possible is to be found clearly stated in one statute. [28]

84. The Minister for Community Safety was of the view that the law needed to be as clear and as accessible as possible and having a statutory definition of defamation would "help to provide that clarity". She thought that the definition proposed is a restatement of the common-law test in Sim v Stretch. [29] The Minister did indicate, however, that she would consider any recommendations the Committee may wish to make in terms of how a statutory definition is able to keep up with developments in the common law through cases. [30]

Conclusions

85. While the Committee invites the Scottish Government to consider the evidence we have received and review whether any final adjustments are required to the current drafting, the Committee welcomes the inclusion of a statutory definition of defamation in the Bill. We recommend that the Minister sets out her views on this in advance of the Stage 1 debate on the Bill.

86. More generally, we recommend that the Scottish Government considers how it will best ensure that the statutory definition used in the Bill can evolve over time as our courts make relevant judgments and the common-law evolves. This includes consideration of an amendment to Section 1 which explicitly states that the courts can refer to previous case law.

87. This issue of the Bill needing to ensure that its provisions can evolve as case law is made in our courts is one that should apply to other provisions, not just the definition of defamation. The Committee wishes to ensure that courts retain the power to develop the law of defamation as the need arises.

Serious harm threshold

88. The second major change to defamation law in Scotland brought about by this Bill is the introduction of a serious harm test. The Bill proposes that the publication of a statement must have caused, or be likely to cause, serious harm to the reputation of the subject of the statement; only then will the court allow the proceedings to go ahead. The provision extends to situations where publication is likely to cause serious harm, in order to cover situations where the harm has not yet occurred at the time the action for defamation is commenced.

89. These sections of the Bill place limits on the circumstances in which proceedings for defamation can be brought where the party seeking to do so is a non-natural person [31] whose primary purpose is trade for profit. The test here would become one of the entity having experienced, or likely to experience, serious financial loss. [32]

90. This is possibly the most controversial proposal in the Bill. In the broadest terms, media respondents to the Committee's call for views were strongly supportive, arguing that it would give journalists confidence when dealing with weak cases. Legal respondents saw it as unnecessary.

91. A serious harm test exists in the Defamation Act 2013 of England and Wales. The provisions in the Scottish Bill are similarly worded, but do not exactly mirror the English test. A recent court case (Lachaux v Independent Print ltd. [33]) looked at the English test's meaning.

92. The Supreme Court found that it created a new requirement for claimants to show, as a matter of fact, that serious harm had occurred (or was likely to occur) before a case could proceed. It therefore operates like a procedural hurdle.

93. In his evidence, Duncan Hamilton, representing the Faculty of Advocates said—

> What we are dealing with here is an English solution to an English problem. It was brought in on the back of various cases—including Jameel v Wall Street Journal Europe Sprl and Thornton v Telegraph Media Group Ltd—and arose from a sense that unmeritorious or frivolous claims were being brought forward; hence the need for a higher threshold. From the position of Scottish practice, that has simply not been the case, so it would be the opposite of adopting a Scottish solution to a Scottish problem. Therefore, before we go any further and simply adopt it, I stress that, in my view, it is not an appropriate fit. [34]

94. Mr Hamilton concluded by saying it was the Faculty of Advocate's view that the serious harm test was "inappropriate" because it has arisen from circumstances that are not present in Scotland where, in its view, there are too few cases tried in Scottish courts. [35] Mr Sheridan of the Law Society of Scotland concurred saying that such as test or threshold should not apply either for defamation or for malicious publication. [36]

95. Dr Andrew Tickell did not share this view. He indicated that a serious harm test was "appropriate in terms of free expression". He thought that the threshold would give people who were subject to threats and menaces of defamation action greater security." [37]

96. Nick McGowan-Lowe agreed, stating—

> If harm has been done to someone's reputation, it is in everyone's interests that that is addressed quickly. Having a serious harm threshold allows clarity at an earlier stage for someone seeking legal advice and it allows an additional filter at the start, so that cases that are largely without merit will not proceed much further, not take up court time and not drag on unnecessarily. [38]

97. Writing as an investigative journalist, Peter Geoghegan also agreed with the need for the test to be in the Bill. He said—

> Adopting a "serious harm" threshold for defamation actions, as the Bill proposes, will not only discourage frivolous actions from being brought. It will also give investigators menaced by frivolous suits greater confidence in ignoring baseless threats they may receive. An additional benefit of the "serious harm" threshold is that it will allow the court to dismiss frivolous or oppressive actions at an earlier stage in judicial proceedings, without the risk of dragging out the action to the expensive stage of proof. [39]

98. Similarly, the Society of Authors said that the inclusion of the test was a substantial improvement but that its "view is that prospective pursuers should also be required to demonstrate serious financial loss arising from a statement in order to substantiate a claim in Scots law." [40]

99. In his evidence, Mr Campbell Deane gave us his perspective in terms of the pursuer. He thought that "by introducing that extra barrier, you would be putting a hurdle in the way of a litigant who may well have a perfectly good right of action." [41] He added that—

> No one has said or been able to explain to me how freedom of expression will be improved by the introduction of serious harm. If anything, it is arguable that journalists will take a slightly less responsible attitude and not qualify for the previous Reynolds privilege defence of responsible journalism, because they can work on the premise that, “This isn’t going to seriously harm them. We’ll just take a nibble at them and cause some damage.” That is the issue that concerns me most. [42]

100. Various witnesses discussed the risk that those with money and a desire to protect their reputation would pursue defamation litigation regardless of the barriers put in front of them. For example, Dr Bogle described the issue thus—

> The problem is that, if you think that your reputation has been seriously harmed and you have the resources and the stomach to raise proceedings against someone or even initiate pre-litigation correspondence, you are going to do that. The idea in England and Wales is that, in a court case, you must establish first that the statement was defamatory and then, as the process goes along, you need to show that it did serious harm. That does not get rid of all the problems that have been identified in the mischief of pre-litigation correspondence having some sort of chilling effect. It may not be that effective. [43]

101. The risk that a serious harm test would add to the complexity of the law was mentioned by several witnesses. Dr Scott of the London School of Economics discussed the English experience—

> That means that, whereas we thought that serious harm would be a question of threshold, and thus would be able to be dealt with at a preliminary hearing, very often it will have to be heard at a substantive hearing—at the end point of the legal process. In addition, very often, significant evidence will have to be led, in order to show that the threshold has been met. That adds cost and complexity to the legal proceeding. [44]

102. In her evidence to the Committee, the Minister for Community Safety told the Committee that the threshold test is "a sensible reform of defamation law". In her view, "if someone is going to say to a court that their reputation has been damaged, they should be able to prove to the court that it has been damaged". The Scottish Government also believed that "when people are notified that a statement that they have published is defamatory, the existence of the threshold will give them confidence that the damage will have to be proved in court". [45] Furthermore, the Minister did not agree with the characterisation that the bill is about English solutions to English problems. [46]

Conclusions

103. The inclusion of a serious harm test was one of the main provisions where the evidence was split between those that welcomed this and those that saw this as a step too far in limiting a pursuer's rights to protect reputation.

104. For some, the serious harm test is a necessary threshold which will ensure that only relevant cases where serious harm may have been done to someone's reputation go ahead and frivolous or vexatious cases are discouraged. In the view of some of our witnesses, the serious harm threshold would give people who were subject to threats and menaces of defamation action greater security.

105. The Committee also heard evidence to the contrary that this level of threshold is tilting the balance too far away from the rights of an individual to protect their reputation and that by introducing that extra barrier, you would be putting a hurdle in the way of a litigant who may well have a perfectly good right of action.

106. We recognise that there are merits in both of these views. On balance, at this stage, and in light of the overall set of provisions set out in this Bill, we favour retention of the serious harm test in the Bill. In our view, the Bill comes as a package which creates an appropriate overall balance between freedom of expression and protection of reputation.

107. In advance of the Stage 1 debate, we recommend 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.

Derbyshire principle

108. Defamation law in England and Wales currently prohibits public bodies from bringing defamation actions. This rule originated from a 1993 House of Lords (Law Lords) decision in a case between Derbyshire County Council and the Times Newspapers Ltd and Others. This rule has become known as "the Derbyshire principle". [47]

109. According to the SPICe briefing on the Bill, the rationale for the Law Lords' decision was that public bodies should be open to "uninhibited public criticism" and that reputation should be protected by political rather than legal means. The SPICe briefing notes that the Scottish Law Commission's Discussion Paper on defamation indicated that, "although there is limited Scottish case law on the Derbyshire principle, one should assume that Scottish courts would follow the general principles." [48]

110. Section 2 of the Bill would create a statutory version of this principle. It would prevent “public authorities” and bodies directly controlled by them from raising defamation actions. The Bill would create an exemption for businesses and charities which deliver only public services “from time to time”.

111. The Committee's evidence and its focus has centred upon the following issue. What should be the scope of the Derbyshire principle in this Bill? Should it relate only to

elected members, and bodies directly controlled by them, being exempt from the ability to sue for their public activities? Or should the principle be widened to cover private bodies providing public services?

112. Some of the respondents to the call for views were concerned that the exception would prevent effective scrutiny of outsourced public services. It could, in their view, also create a "postcode lottery" where what someone could say about public services would depend on how they were delivered in a particular area. They saw this as undermining the Derbyshire principle.

113. Others were concerned that the effects of section 2 were not clear. However, the main issue highlighted was that section 2 may prevent organisations which have legitimate reputations to protect – such as universities – from raising defamation proceedings.

114. Dr Tickell's evidence was typical of those arguing for private companies delivering public services to be covered. He said—

> Our argument is simply this: we can do better than the bill. We can look at a prohibition on any company bringing actions concerning a critique of how they are delivering public services.
>
> In effect, there would be no bar on a private provider in North Lanarkshire bringing defamation actions, whereas there would be a bar on North Lanarkshire Council, for example, suing someone who was critical of their services. Our argument is that we should not just ban public bodies from bringing defamation actions—that is a good thing—but follow the public pound and prohibit private companies from bringing legal actions about how they deliver public services. [49]

115. Dr Tickell added that he was not arguing that the bill should apply to all companies that provide public services nor all aspects of a private company's work. His argument is for an extension to the aspect of a private company's operations that was the deliverer of a public service. [50]

116. Luke McCullough pointed out one of the current loopholes in the law whereby a public authority takes steps to support and fund a particular individual, for example, a chief executive, who would argue that their reputation had been damaged and thereby enable a law suit to take place. [51] This was a point shared by Campbell Deane who described it as an "abuse of process". [52]

117. Similarly, in its written evidence, The Guardian News and Media Ltd (GNM) argued for the principle to cover private bodies in certain circumstances. It said—

> GNM is disappointed that the Bill does not contain any express statutory restriction on the ability of entities trading for profit to bring an action for defamation. As set out in GNM's response to the Scottish Government's consultation "Defamation in Scots Law", GNM is opposed to these sorts of legal persons bringing actions in defamation and consider that there would be considerable public interest in creating an environment in which people are able to criticize and scrutinise the actions of for profit corporations. [53]

118. GNM added that "the Bill should prohibit public authorities from sponsoring defamation actions brought on behalf of individuals in a personal capacity". In its view, "this would prevent public authorities from using proceedings on behalf of an individual as a proxy for action." [54]

119. Speaking also as a Councillor on the City of Edinburgh Council, John McLellan noted that it was common place now for services to be delivered by private bodies on behalf of councils. It was also common for councils to set up separate delivery arms/bodies. In his view—

> The key difference is between a private company that is acting purely in its own private interests and one that is operating on the basis of a contract that has been approved by elected members. There is a difference between the two, and the legislation could be extended where there is some element of public service and a company is working to a public remit. [55]

120. In his evidence, John Paul Sheridan stated that the Law Society of Scotland had some problems with the drafting of these provisions, describing them as odd. He was not clear what type of body was being covered and whether this extended to "universities, housing associations and even individual civil servants or nurses". He concluded that he was "not sure that there is a good solution, but the drafting needs to be tightened up substantially." [56] He was also of the view that the scope of the Derbyshire principle was more one relating to elected members/officials. [57]

121. In his evidence, Dr Lindsay was of the view that "if private companies that provide a public service are allowed to sue, there will usually be a very good argument under section 6 that there is a defence in relation to publication in the public interest." He also noted that those companies enjoy human rights. In his opinion, a private company that is excluded from suing in defamation might launch a challenge to that under the provisions of the Scotland Act 1998. His conclusion was that it might be more proportionate to say that the provision is simply about central government and local government and that, when it comes to private companies providing a public service, the section 6 defence might be the most relevant part here. [58]

122. For writer Christopher Brookmyre, the ability to parody public bodies was important to his writing. He explained—

> As a writer of fiction, I would always reserve the freedom to give my impression of how an institution, authority or company is conducting itself. Within the realm of fiction, a writer will sometimes create a parody or grotesque exaggeration of that, because it is sometimes necessary to blow up unpalatable aspects in order to draw attention to them. Necessarily, you are going to create a depiction that is particularly unflattering if you are drawing attention to something that you think is wrong. [59]

123. The Minister for Community Safety told the Committee that the aim of the provision is simply to place on a statutory footing the common-law principle that public authorities cannot raise defamation litigation. She added that the Government would "need to ensure that we take a flexible approach so that courts can deal with complex and nuanced cases as things develop" and that she was open to considering what the Committee recommended in this area. [60]

124. On whether the drafting in the Bill was tight enough to restrict the principle only to one preventing elected members/officials from suing, the Minister said that the wording did "not expand on the common-law definition" but that, if the Committee had "a strong interest in the matter and does not think that the balance is right, I will endeavour to look at that again with the drafters and see whether there is maybe a way in which that could be changed or whether we could put something into the explanatory notes that might be helpful." [61]

Conclusions

125. This is an area where the Committee has heard overwhelming evidence that section 3 of the Bill will not do what the Minister claimed, that is put the Derbyshire principle on a statutory footing and provide clarity. The weight of evidence we received from legal witnesses was that the Bill as drafted goes further than the current law by including private bodies and charities, and not just directly-elected bodies and their agencies. Other witnesses noted that, by exempting some bodies which deliver public services, those who criticised outsourced services may still be exposed to defamation action.

126. In that respect, we welcome the Minister's commitment that she was happy to look at the Committee's recommendations in relation to this part of the Bill. The Committee is strongly of the view that this is an area where there is a need for greater clarity in the Bill.

127. The Committee believes that the Derbyshire principle was designed to ensure that directly-elected members, bodies and their agencies cannot sue for defamation in relation to their public activities. The Committee supports this principle. The Committee therefore recommends that the section is redrafted so that the Scottish Government's intention is clearer and that clarity is provided as to which bodies are covered as well providing examples of those which are exempt.

128. The Committee also notes the evidence received where some would like the provision to cover private bodies that are under contract to provide public services. Examples from the justice sector include the management of certain prisons and the provision of electronic monitoring services (better known as tags) for offender management which are both delivered by private companies.

129. If that is the intent or direction of travel, then it is important that the Scottish Government redrafts this section so that any body delivering a public service (defined as a body delivering a service under the delegated authority of a public body) is covered in relation to their actions in delivering the public service.

130. This is another of the provisions in the Bill where it will be important that developments in the common-law can be incorporated in the future as the Committee is well aware that the means by which public services are now delivered has changed significantly in recent decades.

Secondary publishers

131. Section 3 of the Bill places restrictions on who can be sued for defamation. At present, those who are not responsible for the content of a defamatory statement can be held liable. Over time, a complicated array of defences and jurisdictional exclusions for these secondary publishers has arisen.

132. The Bill provides that, subject to limited exceptions, defamation proceedings cannot be brought against anyone who is not the author, editor or publisher of a given statement. This covers secondary publishers in general - however the provision is particularly relevant to internet intermediaries. The approach taken in the Bill provides for the removal of liability in relation to secondary publishers rather than relying on the current defence of reasonable care.

133. If passed, the Bill would provide a regulation-making power, under the affirmative procedure, for Scottish Ministers to specify categories of persons to be treated as authors, editors or publishers for the purposes of defamation proceedings who would not otherwise be classed as such, nor as employees or agents of such persons.

134. In general terms, there was broad support for this approach. It was seen as supporting freedom of expression and the potential of the internet. Respondents expressed concerns that, if liability did attach to internet intermediaries, they would take an overly cautious approach to content, removing material even where the author was prepared to defend it.

135. Mr Gavin Sutter was one of the witnesses who disagreed. He noted that the US approach of providing complete immunity meant that internet intermediaries there took no action to remove even clear and notified defamatory material. [62]

136. Several witnesses also highlighted the failure of the Bill to provide options for getting internet intermediaries to remove content.

137. English legislation provides a take-down procedure (section 5 of the Defamation Act 2013). This allows a request to be made to a secondary publisher to either provide the name of the author of contentious material, or remove it, when it is notified to them. Section 10 of the 2013 Act allows secondary publishers to be the subject of court action, but only where it is not “reasonably practicable” to sue the author, editor or publisher.

138. Section 1 of the Defamation Act 1996, which applies in Scotland, also provides a route to requesting take-down because it requires secondary publishers to take reasonable care to benefit from immunity to court action. However, this would be repealed by the Bill.

139. Mr Duncan Hamilton described the situation as follows—

> The bill repeals section 1 of the 1996 act. On top of that, section 5 in the English act—the Defamation Act 2013—deals directly with operators of websites in a way that is not carried across into the bill. In England, even after the 2013 act, there is still section 1 of the 1996 act, as well as a body of case law, such as the Tamiz case, which allows you to say that, after notification, a website operator has a problem. That will not be the situation in Scotland, which we say is a difficulty, because it tilts the table too far. What is my possible remedy as a private individual trying to address the wild ramblings of a keyboard warrior? What do you want me to do with that? We have a difficulty with that. You were given evidence that there was some kind of protection under section 3(3) of the bill, as a nod in the direction of limiting the exemption, but that is nothing as to the protection that is in place at the moment. That concerns a very minor aspect. [63]

140. Dr Scott suggested the need for a new, easily accessible court procedure to deal with take down. This would allow court supervision of the process and therefore consideration of the right to freedom of expression. [64]

141. The process would operate on the premise that if the defender did not demonstrate an intention to defend the action, the court would be able to order take down without investigating further. If simple procedure were used, it could cost as little as £19 to raise an action.

142. In his evidence, John McLellan pointed out the challenges of regulating in this area. He noted that publishers are now "unable to control access to information because of cacheing, republishing and retweeting in the wider context" and that "the legislation is in a reasonable place". In his view, "going beyond that and trying to tame the internet, legislators would drive themselves mad." [65]

143. The Minister for Community Safety explained that the provision was designed not to give internet companies free rein but one trying to safeguard the principle that secondary publishers are not actively responsible for the content even though, at present, they are being held liable. [66]

Conclusions

144. The weight of evidence received by the Committee favoured the exemption of secondary publishers from liability for defamation.

145. The Committee therefore welcomes the exclusion of secondary publishers from liability but recommends that the Scottish Government considers how the process can be improved when a person wishes to request the removal of material. The Committee recommends the Scottish Government provide its written views on this before the Stage 1 debate on the Bill.

Sections 5 to 8: Defences

146. The Bill makes the following provisions in respect of the main defences in proceedings in defamation, it:

- puts the common law defence of *veritas* on a statutory footing, re-naming it "truth";
- puts the common law defence of fair comment on a statutory footing, re-naming it "honest opinion";
- introduces a statutory defence of publication on a matter of public interest; and,
- abolishes the common law version of each of these defences.

147. The Scottish Government argues that putting the main common law defences on a statutory footing will help to make the law more accessible (i.e. use more modern language) and reduce the chilling effect on freedom of expression. The Government believes that it will also put beyond doubt the applicability of the defences in Scots law and serve to reduce the potential for inconsistency and uncertainty in the law.

148. Section 6 creates a new defence on the basis that the statement in relation to which proceedings were brought related to a matter of public interest. It is based on the common law defence established in England and Wales by the leading case of *Reynolds v Times Newspapers Ltd* (and generally accepted in Scotland). The House of Lords held in *Reynolds* that a publisher may have a defence in defamation proceedings if it published defamatory allegations on a matter of public interest, provided that the publication was "responsible".

149. Section 6 is intended to reflect the principles developed in that case and subsequent case law. The test to be applied is now reasonableness of the belief that publication of the statement complained of was in the public interest, rather than the responsibility of the journalism behind the statement.

150. Similarly, section 7 of the Bill replaces the common law defence of fair comment with a statutory equivalent, known as honest opinion. The section broadly reflects the current law while simplifying and clarifying certain elements, but does not include the current requirement for the opinion to be on a matter of public interest.

151. Section 8 provides for the abolition of a number of common law defences, for which statutory equivalents are introduced, in some form, by the Bill. While abolishing the common law defences means that the courts would be required to apply the words used in the statute, the current case law would constitute a helpful (albeit not binding) guide to interpreting how the statutory defences should be applied.

Views expressed to the Committee

152. In her evidence to the Committee, Shelley Jofre said that because there was a statutory defence on publication of public interest in England and Wales then it "makes sense for Scotland to be on the same page as our nearest neighbours." [67]

153. Duncan Hamilton set out the views of the Faculty of Advocates on the issue of defences. He considered the changes to *veritas* as "basically fine". He thought, however, that the defence of honest opinion was "more problematic". He said that

"the biggest difficulty is the justification that is given for the removal of the public interest aspect of the existing fair comment defence" which in his view is currently "easily and regularly applied by the courts".

154. In response to this point, Dr Lindsay noted that "the inner house of the Court of Session recently considered that defence in the case of Campbell v Dugdale, and the opinion of the Lord President did not place much emphasis on that requirement." In his view, "it is unclear what role it continues to play". He was of the view that this "would not be an issue if the public interest qualification were to be retained, because it is relatively easy to show that something is in the public interest". [68]

155. The Scottish Newspaper Society said that its "strongly supports the proposals outlined to replace the existing defences with ones of honest opinion, public interest and truth". It also said that the introduction of a public interest defence will "greatly clarify the law and strike a fairer balance between freedom of expression and the protection of individual reputation." [69]

156. The Society added, however, that each of the defences requires amendment to improve and simplify the law. It said—

> In cases where defamation proceedings are brought in respect of a statement conveying two or more distinct imputations, we need to ensure that the truth defence under s.5 is not defeated on a balance of probability between the number of imputations which are true. Section 5 (2) (a) should be amended to read “one or more” rather than “not all” to avoid any issues of preponderance that obscures the truth of any one imputation.
>
> In respect of an honest opinion defence, s.7 (3) requires clarification as it states that it is a requirement for the statement in question to include or refer to the facts or evidence upon which it is based. Accessing this right should not be based on satisfying it in situations where the evidence is known or is likely to be known by ordinary persons. Without amendment this is an excessively onerous condition that could restrict publication on a subject that is explicitly known (or likely to be known) by the readership.
>
> In addition to the above, greater clarity is needed in respect of the wording in s.7 (5) to ensure that defences are not lost by the use of rhetorical devices such as satire and hyperbole. [70]

157. Similarly, the Society of Authors said that—

> ... the defence of truth should not fail because one meaning alleged by the pursuer is not shown to be substantially true, if that meaning would not cause serious harm to the pursuer's reputation in light of what the defendant has otherwise shown to be substantially true. There should be consistency between sub-Section 2(3) of the Act and Section 5(2) of the Bill. The 'honest opinion' defence introduced in Section 7 of the Bill mirroring Section 3 of the Act is also welcome. [71]

158. The Minister for Community Safety said that "the matter [of defences] has been very carefully considered in order to strike the right balance in the bill". In relation to the

Reynolds defence, she was of the view that the Bill places the current defence on to a statutory footing and that "the explanatory notes to the bill make that explicit". [72]

Conclusions

159. The evidence to the Committee in this area has been that the codification of the defences in the Bill are to be welcomed. However, some stakeholders, particular from the media, have had concerns about specific wording.

160. The Committee welcomes the codification defences in the Bill and recommends that the Scottish Government to give consideration to the evidence the Committee heard on the specific wording used.

161. The Committee further recommends that the Bill is amended to make the ability of the courts to refer to previous case law in this area explicit.

Section 9: Absolute privilege, Sections 10 to 12: Qualified Privilege

162. Sections 9 to 12 of the Bill make provisions to-

- restate the absolute privilege defence for contemporaneous publication of a statement which is a fair and accurate report of any court or tribunal proceedings;
- restate the defence for publication in a scientific or academic journal of a statement relating to a scientific or academic matter if it can be shown that the statement has been subject to an independent review of its scientific or academic merit carried out by the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned;
- extend qualified privilege to cover a fair and accurate report of proceedings of a scientific or academic conference held anywhere in the world, and to copies, extracts from and summaries of material published by such conferences.

163. The Committee did not receive a significant amount of evidence on these provisions but we note that some organisations and individuals did raise a series of points as set out below.

164. Drs Lindsay and Bogle described the changes being made in the Bill as "minor and sensible". [73] The written submission from Professor Elspeth Reid and Professor John Blackie does query however whether the listing in the schedule is intended to be non-exhaustive or exhaustive. In their view, "if the schedule list is intended to be non-exhaustive then this should be stated expressly for the avoidance of doubt". [74]

165. The Summary Sheriffs' Association (SSA) also noted that the current draft does not define absolute privilege. All other forms of privilege are defined. In its view, the drafter may have been relying on the common law definition and that this may cause some confusion. [75]

166. The SSA also said that it agreed that fair and accurate reporting of court proceedings is an essential function of a civilised society and should be protected by absolute privilege. It is however also firmly of the view that "it must be clear that this must extend to the maker of any statement if it occurs during court proceedings." [76]

Sections 13 to 18: Offer to make amends

167. Sections 13 to 18 of the Bill set out the various provisions that allow a person to make an offer to make amends. In essence, the offer to make amends procedure allows a person who is subject to a defamation action to make amends (via an apology and, where agreed, compensation) as an alternative to defending the proceedings. The offer may relate to the statement in general (i.e. an “unqualified offer”), or only to a specific defamatory meaning conveyed by the statement (i.e. a “qualified offer”). In making an offer of amends, be it qualified or unqualified, the person making the offer is conceding, as appropriate, that the statement in general or the specific meaning to which the offer relates is defamatory.

168. Section 13 sets out the components of what would be required to be a valid offer; namely a suitable correction, a sufficient apology, details of any compensation and expenses, format of any offer (i.e. in writing) and rules around withdrawal and deemed rejection of offers.

169. The remaining sections cited here cover the process of making an offer, what happens in relation to a rejected offer etc.

170. In evidence to the Committee, Campbell Deane and Dr Tickell noted that, under the Bill, there is “no discount” for a defender who makes good attempts to settle the case before reaching the court.

171. Luke McCullough said that BBC Scotland "probably would support the ability to discount damages at an earlier stage" [77] and John McLellan said that "the offer of amends system as it stands recognises that, but it can be somewhat fluid, so strengthening that would be very welcome." [78]

172. Also, John Paul Sheridan added—

> The assumption is that most cases do not go to court, and resolving them outside court is very much to be encouraged. At present, if a publisher or media organisation makes an offer to make amends that is not accepted for one reason or another, a discount is applied. There is no provision in the bill for a discount. I think that that would discourage out-of-court settlements or offers being made out of court. That is inequitable in the sense that, if someone currently makes an offer, they are entitled to a discount. If that were not replicated, it would be problematic. [79]

Conclusions

173. The Committee recommends that the Scottish Government reflects on the evidence the Committee has received and make it clear whether courts can take into account the offer to make amends and apply an appropriate discount.

Section 19: Jurisdiction

174. Section 19 of the Bill lays down a jurisdictional threshold limiting the circumstances in which an action for defamation may be brought in a court in Scotland.

175. The Bill provides that a court in Scotland does not have jurisdiction to hear and determine defamation proceedings against a person who is not domiciled in the UK, another EU Member State or a state which is a contracting party to the Lugano Convention (i.e. Iceland, Switzerland and Norway), unless satisfied that Scotland is clearly the most appropriate place to bring the proceedings.

176. It is not immediately clear how this section of the Bill will operate after Brexit as the drafting seems to have been based on the UK remaining in the EU (amendments may therefore be necessary to take into account the terms of the UK's withdrawal from the EU).

177. The Committee did not receive a significant amount of evidence on this particular section of the Bill.

Section 20: Removal of presumption that proceedings are to be trial by jury

178. Section 20 removes the presumption that proceedings in defamation are to be tried by jury. The effect is that defamation cases are to be tried without a jury unless a court orders otherwise. This would put defamation cases at odds with other types of personal injury, where the injured party retains the right to have their claim determined by a jury.

179. The Committee did not receive a significant amount of evidence on this particular section of the Bill. However, all those commenting in the call for views supported the removal.

180. One organisation however which did comment was Channel 4, which said—

> We believe defamation cases are best left with a judge alone. To date, jury trials have resulted inconsistent decisions on damages, which are extremely difficult to quantify, and clashes with a responsible journalism defence. [80]

Part 2: Malicious Publication

181. Part 1 of the Bill covers reform to the law of defamation. Verbal injury is, however, a separate civil wrong and whilst similar to defamation, is distinct in law. It covers statements that, while not defamatory, are likely to be damaging. One of the main differences between verbal injury and defamation is that the pursuer in a verbal injury action does not enjoy the benefit of any of the presumptions that exist in defamation, such as the presumptions of falseness and of malice.

182. According to the Scottish Government, the common law on verbal injury is, at present, both confused and unclear. The Government believes that it is not clear into which of the possible categories of verbal injury a damaging imputation most likely falls. There is also confusion about the scope of verbal injury.

183. Currently, Scots law seems to recognise five main categories of verbal injury. These are-

- Slander of title;
- Slander of property;
- Falsehood about the pursuer causing business loss;
- Verbal injury to feelings by exposure to public hatred, contempt or ridicule; and,
- Slander on a third party.

184. The Bill makes changes to the law of verbal injury. It makes provisions that:

- the principles underlying the three categories of verbal injury which relate to economic interests (i.e. falsehood about the pursuer causing business loss, slander of title and slander of property) should be retained; and,
- the principles underlying the other two verbal injuries - to feelings by exposure to public hatred, contempt or ridicule, and slander on a third party - are not restated

Sections 21 to 23: Actionable types of malicious publication

185. These sections make provisions for a statutory equivalent of certain categories of the common law on verbal injury. In summary, whilst equivalents of the forms of verbal injury relating to economic interests are placed on a statutory footing as actionable types of malicious publication, those categories relating to injury to a natural person’s feelings are abolished outright.

186. Sections 21 to 23 of the Bill provide respectively for three forms of wrong relating to economic interests –

- statements causing injury to business interests,
- statements causing doubt as to title to property, and
- statements criticising assets.

Section 27 of the Bill abolishes the relevant common law verbal injuries.

Malicious publication

187. The key focus for the evidence and the Committee in this area is the fact that there would be no serious harm test in relation to malicious publication actions. In addition, the Bill would define malice in a way which sets a very low threshold (at its lowest, indifference to the truth of a statement).

188. This led to speculation from some that actions for malicious publication could therefore become the preferred way for businesses to protect their interests. This would allow business to bypass the protections for freedom of expression contained in the defamation parts of the Bill.

189. Professor Blackie was one of those who highlighted this issue. His interpretation was that the Bill's definition of malice required knowledge that a statement was false or indifference to the truth, **or** motivation by malicious intention to cause loss. [81]

190. In his view, this removed the traditional requirement of "design to injure" from the definition of malice. He suggested that the Bill was, at the very least, amended to require knowledge of falseness **and** malice. [82]

191. In his written submission on behalf of Scottish PEN, Dr Tickell said that this body argued that there should be a serious harm principle "echoing all the way through litigation in the bill" and he would argue that additional forms of malicious publication should reflect the coherent logic of the Bill. [83]

192. This was a view shared by John McLellan who thought that the reference to financial damage in Part 2 of the Bill was helpful but that if it could be strengthened by a mention of serious harm then he would "welcome that". [84]

193. Mr Hamilton's evidence on this matter was very clear and to the point, favouring a removal of a serious harm test for either malicious publication or for defamation itself. [85] This was a pointed shared by the Law Society of Scotland. [86]

194. In his evidence, Gavin Sutter said that he would be "very comfortable" with the notion of a serious harm test being applied in this part of the Bill.

195. Mark Scodie of TripAdvisor UK agreed that there was a "potential loophole" in the drafting and that " if there are to be improvements—reforms that promote freedom of speech—on the defamation side, those will need to be echoed in the way that you have been exploring on the malicious publication side." [87]

196. The Minister for Community Safety said that, in her opinion, "the bill does not lower the threshold for malicious publication compared with defamation" but that it "recognises that they are different actions and that a different balance needs to be sought". [88] She noted that other tests will need to come into play for malicious publication. She also stated that she did "not necessarily accept the logic that the same threshold test should be used for two different actions." [89]

197. A Scottish Government official added that—

> The Government thinks that, with malicious publication, because the falsity test and the malice test are hurdles that must be overcome, it is not necessarily relevant to include the serious harm test. With defamation, on the other hand, falsity and malice are presumed, so those hurdles do not have to be overcome, with the result that the serious harm threshold is an option. [90]

198. On the separate but related issue of what defences applied to malicious publication, a Scottish Government official indicated that—

> The bill is structured in such a way that malicious publication is dealt with in part 2, but I am not sure that it is obvious how the defences would apply. The Law Commission makes clear—in its discussion paper, I think— which defences would apply to malicious publication. We did not necessarily want to codify that to the same extent in the bill as we did for defamation law. We do not go into clearing up which defences would apply to malicious publication, but the defences that we put in the bill, such as truth and honest opinion—we also touch on absolute privilege—would apply in a malicious publication action. [91]

199. On the potential for a mismatch in the application of defences for parts 1 and 2, the Minister said that she could "certainly commit to looking at that carefully if an amendment is lodged on the issue". [92]

Conclusions

200. The Committee is of the view that whilst the reforms to malicious publication are welcome, the specific proposals may not have been given the attention they deserved. The Committee wishes to see the Scottish Government give consideration as to how this part of the Bill can be improved to 'tidy up' the relationship between defamation and malicious publication. Overall, the Committee welcomes the provisions in the Bill on malicious publication and believes that these represent a useful reform of the law.

201. One area where some 'tidying up' is required is that of the reference to malice. The Committee recommends that the definition of malice is amended to require falseness **and** malice.

202. Furthermore, the Committee believes that the defences that apply to malicious publication need to be clearer in the legislation itself. There also needs to be clarity on whether secondary publishers are immune or not from actions taken under this part of the Bill.

Sections 24 to 26: General provisions and Section 27: Abolition of common law verbal injuries

203. These sections of the Bill make a number of general provisions relating to verbal injury, namely-

- that a pursuer does not need to show actual financial loss if the statement complained of is more likely than not to cause financial loss;
- to clarify the law in relation to statements that convey two or more meanings; and
- set out how distress and anxiety can be taken into account in any determination by a court of damages.

204. The Committee did not receive a significant amount of evidence on these particular sections of the Bill.

Part 3: General

Sections 28 - 31: Remedies

205. These sections introduce a wider range of remedies to better protect the reputation of an individual who has been defamed or the subject of a malicious publication. The Bill provides that the court has the power to-

- order the defender to publish a summary of its judgment;
- allow a settlement statement to be read out in open court; and,
- order the operator of a website to remove a defamatory statement, and an author, editor or publisher of such a statement to stop distributing, selling or exhibiting material containing it.

206. Section 30 of the Bill specifically would create a new power for courts to order the removal of defamatory material. This was considered helpful as the defender may not be in control of distribution. It was mainly considered in relation to the removal of material online. However, it could equally apply to, for example, shops selling a book.

Remedies/new remedies

207. Some of the media respondents to the call for views were very concerned that this power was not limited to being used once a final decision in relation to a case had been issued. The Explanatory Notes specifically state that it could be used as an interim measure during court proceedings. This was seen as disproportionate when the issues had not yet been adjudicated on.

208. Several respondents suggested placing a disclaimer on online content was a better alternative. The Society of Authors, for example, noted that section 30 could be

used to require books to be pulped, with significant financial consequences, when action for defamation might ultimately be unsuccessful. [93]

209. Dr Tickell said that Scottish PEN had "some anxieties about orders being made and people directed to remove material before a case is concluded or before any defamation has been established as a matter of law". He noted that service providers can take down material that they regard as problematic, irrespective of what the law of defamation happens to say. In his view, we "need to focus on whether it would be right that the court could order someone to take material down before any defamation had been established—material that might be perfectly true." [94]

210. Similarly, John McLellan said that when an organisation is mounting a robust defence, an order to remove something may impute liability. He was concerned that an interim order to remove content "could be seen to have an implication, especially if there was still jury involvement". [95] Luke McCullough agreed, noting, "Being instructed by a judge to remove content before the judge has had an opportunity to consider whether or not that content is defamatory almost prejudges the case that you are involved with." [96]

211. Mr Hamilton said that the Faculty of Advocates did not have specific concerns with section 30 but that an application to the court has to be made to take such material down and that, "in fact, arguably makes it more expensive and more onerous than having some form of either informal or regulated take-down procedure." [97]

212. Dr Scott was of the view that the " bare rule maybe does not allow for an appropriate balance between ECHR article 8 protection of reputation and article 10 freedom of speech" and that, "the desirable position is very much publish and be damned, at least in this context, where we are talking about truth rather than the invasion of privacy." [98]

213. Ally Tibbett of *The Ferret* said that his organisation "would not support any measure that would, in essence, be a pre-emptive rule." [99]

214. The Minister's view was that "the power of the court to order the operator of a website on which a defamatory statement has been posted to remove the statement—even if just as an interim measure—can be exercised only once court proceedings have commenced". In her view, the court will therefore have an opportunity to hear from both parties where possible. [100]

Conclusions

215. The Committee welcomes the range of views expressed to us. The Committee did give consideration as to whether additional protections should be put in place - such as that the court must seek the views all the parties and the host of the material (who may not be involved in the proceedings) - before making an interim order.

216. The Committee invites the Scottish Government to reflect on the strong evidence we have received that some change is needed.

217. In any case, the Committee welcomes the power set out in the Bill as helpful in clarifying the law in this area and being useful to deal with third parties such as website operators.

Sections 32: Limitation

218. Section 32 provides for some important limitations on actions. Firstly, it brings forward the date on which a right of action accrues in relation to defamation and conduct falling within Part 2 for a malicious publication.

219. Secondly, it reduces the period within which an action must be brought and, thirdly, restricts the limitation period applying to subsequent publications of the same or substantially the same material.

220. Consequently, the limitation period for the bringing of a defamation action and actions under Part 2 is reduced from three years to one year. The Scottish Law Commission's report argues that it is difficult to discern a legitimate reason why a pursuer who was aware of harm to their reputation resulting from a publication should delay in bringing action for redress. Closely tied to this is consideration that a person who has suffered harm to reputation such as to satisfy the serious harm threshold might reasonably be expected to become aware of that before a period of three years had expired, and most likely less than a year.

221. The Bill therefore makes provision that the cause of action will accrue on the date of original publication of a statement, with the limitation period of one year starting to run on that date.

222. Subsection (3) of section 32 introduces important provisions relating to a single publication rule. This imposes a restriction, in certain circumstances, on the bringing of actions in respect of subsequent publication of material that has been published previously. It is intended to address a potential risk of perpetual liability for defamation, owing in particular to the increasing prevalence of online publication.

223. As matters currently stand, each accessing of an article, image etc. by a new reader/viewer/listener would trigger a new cause of action and, therefore, a new limitation period. The effect of subsection (1A) is that, where material has been published to the public or a section of the public, any right of action based on subsequent publications of the same (or substantially the same) material by the same publisher is taken to have accrued on the date on which the statement was first seen or heard and understood by the public or a section of the public. The member of the public on whom the start of the limitation period is based must be a person other than the subject of the statement – in other words, a third party.

Views expressed to the Committee

224. Some of the witnesses who gave evidence to the Committee have argued that, in the digital era, it is inconceivable that someone would not be aware of material which damaged their reputation within a year.

225. However, others thought one year was too short. For example, the Law Society highlighted practical difficulties, for example, a defamatory statement in a job reference may be difficult to discover.

226. The issue of cumulative statements has also been highlighted in the evidence to the Committee. For example, someone may be pushed into action because of the overall effect of defamatory allegations over time. However, they will only have one year from the date of first publication to take action.

227. It should be noted that that publication of new material (eg. a different newspaper writing a story) will start the time limit again. However, circulation of the original story (eg. by retweeting) will not usually have that effect. If most damage was caused by the original material, someone may lose the right to take action about this if it takes more than one year from the date of publication of that statement to take action.

228. John McLellan of the Scottish Newspaper Society was quite clear on where his organisation stood, stating—

> That is an element of law that does not just go back to the analogue era; it goes back to the era of the pigeon. If you have not suffered any harm within a year in the digital era, it is unlikely that you have suffered any harm to your reputation. Three years is an opportunity for speculative litigation.
>
> In this day and age, unless you are Robinson Crusoe, it is highly unlikely that anything that has been said about you would not come to your attention within that period. A year is more than adequate and brings the law into line with the position in England and Wales. [101]

229. Whereas Mr Hamilton's views were equally clear in the other direction. He said—

> We are against a move from three years to one year; we see no reason for such a move and no particular justification for it is given. As does anyone in this field, I have experience of a range of cases that were not raised within a year. Many—perhaps most—cases are raised within a year, but many are not. An obvious example is a case in which an individual defames someone for years until eventually there is a straw that breaks the camel's back and the person decides to proceed. Are we really saying that if the defamation happens over a three-year period, previous incidents will not be matters in relation to which an action can be raised? There will be a range of reasons, given people's lives and circumstances, why things do not necessarily happen within a year. [102]

230. Mr Sutter indicated that he approved of the reduced time limit for bringing a defamation action because the speed of modern media cycles has rendered the old three-year period unnecessary.

231. The Minister for Community Safety said that—

> If someone suffers damage to their reputation, they usually become aware of it quite quickly. We are again back to the balancing act in relation to time and how long things should take. A one-year period strikes the right balance. It is enough time to assess the damage and prepare for litigation, or to engage in alternative dispute resolution, if appropriate in that case. [103]

She also noted the current discretion that the courts have to allow litigation to proceed outwith the one-year limitation period when it is equitable to do so.

232. In relation to the single publication rule, Channel 4 said that it was "in favour of a single publication rule, where the time limit runs against the defender from the date they first published the statement, having seen it operate successfully in England and Wales." [104]

233. The Guardian News and Media Ltd were also supportive of a single publication rule, stating that it "considers the provisions on the single publication rule to be welcome as tying the date of accrual to the date of first publication achieves the right balance between Article 8 and Article 10 rights." [105]

Conclusions

234. The Committee recognises the concerns expressed to us by some witnesses that the changes to the time limit for bringing defamation action may operate unfairly in some circumstances – in particular, where it takes time to find out that a defamatory statement has been made and where the effects of a defamatory statement are cumulative. The Committee notes, however, the evidence from the Minister that the courts have discretion to allow cases outwith the time limit to proceed.

235. On balance, whilst welcoming the provisions in the Bill and notwithstanding the discretion available to the courts, the Committee recommends the Scottish Government reviews the evidence we have taken and reports back to the Committee before Stage 2 with a view to making amendments to allay the legitimate concerns we heard about the important rights of individuals to pursue a case even after one year.

Section 33: Mediation

236. Section 33 provides for an interruption in the limitation period to allow for the parties to pursue a process of mediation, and also provides for a fairly broad definition of mediation to encompass similar forms of alternative dispute resolution, conciliation and the involvement of an Ombudsman.

237. The Committee did not receive a significant amount of evidence on this particular section of the Bill.

Section 34: Information society services

238. Information society services are providers of economic services which take place online, such as the sale of goods by companies such as eBay, or the providers of payment facilities, like PayPal. They are defined as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

239. The Bill contains provisions allowing the Scottish Ministers to make regulations on how providers of "information society services" are to be treated both in respect of proceedings for defamation and for malicious publication. This will allow for the implementation of obligations under the E-Commerce Directive (2000/31/EC) requiring the providers of information society services to be exempt from liability, in certain circumstances, in respect of conduit, caching, and hosting services, provided the service is of a mere technical, automatic and passive nature.

240. As stated in paragraph 176 above, it is not clear what impact Brexit will have here and whether this section is covered by the Electronic Commerce (Amendment etc.) (EU Exit) Regulations 2019.

241. The Committee did not receive a significant amount of evidence on this particular section of the Bill.

Sections 35-40: Miscellaneous

242. These sections contain various miscellaneous provisions relating to consequential modifications, interpretation, commencement and the short title of the Bill.

243. The sections on interpretation, regulations, commencement and the short title come into force automatically on the day after the Bill receives Royal Assent. The other substantive provisions will come into force in accordance with regulations made by the Scottish Ministers.

244. The Committee did not receive a significant amount of evidence on these particular sections of the Bill.

Wider issues

Access to justice

245. A number of witnesses and respondents raised a wider set of issues regarding the ease of accessing justice in the area of defamation. For example, Mr Sutter described the biggest barrier to exercising rights in this area as "the cost of entry". Essentially, taking defamation court action is beyond the means of most people.

246. Some witnesses described the increased role of freelance journalists, as well as the work of activists and campaigners, noting that these people will usually not have a legal team they can consult if threatened with defamation.

247. One option highlighted to the Committee to improve this situation is for there to be a central resource setting out the law on defamation in an accessible way. This could be provided or funded by the Scottish Government.

248. It should be noted that people on low to moderate incomes can usually access legal aid to enforce or defend their legal rights. However, legal aid for defamation cases is quite limited. Essentially, it is only available where:

- there is a wider public interest in the case (ie. it will provide benefit to people beyond the applicant), and/or
- the applicant would be unable to take court action effectively without legal aid.

249. The Committee received various suggestions to improve the accessibility of the law in this area. As noted above, Dr Scott has suggested the introduction of an accessible court procedure to facilitate requests to take down contentious material.

250. He has also suggested a tribunal-type forum to decide on the meaning of allegedly defamatory words. This is a slow, complex and expensive process at the moment. Yet it is key to deciding what options the parties have. Dealing with this issue quickly would allow the parties to move to a swift settlement of their issues in many cases.

Court action to protect against unjustified threats

251. A number of media respondents noted that threats of legal action were a key component to the chilling effect of defamation law. They backed calls by Scottish PEN for a new court action to protect against unjustified threats.

252. Scottish PEN's proposal builds on a similar court action that exists in relation to intellectual property rights. It would allow someone to raise an action for unjustified threat if they received a letter threatening legal action. It could also be used as a counter-claim during court action.

253. Most witnesses have expressed concerns about how this would operate in practice. For example, Dr Lindsay noted that the intellectual property rights action the

proposal was based on related to registered rights that could be verified. In his view, defamation claims did not have the same degree of certainty.

254. Dr Scott also highlighted the existence of anti-SLAPP (strategic lawsuit against public participation) measures in some jurisdictions. These were designed to tackle powerful bodies or people who used their resources and the legal system strategically to silence critics. These people take legal action, not because of legitimate disputes, but to draw time and money away from the cause of their critics.

255. Some North American jurisdictions have enacted laws which allow campaigners to take action against people or bodies because they are using the law to block public participation. These generally operate by allowing the defendant to argue before the court that their right to freedom of expression is being affected. If the court agrees, it can require the plaintiff to show that their case is more likely than not to succeed before they can proceed with court action.

Conclusions

256. The Committee has long been a strong supporter of any efforts to improve access to justice. The Committee's recent inquiry report on alternative dispute resolution is just one such example.

257. During our evidence taking, the Committee received a helpful series of views on how access to justice in the area of defamation and more widely in the civil courts can be improved. Regrettably, this particular Bill - focused as it is on defamation and malicious publication - is not the place for wide-ranging reforms to civil justice.

258. Nevertheless, the Committee does not wish these important suggestions to be ignored. Whilst ensuring that the provisions in this Bill, if passed into law, are not unduly delayed, the Committee recommends that the Scottish Government gives consideration to a series of improvements that can be made and reports to the Committee.

259. These include looking at the provision of legal aid in this area and whether some form of pre-action protocol can be put in place. We also recommend that an accessible guide to the law in this area is produced.

260. Finally, the Committee has some sympathy with the view that specific court processes for defamation be introduced (e.g. a removal procedure as discussed above, and/or a specific hearing to look at the meaning of defamatory words).

261. In relation to the proposals raised by Scottish PEN - whereby someone can raise an action for unjustified threat if they received a letter threatening legal action - the Committee also has some sympathy with the intentions, but also has some concerns.

262. The Committee does not underestimate the anxiety that can be caused to some upon receipt of a letter from a lawyer alleging defamation and requesting redress.

However, the Committee would not want to see a process put in place which might unintentionally prevent or discourage the legitimate right of an individual to instruct a lawyer and correspond with a defender.

263. The Committee notes that the Law Society has practice rules in place regarding solicitors' behaviour which should prevent unjustified threats being made or suggestions of legal action where there is no intent at all behind these. The Committee will bring the evidence we have taken to the attention of the Law Society of Scotland and would welcome a discussion with this body and others in this, or the next, session of Parliament on this issue. We also recommend that the Scottish Government write to the Scottish Civil Justice Council on this matter in order to proceed.

Financial and Policy Memoranda

264. The Financial and Policy Memoranda which accompany the Bill sets out indicative costs and savings the Scottish Government estimates will be delivered by the policy set out in the Bill

265. The Financial Memorandum summaries the potential costs and savings of the Bill based on a number of assumptions identified in the Memorandum. The Memorandum stated that these costs and saving are indicative.

SUMMARY OF COSTS AND SAVINGS

Annual costs and savings for the Scottish Administration	
SCTS costs through judicial training	£913.66 per day
Minus SCTS savings (based on a case disposed at an earlier debate stage in proceedings and that would have required a 1-day proof lasting 5 hours in the Sheriff Court)	£1,190 per case
Total	(£913.66 if delivered as a one day training session) [106] *Minus* (annual number of notional cases in Scottish Courts as described above multiplied by £1,190) = Estimated to be cost neutral
Annual costs and savings for solicitors' firms and clients	
Training costs (assuming one 3- hour course delivered by an external agency)	£255 per person
Litigation savings for firm/client (based on a case disposed at an earlier debate stage of proceedings)	£18,000 per case
Total	(£255 multiplied by annual number of persons receiving training) *Minus* (annual number of notional cases as described above brought by firm multiplied by £18,000) = Estimated to be cost neutral

266. In his evidence to the Finance and Constitution Committee, Mr Gavin Sutter said that "the process provided for in Section 4 (“Power to specify persons to be treated as publishers”) will incur some level of cost in the production of necessary regulations on which a ministerial decision is to be made." [107]

267. The Committee has no particular concerns it wishes to bring to the attention of the Parliament in relation to the Financial or Policy Memoranda produced for this Bill.

Delegated Powers Memorandum

268. The Delegated Powers and Law Reform Committee (DPLR Committee) considered the delegated powers in the Bill at its meeting on 4 February 2020.

269. The DPLR Committee considered each of the delegated powers in the Bill and published its the report on its consideration on 4 February 2020. [108] **It determined that it did not need to draw the attention of the Committee or the Parliament to the delegated powers set out in the Bill.**

Summary of conclusions and recommendations

270. The conclusions and recommendations of the Committee's Stage 1 consideration of the Bill are summarised below, for information. Conclusions are set out in plain text, recommendations appear in boxes. The conclusions and recommendations should be read in the context of where they are set out in the main body of the report.

Part 1: Defamation

Striking the balance between freedom of expression and the protection of reputation, and the chilling effect

[Paragraph 72] The Committee recognises the strength of feeling behind the views expressed both to support freedom of expression and in relation to the importance of protecting individual reputations. We agree with the Scottish Government's view that the Bill represents a "package" of measures creating an overall balance.

[Paragraph 73] Consequently, the Committee has no single over-arching recommendation to alter fundamentally the overall balance of the Bill. The Committee addresses each of the main provisions in turn when concluding and recommending any changes in the sections that follow.

Definitions

[Paragraph 85] While the Committee invites the Scottish Government to consider the evidence we have received and review whether any final adjustments are required to the current drafting, the Committee welcomes the inclusion of a statutory definition of defamation in the Bill. We recommend that the Minister sets out her views on this in advance of the Stage 1 debate on the Bill.

[Paragraph 86] More generally, we recommend that the Scottish Government considers how it will best ensure that the statutory definition used in the Bill can evolve over time as our courts make relevant judgments and the common-law evolves. This includes consideration of an amendment to Section 1 which explicitly states that the courts can refer to previous case law.

[Paragraph 87] This issue of the Bill needing to ensure that its provisions can evolve as case law is made in our courts is one that should apply to other provisions, not just the definition of defamation. The Committee wishes to ensure that courts retain the power to develop the law of defamation as the need arises.

Serious harm threshold

[Paragraph 103] The inclusion of a serious harm test was one of the main provisions where the evidence was split between those that welcomed this and those that saw this as a step too far in limiting a pursuer's rights to protect reputation.

[Paragraph 104] For some, the serious harm test is a necessary threshold which will ensure that only relevant cases where serious harm may have been done to someone's reputation go ahead and frivolous or vexatious cases are discouraged. In the view of some of our witnesses, the serious harm threshold would give people who were subject to threats and menaces of defamation action greater security.

[Paragraph 105] The Committee also heard evidence to the contrary that this level of threshold is tilting the balance too far away from the rights of an individual to protect their reputation and that by introducing that extra barrier, you would be putting a hurdle in the way of a litigant who may well have a perfectly good right of action.

[Paragraph 106] We recognise that there are merits in both of these views. On balance, at this stage, and in light of the overall set of provisions set out in this Bill, we favour retention of the serious harm test in the Bill. In our view, the Bill comes as a package which creates an appropriate overall balance between freedom of expression and protection of reputation.

[Paragraph 107] In advance of the Stage 1 debate, we recommend 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.

Derbyshire principle

[Paragraph 125] This is an area where the Committee has heard overwhelming evidence that section 3 of the Bill will not do what the Minister claimed, that is put the Derbyshire principle on a statutory footing and provide clarity. The weight of evidence we received from legal witnesses was that the Bill as drafted goes further than the current law by including private bodies and charities, and not just directly-elected bodies and their agencies. Other witnesses noted that, by exempting some bodies which deliver public services, those who criticised outsourced services may still be exposed to defamation action.

[Paragraph 126] In that respect, we welcome the Minister's commitment that she was happy to look at the Committee’s recommendations in relation to this part of the Bill. The Committee is strongly of the view that this is an area where there is a need for greater clarity in the Bill.

[Paragraph 127] The Committee believes that the Derbyshire principle was designed to ensure that directly-elected members, bodies and their agencies cannot sue for defamation in relation to their public activities. The Committee supports this principle. The Committee therefore recommends that the section is redrafted so that the Scottish Government’s intention is clearer and that clarity is provided as to which bodies are covered as well providing examples of those which are exempt.

[Paragraph 128] The Committee also notes the evidence received where some would like the provision to cover private bodies that are under contract to provide public services.

Examples from the justice sector include the management of certain prisons and the provision of electronic monitoring services (better known as tags) for offender management which are both delivered by private companies.

[Paragraph 129] If that is the intent or direction of travel, then it is important that the Scottish Government redrafts this section so that any body delivering a public service (defined as a body delivering a service under the delegated authority of a public body) is covered in relation to their actions in delivering the public service.

[Paragraph 130] This is another of the provisions in the Bill where it will be important that developments in the common-law can be incorporated in the future as the Committee is well aware that the means by which public services are now delivered has changed significantly in recent decades.

Secondary publishers

[Paragraph 144] The weight of evidence received by the Committee favoured the exemption of secondary publishers from liability for defamation.

[Paragraph 145] The Committee therefore welcomes the exclusion of secondary publishers from liability but recommends that the Scottish Government considers how the process can be improved when a person wishes to request the removal of material. The Committee recommends the Scottish Government provide its written views on this before the Stage 1 debate on the Bill.

Sections 5 to 8: Defences

[Paragraph 159] The evidence to the Committee in this area has been that the codification of the defences in the Bill is to be welcomed. However, some stakeholders, particular from the media, have had concerns about specific wording.

[Paragraph 160] The Committee welcomes the codification of defences in the Bill and recommends that the Scottish Government give consideration to the evidence the Committee heard on the specific wording used.

[Paragraph 161] The Committee further recommends that the Bill is amended to make the ability of the courts to refer to previous case law in this area explicit.

Sections 13 to 18: Offer to make amends

[Paragraph 173] The Committee recommends that the Scottish Government reflects on the evidence the Committee has received and make it clear whether courts can take into account the offer to make amends and apply an appropriate discount.

Part 2: Malicious Publication

[Paragraph 200] The Committee is of the view that whilst the reforms to malicious publication are welcome, the specific proposals may not have been given the attention they deserved. The Committee wishes to see the Scottish Government give consideration as to how this part of the Bill can be improved to 'tidy up' the relationship between defamation and malicious publication. Overall, the Committee welcomes the provisions in the Bill on malicious publication and believes that these represent a useful reform of the law.

[Paragraph 201] One area where some 'tidying up' is required is that of the reference to malice. The Committee recommends that the definition of malice is amended to require falseness **and** malice.

[Paragraph 202] Furthermore, the Committee believes that the defences that apply to malicious publication need to be clearer in the legislation itself. There also needs to be clarity on whether secondary publishers are immune or not from actions taken under this part of the Bill.

Part 3: General: Remedies

[Paragraph 215] The Committee welcomes the range of views expressed to us. The Committee did give consideration as to whether additional protections should be put in place - such as that the court must seek the views all the parties and the host of the material (who may not be involved in the proceedings) - before making an interim order.

[Paragraph 216] The Committee invites the Scottish Government to reflect on the strong evidence we have received that some change is needed.

[Paragraph 217] In any case, the Committee welcomes the power set out in the Bill as helpful in clarifying the law in this area and being useful to deal with third parties such as website operators.

Views expressed to the Committee

[Paragraph 234] The Committee recognises the concerns expressed to us by some witnesses that the changes to the time limit for bringing defamation action may operate unfairly in some circumstances – in particular, where it takes time to find out that a defamatory statement has been made and where the effects of a defamatory statement are cumulative. The Committee notes, however, the evidence from the Minister that the courts have discretion to allow cases outwith the time limit to proceed.

[Paragraph 235] On balance, whilst welcoming the provisions in the Bill and notwithstanding the discretion available to the courts, the Committee recommends the Scottish Government reviews the evidence we have taken and reports back to the Committee before stage 2 with a view to making amendments to allay the legitimate

concerns we heard about the important rights of individuals to pursue a case even after one year.

Wider issues

Access to justice and Court action to protect against unjustified threats

[Paragraph 256] The Committee has long been a strong supporter of any efforts to improve access to justice. The Committee's recent inquiry report on alternative dispute resolution is just one such example.

[Paragraph 257] During our evidence taking, the Committee received a helpful series of views on how access to justice in the area of defamation and more widely in the civil courts can be improved. Regrettably, this particular Bill - focused as it is on defamation and malicious publication - is not the place for wide-ranging reforms to civil justice.

[Paragraph 258] Nevertheless, the Committee does not wish these important suggestions to be ignored. Whilst ensuring that the provisions in this Bill, if passed into law, are not unduly delayed, the Committee recommends that the Scottish Government gives consideration to a series of improvements that can be made and reports to the Committee.

[Paragraph 259] These include looking at the provision of legal aid in this area and whether some form of pre-action protocol can be put in place. We also recommend that an accessible guide to the law in this area is produced.

[Paragraph 260] Finally, the Committee has some sympathy with the view that specific court processes for defamation be introduced (e.g. a removal procedure as discussed above, and/or a specific hearing to look at the meaning of defamatory words).

[Paragraph 261] In relation to the proposals raised by Scottish PEN - whereby someone can raise an action for unjustified threat if they received a letter threatening legal action - the Committee also has some sympathy with the intentions, but also has some concerns.

[Paragraph 262] The Committee does not underestimate the anxiety that can be caused to some upon receipt of a letter from a lawyer alleging defamation and requesting redress. However, the Committee would not want to see a process put in place which might unintentionally prevent or discourage the legitimate right of an individual to instruct a lawyer and correspond with a defender.

[Paragraph 263] The Committee notes that the Law Society has practice rules in place regarding solicitors' behaviour which should prevent unjustified threats being made or suggestions of legal action where there is no intent at all behind these. The Committee will bring the evidence we have taken to the attention of the Law Society of Scotland and would welcome a discussion with this body and others in this, or the next, session of Parliament on this issue. We also recommend that the Scottish Government write to the Scottish Civil Justice Council on this matter in order to proceed.

Financial and Policy Memoranda

[Paragraph 267] The Committee has no particular concerns it wishes to bring to the attention of the Parliament in relation to the Financial or Policy Memoranda produced for this Bill.

Delegated Powers Memorandum

[Paragraph 269] The DPLR Committee considered each of the delegated powers in the Bill and published its the report on its consideration on 4 February 2020. **It determined that it did not need to draw the attention of the Committee or the Parliament to the delegated powers set out in the Bill.**

Recommendation on the general principles of the Bill

271. The Justice Committee recommends to the Parliament that the general principles of the Defamation and Malicious Publication (Scotland) Bill be approved.

Annex A

Written and Oral evidence links

The Committee took oral evidence at the following committee meetings:

- 17 March 2020
- 25 August 2020
- 1 September 2020
- 8 September 2020
- 15 September 2020
- 22 September 2020

Written submissions of evidence were received from:

- Anonymous 2
- Anonymous 3
- Association of Illustrators
- BBC Scotland
- Bogle, Dr Stephen and Lindsay, Dr Bobby
- Channel 4
- Deane, Campbell S
- Faculty of Advocates
- Geoghegan, Peter
- Global Witness
- Graham Morgan
- Guardian News and Media Ltd
- Law Society of Scotland
- National Union of Journalists
- News Media Association
- Open Rights Group
- PA Media

- PEN International
- Reid, Elspeth and Blackie, John
- Scott, Dr Andrew
- Scottish Newspaper Society
- Scottish PEN (two submissions)
- Senators of the College of Justice
- Society of Authors
- Summary Sheriffs Association
- Sutter, Gavin
- Society of Editors

The Committee also received a number of submissions to the call for views, the text of which was identical. The text of these submissions is available here . These submissions were made by:

- Anonymous 1
- Bain, Finn
- Bleau, Renée
- Miller
- Caruana, Gerard
- Clarke, A C
- Delahunt, Meaghan
- Eldridge, Dr Lizzie
- English PEN
- Graham, Fiona
- Hendry, Joy
- Loose, Gerry

Annex B

Note of informal discussion

Introduction

On Friday 11 September 2020, Members of the Committee undertook a virtual informal discussion with Andy Wightman MSP and Kezia Dugdale. Both participants have recently been the subject of defamation action taken against them.

The purpose of the exercise was not to consider the specific details or merits of any particular defamation case. Rather, it was an opportunity for the Committee to gain a perspective of some of the personal implications for an individual in being involved in court action for defamation. For example, engaging with the legal process, the timescales and level of engagement required, and any personal observations on how the proposals set out in the Bill may impact on defending a defamation action.

Issues emerging

This note set out the key issues to emerge from this discussion.

<u>Engaging with the defamation process</u>

- The legal costs involved in defending a defamation action can be very considerable, even if someone is successful.

- A defamation action can take several years resolve, starting from the time the defender received the first notification of an action (or possible action) against them, up to any final ruling by a court (including a resolution of costs in a case).

- Depending on circumstances, pre-court legal costs for a defender can come to a mid-five figure sum (£50,000+), without actually getting in to court. Once in court, legal expenses can be a mid-five figure sum (£80,000+). Total costs can amount to as much as £250,000+. These costs can exceed the value of the assets of most ordinary people, including the value of someone's family home. As a result, someone could become bankrupt with very serious consequence for their personal and professional life. The Parliament should consider whether some personal assets – such as a family home – should be protected in these circumstances.

- Being involved in defending a defamation action can be quite an isolating and lonely process. It can cause a good deal of anxiety and stress and can have a significant impact on an individual's personal wellbeing. This is especially true if the case takes a number of years to resolve, as the stress and anxiety become an ever-present factor of daily life.

<u>Accessibility of the Law</u>

- Defamation law, and the processes around it, can be very inaccessible, especially for lay people with little or no experience of the law. There is no easily understandable information out there about defamation law – which should be addressed. Any clarity the Bill can bring to the overall process would also be welcome.

- Defamation is a specialised area of the law with only a small number of legal practitioners in Scotland actively engaged in it. So, there is only a small pool of legal expertise to draw on.

Balance between freedom of expression and right to privacy/reputation

- People have to be able to defend their name/reputation if they feel they've been defamed. So, we need to think carefully about putting up too many barriers to allow someone to seek legal redress by taking an action.

- Apart from bringing clarity in certain areas, it's questionable as how far the law can go in addressing the “chilling effect” of defamation on freedom of speech/press freedom. Pursuers with deep pockets can take a case regardless of legal barriers. This is especially true if their intention is to intimidate their critics, rather than to win their case.

- The experience of defending against a defamation case would not necessarily prevent someone for commenting in public on possible controversial issues, especially if they are a public figure. But the Committee has already heard formal evidence that large well-resourced media organisations pull stories on the basis of threats of legal action, or if owners become concerned at the legal costs of assessing stories.

Serious Harm Test and 1 Year time limit

- A Serious Harm Test can be helpful in terms of defending against an action, and it may shorten the time it taken for an action to be resolved. This might have a benefit to those defending am action in terms of the financial and personal impacts.

- However, it would depend on the specific circumstances of the action. There may also be a risk in introducing a barrier to someone seeking redress for defamation.

- It would still be for a court to have to rule on whether a threshold of serious harm has been reached. So substantial time and legal costs could be incurred by someone defending an action, even if the proposed test were enacted.

- The Serious Harm Test in the Bill may not, in practice, meaningfully address all of the intended consequences the Scottish Government may hope.

- A time limit of 1 year would be helpful in terms of defending a defamation action. It would reduce the time the threat of legal action could hang over someone’s life. However, such a limit would not shorten the process in terms of how long an action, once it has been raised in court, may take to conclude.

Alternative/Informal Dispute Resolution (ARD/IDR)

- ADR is a desirable process if both parties are willing to engage to find a solution. But it is difficult to ensure informal dispute resolution is effective. Many civil law cases, such as defamation, will invariably result in some form of court action with all of the time, expense and personal consequences that involved.

- Some process which would help decide what aspects (if any) of an action are potentially valid, and what are without merit, would help.

- Such dispute resolution systems would also be ineffective if the litigant's intention is to pursue the defender irrespective of what offer to make amends are made.

- The level of damages sought in a defamation action should also be considered. If the pursuer of an action is seeking a sum in the thousands, or tens of thousands, there may be grounds to reach a pre-court settlement. If a pursuer is seeking hundreds of thousands of pounds or greater in damages, then there is very little chance a defender could reach a settlement in advance of court action.

Protect against unjustified threats/Anti-SLAPP provisions

- Courts should have an ability to assess the merits or motives of a defamation action being brought against an individual. This would allow a court to assess whether the action was for genuine reason of redress under the law. Or whether, in the view of the court, the action was brought against a specific individual for vexatious or malicious reasons in order to single them out or target them.

- Defamation actions (or the threat of such actions) should not be used as a strategic tool to stifle or prevent legitimate democratic debate, or exposition of facts or issues in the public interest, whether by the media or by elected representatives.

- Clearer powers for the courts to dismiss weak or vexatious cases at an early stage would also offer some protection. The seemingly stronger "strike-out" powers of the English courts were noted.

- The Committee and the Parliament needs to consider the question of absolute and qualified privilege for elected Members of the Scottish Parliament in contrast to elected Members of the House of Commons.

Other issues

- The impact of the social media age, where phenomena like crowd-funding exist, have major implications for defamation, both for pursuers and defenders of an action.

- Also, social media and blogging etc. now means many more people are publishing material in the public domain, and potentially liable for defamation/or to be defamed.

- Imbalances in the costs of access to civil justice need to be consider more widely in the context of changes to defamation law, and the impact of the digital/social media age. The Parliament should consider in future whether legal aid should be available to some extent to pursuers/defenders in a defamation action.

1 Justice Committee call for written evidence (17 January 2020): https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/114208.aspx

2 Written submissions received by the Committee (10 March 2020): https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/114868.aspx

3 Justice Committee Official Report 11th Meeting 2020, Tuesday 17 March 2020 : http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12586

4 Scottish Parliament Minutes of Proceedings, 14 May 2020 (Item 8): https://www.parliament.scot/S5_BusinessTeam/Chamber_Minutes_20200520.pdf

5 Scottish Law Commission, Report on Defamation (2017): https://www.scotlawcom.gov.uk/files/7315/1316/5353/Report_on_Defamation_Report_No_248.pdf

6 Justice Committee Official Report 3rd Meeting 2018, Tuesday 23 January 2018: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11324

7 Justice Committee Official Report 18th Meeting 2018, Tuesday 12 June 2018 : http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11599

8 Scottish Government consultation on defamation (2019): https://consult.gov.scot/justice/defamation-in-scots-law/

9 Scottish Government consultation written submissions: https://consult.gov.scot/justice/defamation-in-scots-law/consultation/published_select_respondent

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11 Justice Committee Official Report 20th Meeting 2020, Tuesday 8 September 2020, Col 6: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12803

12 Justice Committee Official Report 19th Meeting 2020, Tuesday 1 September 2020, Col 8: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12783

13 Justice Committee Official Report 19th Meeting 2020, Tuesday 1 September 2020, Col 8: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12783

14 Channel 4, written submission

15 National Union of Journalists, written submission

16 Justice Committee Official Report 18th Meeting 2020, Tuesday 25 August 2020, Col 2: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12768&mode=pdf

17 Justice Committee Official Report 18th Meeting 2020, Tuesday 25 August 2020, Col 25: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12768&mode=pdf

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19 Justice Committee Official Report 18th Meeting 2020, Tuesday 25 August 2020, Col 6: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12768

20 Justice Committee Official Report 21st Meeting 2020, Tuesday 15 September 2020, Col 4: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12822

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22 [1936] 2 All ER 1237.

23 Justice Committee Official Report 19th Meeting 2020, Tuesday 1 September 2020, Col 10: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12783

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26 Justice Committee Official Report 18th Meeting 2020, Tuesday 25 August 2020, Col 27: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12768

27 Justice Committee Official Report 18th Meeting 2020, Tuesday 25 August 2020, Col 29: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12768

28 Senators of the College of Justice, written submission

29 Justice Committee Official Report 22nd Meeting 2020, Tuesday 22 September 2020, Col 3: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12844

30 Justice Committee Official Report 22nd Meeting 2020, Tuesday 22 September 2020, Col 4: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12844

31 A non-natural person is a legal term for a body with a legal personality district from the people who are part of it. Examples include companies and corporate body such as local authorities. Such bodies can take legal action in their own name, rather than in the name of one of the people involved in running them.

32 SPICe Bill briefing, page 21: https://sp-bpr-en-prod-cdnep.azureedge.net/published/2020/3/11/Defamation-and-Malicious-Publication--Scotland--Bill/SB%2020-22.pdf

33 [2019] UKSC 27

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35 Justice Committee Official Report 19th Meeting 2020, Tuesday 1 September 2020, Col 14: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12783

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37 Justice Committee Official Report 18th Meeting 2020, Tuesday 25 August 2020 Col 9: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12768

38 Justice Committee Official Report 18th Meeting 2020, Tuesday 25 August 2020 Col 9: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12768

39 Peter Geoghegan, written submission

40 Society of Authors, written submission

41 Justice Committee Official Report 21st Meeting 2020, Tuesday 15 September 2020, Col 5: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12822

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47 Loveland: Constitutional Law, Administrative Law and Human Rights 8e: Online Casebook. *Oxford University Press*: https://oup-arc.com/static/5c0e79ef50eddf00160f35ad/casebook_195.htm

48 SPICe Bill briefing, page 21: https://sp-bpr-en-prod-cdnep.azureedge.net/published/2020/3/11/Defamation-and-Malicious-Publication--Scotland--Bill/SB%2020-22.pdf

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52 Justice Committee Official Report 21st Meeting 2020, Tuesday 15 September 2020, Col 14: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12822

53 Guardian News and Media Ltd, written submission

54 Guardian News and Media Ltd, written submission

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58 Justice Committee Official Report 19th Meeting 2020, Tuesday 1 September 2020, Col 36: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12783

59 Justice Committee Official Report 21st Meeting 2020, Tuesday 15 September 2020, col 13: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12822

60 Justice Committee Official Report 22nd Meeting 2020, Tuesday 22 September 2020 , Cols 10-11: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12844

61 Justice Committee Official Report 22nd Meeting 2020, Tuesday 22 September 2020, Col 12: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12844

62 Gavin Sutter, written submission

63 Justice Committee Official Report 19th Meeting 2020, Tuesday 1 September 2020 Col 19: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12783

64 Dr Andrew Scott, written submission

65 Justice Committee Official Report 18th Meeting 2020, Tuesday 25 August 2020 Cols 34-35: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12768

66 Justice Committee Official Report 22nd Meeting 2020, Tuesday 22 September 2020, Col 12: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12844

67 Justice Committee Official Report 18th Meeting 2020, Tuesday 25 August 2020, Col 36: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12768

68 Justice Committee Official Report 19th Meeting 2020, Tuesday 1 September 2020, Col 42: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12783

69 Scottish Newspaper Society, written submission

70 Scottish Newspaper Society, written submission

71 Society of Authors, written submission

72 Justice Committee Official Report 22nd Meeting 2020, Tuesday 22 September 2020, Col 13: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12844

73 Dr Lindsay and Dr Bogle, written submission

74 Professor Reid and Professor Blackie, written submission

75 Summary Sheriffs' Association, written submission

76 Summary Sheriffs' Association, written submission

77 Justice Committee Official Report 18th Meeting 2020, Tuesday 25 August 2020 Col 37: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12768

78 Justice Committee Official Report 18th Meeting 2020, Tuesday 25 August 2020 Col 37: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12768

79 Justice Committee Official Report 19th Meeting 2020, Tuesday 1 September 2020, Col 22: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12783

80 Channel 4, written submission

81 Justice Committee Official Report 21st Meeting 2020, Tuesday 15 September 2020, Col 18: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12822

82 Justice Committee Official Report 21st Meeting 2020, Tuesday 15 September 2020, Cols 18-19: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12822

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84 Justice Committee Official Report 18th Meeting 2020, Tuesday 25 August 2020, Col 38: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12768

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86 Justice Committee Official Report 19th Meeting 2020, Tuesday 1 September 2020, Col 23: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12783

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92 Justice Committee Official Report 22nd Meeting 2020, Tuesday 22 September 2020, Col 16: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12844

93 Society of Authors, written submission

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96 Justice Committee Official Report 18th Meeting 2020, Tuesday 25 August 2020, Col 39: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12768

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98 Justice Committee Official Report 20th Meeting 2020, Tuesday 8 September 2020, Cols 22-23: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12803

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101 Justice Committee Official Report 18th Meeting 2020, Tuesday 25 August 2020, Col 40: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12768

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103 Justice Committee Official Report 22nd Meeting 2020, Tuesday 22 September 2020, Col 18: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12844

104 Channel 4, written submission

105 Guardian News and Media Ltd, written submission

106 See the Judicial Institute for Scotland's Annual report for an example of how training is delivered to the judiciary (available at http://www.scotland-judiciary.org.uk/Upload/Documents/JudicialInstituteforScotlandAnnualReport20172018.pdf)

107 Mr Gavin Sutter, written evidence submitted to the Finance and Constitution Committee.

108 Delegated Powers and Law Reform Committee, 10th Report 2020 (Session 5) - Defamation and Malicious Publication (Scotland) Bill: Stage 1 (SP Paper 674); https://sp-bpr-en-prod-cdnep.azureedge.net/published/DPLR/2020/2/4/Defamation-and-Malicious-Publication--Scotland--Bill--Stage-1/DPLRS052020R10.pdf