Northern Ireland Assembly

Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

Defamation Act 2013: Libel Reform Campaign Briefing

3 July 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Daithí McKay (Chairperson)
Mr Dominic Bradley (Deputy Chairperson)
Mrs Judith Cochrane
Mr Leslie Cree
Mr Paul Girvan
Mr Peter Weir

Witnesses:

Ms Jo Glanville	English PEN
Mr Mike Harris	Index on Censorship
Ms Síle Lane	Index on Censorship
Dr Peter Wilmshurst	

The Chairperson: Representing the Libel Reform Campaign, I welcome Mr Mike Harris and Ms Síle Lane from Index on Censorship; and Ms Jo Glanville, director of English PEN. I also welcome Dr Peter Wilmshurst, a senior NHS cardiologist. Do you want to give us an overview of your position before we move to questions?

Mr Mike Harris (Index on Censorship): I will make just a few very brief introductory comments. First, I would like to thank the Chair and the Committee for the opportunity to give evidence today. Obviously, we were extremely concerned when Minister Sammy Wilson made the decision not to bring full papers to the Executive, and when the Executive did not make a clear decision on extending the Defamation Act 2013 to Northern Ireland, so we warmly welcome the opportunity to talk about the Libel Reform Campaign, how and why we started, and the importance of the Defamation Act. I will hand over to my colleague Jo.

Ms Jo Glanville (English PEN): Good morning. Thank you very much for inviting us to speak to you. I want to say a few words about the Libel Reform Campaign, which, as you may know, was formed three and a half years ago to campaign to reform defamation law in England, Wales and Northern Ireland. All the groups that belong to the campaign are charities. We do not have the vested interests that I think some witnesses have cited in giving evidence to you previously. Our chief concern is the wider public interest of protecting the right to freedom of expression.

In the three and a half years that we have been campaigning, we have won the support of a really remarkable cross-section of society, embracing bloggers, academics, consumer rights advocates, scientists, doctors and writers. It won cross-party support from Labour, the Lib Dems and the Conservatives. They all made a commitment to libel reform in their manifestos for the last general election, so it really was a rare consensus for reform and it really was a citizens' campaign. I think that

we were all united in the recognition that the archaic libel laws had a chilling effect on the free speech of everyone. That was partly because of the age of the internet, when everyone has the freedom to be a writer or a publisher and when what you write can be downloaded all over the world and read instantly. Our defamation laws were simply no longer fit for purpose in this extraordinary new world. The internet meant that what had been just a national embarrassment was now an international scandal that affected the free speech of everyone worldwide, not just in the United Kingdom.

As I am sure you are aware, the United Kingdom had been criticised by the United Nations Human Rights Committee for its chilling effect on critical media reporting on matters of public interest. You will also be aware that the United States passed legislation to protect its citizens from our courts. Our concern is that, if Northern Ireland fails to adopt the Act, it will be in danger of becoming a free speech time warp, where what is perpetuated is an antiquated, illiberal law that curtails the free speech of citizens not only in Northern Ireland but in England and Wales. It is possible that Northern Ireland could then become a magnet for any bully who wants to silence unwelcome criticism or dissent: speech that is in the public interest. That would be a serious blow to the liberalisation of our libel laws that has now taken place with the passing of the Defamation Act. It could also create quite significant legal uncertainty and could leave Northern Ireland open to legal challenges. It is also possible that it may breach the Executive's obligations under the Human Rights Act 1998.

I would like to finish by pointing out that the Defamation Act was subject to extensive scrutiny and public consultation. What worries us is that, in contrast, there appears to have been no debate or consultation in Northern Ireland on the decision by the Executive not to extend the Act, so we are doubly delighted to have the chance to talk to you today.

The Chairperson: Thank you very much. I also thank you for the paper that you have provided to the Committee. Many of us our still forming our views on this issue, but there are a number of case studies in your submission, and we have not previously been provided with any concrete examples, so that is very useful.

Obviously, there is another side to the argument. Paul Tweed was before the Committee last week. I would say that a lot of us are not so concerned about the oligarchs and their interests, but other examples. Reference was made to the case that Mr McAreavey took against the 'Irish Daily Mail'. There was also reference to the Louis Walsh case. Many would say that those people were entitled to take a case. Some say that, if the bar is raised, those cases would not be heard, and that would be an injustice. Will you comment on that?

Ms Glanville: I think that is looking at it the wrong way around. We are concerned about both sides. We recognise that people are defamed and that people need a right to defend their reputations. We do not want it to become more difficult for people to do that. We are very concerned, as the Government and everyone who scrutinised the Bill has been, that the balance is right. Our concern is that we stop trivial and vexatious claims. Raising the bar will hit those on the head, which means that there will be an end to the threatening letter that prevents an article from being published. We do not believe that raising the threshold will make it hard or impossible for cases that really are instances of defamation to get through. My colleagues might want to add to that.

Mr Harris: Just to be clear, there is already a hurdle in the law as it stands, unreformed, which comes from the Jameel case. That means that, for a defamation action to proceed, it has to be serious. We have called for that to be put in statute law. At the moment, the common law provides for that "serious" hurdle. We say that it should be put into statute. If you do that, it is easier for judges to strike out vexatious cases. Therefore, we are calling for judges to strike out those cases earlier so that we do not get claimants running up huge costs, which they then have to pay for when it is proven that the claim they have made is not serious or substantial in scope. That already exists in Northern Irish common law. We are calling for that to be put into statute so that judges strike out vexatious or trivial cases early on.

Ms Síle Lane (Index on Censorship): It becomes clear when you think about it in this way: someone or some company says, "You have defamed me; you have damaged my reputation. I need £90,000 to make up for that damage, and I will take you to court to get that". That means that you probably have to put your house on the line, without them ever having to show you how they know they were damaged. How can that be fair? Surely, if the claimant has already worked out that he has been damaged, it is no extra burden to ask him to simply demonstrate that to the court.

It is also really worth stressing that the law is not working right now for the man on the street who is trying to get redress. If you need to get a correction of a scurrilous newspaper allegation or to remove an innuendo from a website, it is really hard to do. The law is just as complicated and lawyers are just as expensive no matter what side of a case you are on. The law was designed on the basis that only gentlemen — the wealthy and the powerful — have a reputation that is worth defending, so it is really grand litigation, with knobs on, at the High Court. It works rather well to restrict access to those laws to the wealthy. Furthermore, as you probably know, defamation law has progressed through case law. Therefore, until the Defamation Act 2013, the law was not captured and written down in one place in statute. If you wanted to take a case, understand whether you had a case and where the law stood, you had to rely on a lawyer going back through perhaps decades of case law to try to figure out whether you had a case. The aim of the Defamation Act, and our aim in campaigning for it, was to get to a law that is clear, accessible, readable and, for the first time, collected in one place so that anyone, whether defending or wanting to take a case, can read it and understand their rights without having to shell out for dozens or hundreds of lawyers' hours. The Defamation Act really goes a long way towards that.

The Chairperson: Rather than just copying and pasting the Westminster legislation, is there anything further that, perhaps, we should consider adding to it? Obviously, there has been discussion of the defence that a matter is of public interest. You state that that defence would be defeated if the publication were malicious or reckless. Should something along those lines be included?

Mr Harris: The Defamation Bill was amended at the last minute to strengthen the public interest defence. Síle can speak more about that and the cases that led to the strengthening of that defence. Having a public interest defence clearly laid out so that you know whether what you are writing is in the public interest and whether you have a defence is incredibly important in cases such as that of Dr Peter Wilmshurst. It will be very useful to hear from him.

There is one other thing that I would say on the point of bringing the law into statute. If you are an internet company in Northern Ireland right now, you will find that the publication rule in Northern Ireland predates the light bulb — it is from 1843. The Defamation Act updates that to reflect the presence of the internet in 2013. If you do not update your law, you will have a publication rule that dates from 1843 and the Duke of Brunswick case. It is a matter of great urgency to get some of this into statute.

Peter, would you like to speak about the public interest defence and your case?

Dr Peter Wilmshurst: I was the principal cardiologist in a multi-centre research study in the UK, involving 15 cardiac and neurology centres. We were closing holes in the heart using a device made by an American company named NMT Medical. At the end of the study, I was concerned that the results were not being presented accurately or completely, and I said so at a meeting in Washington, DC. Some of what I said was published online by an American website and, as a result, I was sued. Although the 3,000-word article quoted only 78 words from me, the company sued me on the basis of the entire article. It did not sue the Canadian journalist or the American website. When the article was amended, the company sued me again. I went on the BBC Radio 4 'Today' programme to talk about libel laws, without mentioning the company. The interview was pre-recorded so that the BBC's lawyers could check that there would be no risk of litigation, but I was sued yet again because it is very easy to sue.

While that company was suing me, it was also publishing things about me that were, frankly, untrue. It said, for example, that I had been kicked out of the research trial for committing protocol violations. That was easily disproved because I wrote to the independent clinical research organisation, and asked it how many protocol violations I had committed. It sent back one sentence to say that I had not committed any. I took that to the lawyers and I asked whether we should sue, because what the company was saying was clearly defamatory. The lawyers asked, "Do you have another £1 million? Your house is already on the line. You are going to be bankrupt even if you win."

We did not sue them. NMT Medical is an American company, and the US has passed laws to protect its citizens from UK laws, so the lawyers told me that, even if I won and got a costs order, I would be unable to enforce the order in America and I would not get a penny.

My case went on from 2007 to 2011. During that time, the company instructed its lawyers to bring litigation or defamation claims against two other parties in the UK. It threatened another UK doctor who worked for a regulator and the Department of Health for speaking about concerns. As a result,

there was such a chilling effect that many other doctors who had concerns would not speak about the problems with the device. That went on for four years until the company went bankrupt. My costs were £300,000.

At that point, people were realising the problems with the device but, because of the ongoing litigation, patients were continuing to have that company's devices implanted in their hearts. People have died. People in the UK have had to have the devices surgically removed from their hearts. The defamation laws did not protect me from that company because I did not have enough money to counter-sue them; and they did not protect others who were chilled because they knew that I was being sued. Fortunately, when we realised that the firm was going bankrupt, we managed to get it to pay £200,000 security into court, so my costs were partly met.

There is a chilling effect on anyone who wants to blow the whistle on serious misconduct. That is the problem. I am not part of any organisation. I am here only because I consider it very important that the law be changed. It may interest you to know that I have written articles lately. The 'BMJ' in the past month has been threatened with litigation on two occasions because of two articles that I wrote on concerns about people in the medical profession who were getting away with serious misconduct. The 'BMJ' has seen the evidence and the articles were scrutinised by lawyers in advance, but it is now defending two threats of litigation.

Mr Harris: Can I just bring in the whole notion of public interest? It is really important. As the common law stands in Northern Ireland, unreformed, the only way in which claimants can get access to a public interest defence is by relying on the Reynolds defence, which is framed around responsible journalism. Therefore, you have a defence, but it was devised for journalists. If you are a doctor, an academic or anyone doing serious research, the defence that you have if you are sued for defamation has been devised for journalists and it is a 12-step test. It is not well designed for the type of public interest reporting that has just been described.

Ms Lane: It is called defence of responsible publication in the public interest, and it is really a defence whereby you have to prove responsible publication. As Mike said, a defendant has to show that they have fulfilled a dozen or so onerous steps to show how they sourced what they wrote. To give you an example of how useful — or not — that has been, the science journal 'Nature', the biggest science journal in the world, wrote an investigative piece about the editor of another science journal, questioning the publication ethics of that journal. I can send you a memo on that.

'Nature' discussed publication standards and what was going on at the other journal, and the editor of the other journal sued it for libel. 'Nature' wanted to use the Reynolds defence of responsible publication in the public interest. However, because it is common law and not in statute, and because it has those 12 factors that have been applied confusingly and in varying ways by different judges in different cases, it was very uncertain which of those factors would end up being important once the case came to court. 'Nature' had to pull out all the stops and show that it had fulfilled to the nth degree all of those factors, which meant going back through all of the notes for years, contacting every editor and journalist who was involved in the story and flying expert witnesses in from all over the world to talk on the subject of the other journal and on publication ethics — covering absolutely every base. It won the case, but at the cost of £1·5 million to use that defence. If 'Nature', the biggest science journal in the world, cannot discuss what is going on in the scientific community without risking that cost, what are we at?

That is what the Reynolds common law defence is now. It is onerous and it is not available to the type of people from whom we have been hearing every week in the past four years of the campaign. Hundreds of scientists, doctors, historians, community and parenting bloggers, and consumer groups wrote to us and told us that they want to write about things such as childcare, safety, behaviour at their children's schools, or perhaps illegal practices by high street firms that they want to expose, but they are telling us that they cannot do it because the public interest defence, even though they are clearly writing on public interest matters, is not accessible to them.

To answer your original question, Chairperson, yes; the public interest defence in the Defamation Act 2013 in the UK is a great improvement on the current common law responsible publication defence that is in use in Northern Ireland now. The Act asks the defendant to show that they reasonably believed that publication of their words was in the public interest. It is clearer and it is in statute so everyone can read it, instead of having to go through years of cases to try to figure out case law. That is a great improvement.

To answer the second part of the question, yes; we think it could be improved and we have suggestions as to how it could be made tighter, clearer and more robust. We are worried that, right now, the phrase, "could have reasonably believed", would invite importation of another list of factors into court cases where judges might figure that they need to ask people to go to the nth degree to prove that they reasonably believed something, so we could tighten that up.

Ms Glanville: To add to that, something that has, ironically, fallen by the wayside at Westminster is the question of alternative dispute resolution. A year ago, the Government said that they would look at civil procedure rules, and that has been a significant part of our work. An independent piece of research that Index on Censorship and English PEN did, which was supported by the Nuffield Foundation, pushed strongly for alternative dispute resolution. Ironically, however, because that came into the arena of the Leveson inquiry, which, as you know, is still hanging in the balance, it looks at the moment as though nothing is happening in encouraging alternative dispute resolution for defamation and privacy cases. That area is still wide open, and that may be something that you could look at here as well.

The Chairperson: I think what Peter's case outlines is that free speech is necessary sometimes for the public interest, and it could run against the public interest if that principle is not upheld. I think that a number of MLAs have no problem with the general thrust of the Act and the majority of its sections. The sections that I think are of most concern — or in most need of clarification — are section 1 and section 11, on the need for a jury. That argument has been put forward here in recent weeks. Do you have a particular view on that?

Ms Glanville: The question of a jury trial is, obviously, a hot potato because of the principle that it represents. On defamation, it is an anomaly in civil cases to have a jury trial. The expense and complication of a jury trial was cited frequently in the research that we did as an impediment to access to justice.

Dr Wilmshurst: I was told that, if my case were to come to court, it would last six months. Of course, the "McLibel" case lasted 18 months. It would be very tough on juries to have to give up 18 months of their life to settle a dispute, as in "McLibel", over the hand-out of single sheets of paper. Whether the reputation of McDonald's was damaged or not, it would, I think, be very difficult for 12 people to give up 18 months of their life for something like that.

Ms Lane: Of course, it has not been removed altogether. All that has been removed is the presumption of a jury trial, so you can still request one. As Jo said, removing the presumption of a jury trial takes away one more bludgeon of expensive litigation that people have used to scare defendants and chill discussion.

Mr Harris: I think that, in the past three years, there has been one jury trial. It is very rarely used nowadays.

Dr Wilmshurst: Most of these cases last much longer than, for example, the Harold Shipman trial. In the Simon Singh case, three senior judges spent six weeks debating what one word — "bogus" — meant. My aunt could have told them what that word meant within 10 minutes. They spent six weeks on that, whereas the Harold Shipman jury was out for a couple of hours before coming back to say that he was guilty of all the murders. You sometimes wonder what is going on during that process.

Mr Weir: Thank you for your evidence. I will start with the jury issue. You chose the example of three judges going off for a long period to decide what one word meant, compared with a jury taking a couple of hours. We are talking about trying to speed up the process, but I will leave that aside for the moment. You mentioned, rightly, that, in civil cases, it is relatively rare now to have a jury. In libel, a defamatory comment is, largely speaking, defined as something that lowers a person's reputation in the estimation of the average person in the street. That is, basically, what it boils down to. Can you think of anything that is more directly suited to the use of a jury, where you are actually testing the views of members of the public? That is in contrast to, for example, negligence, a nuisance issue, and so on.

Mr Harris: If it were the wish of the Northern Ireland Assembly to bring forward libel reform with the exception of the provision for a jury trial, that would still be a big step forward. One risk is the cost associated with jury trials. In the balance is access to justice. Obviously, a jury trial makes it more

difficult for people to get access to justice. However, a jury trial, in a sense, is a safeguard against arbitrary decisions by judges. The Assembly could make the decision on that balance.

Mr Weir: There are probably at least two issues that run alongside that, and I think that there would be a lot more sympathy for one than the other. The first is the burden of proof: at what level the hurdles should be, and the balance between that and, for instance, freedom of speech. The second is the broader issue of access to justice, for which, I think, there is a strong case. That is why I do not think it is right simply to copy the blueprint of what happened across the water. On the issue of access to justice, there is clearly a major problem, which is not confined to libel but particularly relates to libel. Largely speaking, that is principally driven by financial considerations, and, clearly, there is a need to change the position on the financial situation. Let us take Peter's case — I appreciate that we have only a snapshot of it today. The principal problem seemed to be the very large threat of financial burden that was put on you, and the danger was that you were going to be spending vast amounts of money, even having won the case. The merits of your case were clearly strong enough to win it, so, from the pure law point of view, the law worked for you. It was the financial and access-to-justice side of it that did not work. Clearly, there is a need for reform of that.

I also take on board, to some extent, what has been said on the public interest side of it, and I am interested in looking further at that at some stage. You presented the issue as being, to some extent, about freedom of speech at what might be described as the virtuous end. That is where a person is trying to uncover a terrible conspiracy or lie that is being put out there. That person is acting as the crusader for truth and freedom. Clearly, there is a need for updating the internet side of the law. The internet is plagued with people who are making utterly defamatory statements, quite often out of sheer bitterness or bigotry, racism, evil or whatever. I wonder whether shifting the burden from a situation where libel is actionable per se to one which moves it to having to show that serious harm has been done will make it more difficult for a defamed person to take action against such people. You might have a certain level of embarrassment or annoyance at something that you have read on the internet that is utterly defamatory and utterly untrue, but showing that you have suffered direct loss or a great deal of loss can be very difficult. There is a danger that this will be seen simply as an open door for anyone to put whatever they want on the internet, irrespective of how defamatory it is. Indeed, you will loosen the degree of opportunity to have some level of pressure to say that what is untrue and defamatory should not be appearing there. Is that not the downside?

Mr Harris: In Northern Ireland today, under common law, the burden is already on showing serious harm. That is the current common law position. The Government have put that into statute for that to be clearer so that judges can strike out cases early on. This also works for claimants, because, if you are a claimant and are offended by something that you have seen on the internet, your lawyer will have to give you advice on whether or not that is actionable earlier on, before you have spent tens of thousands of pounds on solicitors' fees. So, it does not change the current common law position as it stands in Northern Ireland.

On the point about access to justice, it is extremely important to say that there are two separate things. There is access to justice, which is around costs and mediation, and there is the substantive law, which is around defences available, striking out and stopping libel tourism. Those are two separate things. So, in Northern Ireland, you can have all the protections around access to justice. You can have increased mediation, which means that more people are able to sit around a table with people who have defamed them and get defamatory comment down off the internet earlier. You can have that side of things, but you need the substantive law that we are talking about — the law to protect people such as Peter —

Mr Weir: With respect, if you are saying that common law already strikes out vexatious claims, why would there be libel tourism?

Mr Harris: Because there is not a specific directive on judges to strike out cases where this is not the most appropriate jurisdiction.

Mr Weir: With respect, libel is a very expensive business, and I can appreciate a potential degree of burden. Why would someone bring an utterly vexatious case that will cost them tens of thousands of pounds?

Mr Harris: Because of the chill. For example, when I went to Kiev and met the editor of the 'Kyiv Post', he said that the biggest issue for his newspaper was the fact that there were lawyers in London who sent it letters every single time that it wrote about two particular politically connected oligarchs.

Those lawyers did that because they knew that the 'Kyiv Post' would buckle straight away because, if it had to take a case in Belfast or London, it would risk —

Mr Weir: Is the 'Kyiv Post' published in London or Belfast?

Mr Harris: No.

Mr Weir: Then, there is no legal case.

Mr Harris: No, there is the internet.

Mr Weir: Therefore, it is publishing in Belfast or London. The publication is expressing that to the public, so it is publishing.

Mr Harris: Its website was read by 20 people in London. So, the substantial tort was in Kiev, but there were lawyers in London who would argue that, because 20 people there saw the story in question, London would be the most appropriate forum for the case.

Mr Weir: Presumably, the paper's justification would be that it was telling the truth. Mention was made of public interest, but justification or truth is a complete defence against any libel.

Mr Harris: But, if you are the editor of the 'Kyiv Post' and earn $2,000 a year, are you going to pay for a flight, come to London and stand in front of a judge and say, "Your Honour, here is the justification and the evidence"? That is the international chill, and that is why it is important that we strike out cases.

Mr Weir: Again, with respect, there has to be protection to prevent that.

Dr Wilmshurst: My case helps a bit. It was estimated that the costs on each side would be £3·5 million and that the damages if we lost, and we did not think we would, would be about £10,000. So, the company was not suing me to get the £10,000, because even if I was not bankrupt after losing the case, which I would be, and had £3·5 million, it would only get two-thirds of it anyway, so it would be down £1 million. So, it was not suing me to get the money back.

Mr Weir: There would be a financial way around that if the law was more generous and had a greater level of requirement in terms of security of costs. Given that, in the vast bulk of cases in the UK, costs follow the event, a degree of security for the person would be provided. The danger is on the financial side. If somebody starts a case, there is the risk of the people who are being sued going bankrupt and not being able to pay.

Dr Wilmshurst: The company knew that I could not pay when it started. In fact, its financial report said, "Dr Wilmshurst will run out of money", two years running in 2008 and 2009. They said, "Even if we lose, we will not have to pay his costs because he won't have run up any because he will be a litigant in person."

There have to be better ways of doing this. For example, when my case was going on, a French pharmaceutical company sued the journal 'Prescrire', which is like the 'Prescriber' journal in this country, because of an article that it published. The amount of damages claimed was €10,000, which was comparable to the estimated damages in my case, and the total costs on both sides combined, after it had come to court and was finished, was less than £10,000. So, the costs were not out of proportion to the damages. If you want everyone to have the opportunity to use the law, you have to ensure that it is cheap enough for everyone to use it. The only way to do that is to simplify the law.

Mr Weir: I do not disagree with you on the broad point that that would be a good thing.

There is one concern that has been raised that was effectively admitted by the proponent of the Bill. Most newspapers and journalists are highly responsible and try to promote proper discussion. However, there are some, effectively at the gutter end, who look at stories of a salacious nature. Often, they will simply do a financial calculation as to whether it is in their interest to publish a story. They will weigh up the chances of losing in court and the damages they face paying in that case against the extra circulation of their publication. So, it is a financial calculation. The danger is that, if

the burden gets shifted on the jury side of it, and we have had evidence suggesting that that is one major factor, essentially there will be a situation in which a lot of those papers simply produce more.

You mentioned the cross-party support that you received at Westminster. The reforms of libel laws are in the particular interests of the newspapers. They shift the burden; they make it more unlikely in England that somebody is going to be sued, hence, supposedly, your fear about libel tourism. In welcoming that support from those parties across the water, do you not think that you are being a little bit naive, and what you are actually seeing is parties that, faced with having to do something on Leveson, are trying to counterbalance that by scratching the backs of newspapers? Let us be honest: the general accusation in the past number of years, particularly at Westminster, has not been that political parties are too strict in preventing freedom of speech; it is that they have been too cosy with newspapers and too keen to support them. Is this not simply another exercise in scratching the back of newspapers?

Ms Glanville: I will answer part of that question. I know that that is how it is characterised. Obviously, it is a concern. However, I really ask you to take on board the extraordinary support for this campaign. The campaign predates Leveson and the phone-hacking scandal. What was truly —

Mr Weir: Yes, but all that was coming down the track. Everybody could see that that was happening.

Ms Glanville: I started out my career as a journalist. I moved into human rights and freedom of speech six years ago. The first thing that puzzled me was why there was not a libel reform campaign. There was the notorious chill on free speech, London is a town named Sue, and all those kinds of clichés. I wondered why there was not a campaign. A number of extraordinary things happened. The two most extraordinary things were the number of shocking cases, of which Peter is the most outstanding, along with Simon Singh, where scientists and doctors speaking out in the public interest were being bullied and harassed to the point of bankruptcy. Put that alongside the internet, and, suddenly, our little shameful national embarrassment was having an effect worldwide. You put the scandal of doctors and scientists being silenced alongside that worldwide impact, and, finally, everybody woke up to the fact that something had to be done. It was not driven by the vested interests of the media —

Mr Weir: Jo, on the flip side of the coin — you mention the internet — there have also been cases in which people have suffered cyberbullying and defamation on the internet. There have been suicides because of that. The idea of anything that makes the burden of taking a libel —

Ms Glanville: I have another very important point. I do not think that any of us believe that people should not have a right to defend their reputation or that people should not be protected. We are all aware that this is a balance and that, in making the balance, there might be issues that come up that have to be discussed as you are raising them. We recognise the bullying that goes on online, but it is very important to make the distinction between defamation and harassment, trolling and libel. Often, those things are merged, and there are different problems with different laws to deal with them.

Mr Harris: Peter, your arguments are very important ones. All of them were tested during the pre-legislative scrutiny of the Defamation Bill by Jack Straw's working group on defamation. There have been seven different inquiries and parliamentary working groups, including the Culture, Media and Sport Select Committee, that have looked at it in significant detail. Those arguments were tested to destruction to ensure that there was an appropriate balance between reputation and freedom of expression. I do not think that anyone would argue that Westminster has acted rashly in coming up with something that took three and a half years of scrutiny.

On the specific point about whether politicians are too close to the press, the Labour Party, which has been incredibly tough on Leveson and has taken a lot of stick from freedom of expression campaigners for its position, has also backed the Defamation Bill. Any goodwill that the Labour Party has won through backing the Defamation Bill has instantly been lost on its position on Leveson —

Mr Weir: With respect, that might be a certain level of damage limitation. The Labour Party has taken an incredibly populist line on Leveson by pretending that it is leading the charge to defend people.

Mr Harris: Every Westminster party, with the exception of the DUP, spoke in support of the Defamation Bill in the Second Reading in the House of Commons. Ian Paisley Junior was the only person who spoke out against the Defamation Bill at that stage. There is a long-standing argument

against the Defamation Act from your party and that is fine, because obviously in politics people have different political positions, but a lot of your concerns around access to justice and that balance have been looked at in detail. Judges and practitioners have given evidence. For instance, notorious libel lawyers Carter-Ruck looked at the Bill and saw merit in raising the hurdle to "serious". People on both sides have looked at this, and the outcome that we have is not exactly all that we wanted, but it strikes a decent balance.

Dr Wilmshurst: I know that this predates Leveson, because my lawyer, who acted for me on a conditional fee agreement and then reduced his fees when I did not get all my costs back, was the first person to sue News International over Gordon Taylor. I remember him telling me over lunch about getting the money for Gordon Taylor, so I know that this preceded —

Mr Weir: The point I make more generally is that if major political parties are doing something that ends up being in the broad interest of the press, it is not because of some great love of freedom of expression. There may be other motives.

Ms Lane: There is a bigger interest in the public interest. You described the libel laws as being there for newspapers and "crusaders" — I think that was your word; the people or the extraordinary individuals who whistle-blow and find out about conspiracies. However, in our experience, it is not about those two things. It is about people who want to talk about and ask questions of evidence; it is about scientific —

Mr Weir: My point was the opposite; that in the examples you are using, everybody wants to defend the crusader, but that is not so if you are looking particularly at internet comment. That is not the general run of the mill; there is an awful lot more that is pure defamatory, bitter nonsense.

Ms Lane: It is harassment, absolutely; and there is stuff that is not included that is about consumer safety, publishing standards, historical scholarship and human rights. Those are the kind of discussions that we, as consumers and parents and citizens, want to read and hear about. That is how the campaign got so much support and interest, as you described earlier. That is the entire layer of discussion in society that is just not appearing now because of the defamation laws.

Mr D Bradley: Good morning. Síle, when you responded earlier, you said that the Act could be tighter, clearer and more robust. Can you expand on what you meant by that?

Ms Lane: I was talking about the public interest defence, in particular. I may have got this slightly wrong earlier, but in the Act now, the public interest defence asks defendants to show that they reasonably believed that publication is in the public interest. We think that that is unclear and that it still risks bringing in a checklist of factors that a judge might introduce to check whether a defendant reasonably believed something. It invites judges to try to get into the author's mind and figure out whether they reasonably believed something. We think that it should read "could have" reasonably believed, which is more subjective and more concrete. That would ask what you knew at the time when you were publishing. That is the main way in which it could be clearer.

For us, the other point at the heart of the Act is that it introduces limitations on corporations' use of the libel laws to stifle criticism. As the law stands now, a corporation can take a libel case without having to show that it was damaged — that it had any harm caused to it. As corporations are usually bigger and more well-resourced and financed than individuals, the fact that a corporation takes a libel threat against you is usually enough to silence almost everybody. The Defamation Act 2013 introduces a provision that corporations have to show likely or actual financial harm before they can continue with a case. It is their version of the serious harm hurdle to trivial and vexatious claims that we heard about earlier. What is missing from that, though, is an extension of what is known as the Derbyshire principle in common law. The Derbyshire principle is named after Derbyshire County Council, and it found that there is a greater interest in citizens and the public being able to discuss openly what is going on at their local council than there is in the local council being able to sue for libel. So, under common law now, public authorities cannot sue citizens for libel. We wanted that to be put into statute and written down clearly in the Bill. For us, that is the next greatest mission.

Mr Harris: And extended to public authorities that provide a private service. For example, Atos, a company that does disability checks, took down a carer support forum. The forum suddenly disappeared off the internet. No attempt was made to contact its administrator. The forum eventually got put back on after it removed one sentence from its forum. That is out of tens of thousands of posts

by carers talking about their experience. We do not think that taxpayers' money should be used to fund defamation cases against citizens, so it is just about extending that principle.

Mr D Bradley: Síle, you said that, with regard to the public interest defence, you would prefer as part of the test that words such as "could have" —

Ms Lane: "Could have reasonably believed".

Mr D Bradley: Yes. Surely that makes it looser, less clear and less robust?

Ms Lane: If it is said that the defendant must show that they "reasonably believed", that invites judges to try to get into the defendants' minds. It asks judges to think about what they would have done had they been in the author's, journalist's or scientist's shoes, not to look at what the author actually knew and did at the time and to see whether they could have reasonably believed that it was in the public interest. Our preference would ask judges to stop trying to get into defendants' minds and instead look at what actually happened — what was the decision process and what was known and not known at the time. So, it relies more on facts, if you like, rather than trying to figure out if there were any other motives or anything in the defendant's state of mind at the time.

Mr Harris: That was a legal opinion drafted by Adrienne Page QC, who is an exceptionally eminent libel lawyer. We can share that opinion with you. The test that we wanted asks about a reasonable person; the test is of reasonableness. If a reasonable person was in the same shoes as the defendant, would they have acted in that way? It is a much simpler test. What Adrienne suggested to us was that, with the test as it stands, if you were an unscrupulous libel lawyer you would attempt to portray the defendant as having malicious intent and get into very long arguments, not about what has been published, how it has been published or the evidence for why it was published, but about malice and intent, and that can take significant amounts of time.

Mr D Bradley: One of the difficulties that has been mentioned in relation to a lack of legislative response here to the Defamation Act is that Belfast could become a centre for libel tourism. What other major difficulties will the lack of legislative response bring about?

Ms Glanville: As you say, there is a risk that people will start bringing their cases here because the law here will be more attractive to claimants. It will also create legal uncertainty over how it is actually going to play out with Northern Ireland using the old law and England and Wales using a new one. That is going to open up legal challenge, which is going to be very expensive in terms of bringing a libel action. It could also be challenged, I imagine, under the Human Rights Act in Strasbourg. It brings a whole unending trail of legal complication, when what we are looking for is clarity, speed, cheaper and easier access to justice, and something that provides proper protection of freedom of speech for the man in the street. I see a whole plethora of possible problems coming.

Mr Harris: The old law, as it stood, was deemed by the United Nations Human Rights Committee to be incompatible with international human rights standards. A number of cases were on the track to Strasbourg, because, again, there was a fear that the law was incompatible with article 10 responsibilities. So, you could get into a position where you have law as it stands that is deemed to be incompatible with article 10 rights. That, again, is problematic.

Mr D Bradley: Do you agree with the view of Lord Lexden that, if there is no legislative response, there will be a duty on the Secretary of State to intervene and legislate for Northern Ireland?

Mr Harris: I think that there is political will in the Assembly for the Northern Ireland Assembly to deal with this issue. The best place for this to be decided is at the Northern Ireland Assembly. A significant amount of scrutiny has been done of this legislation, so the Assembly could be confident, if it were to enact defamation reform, that the arguments had been tested well. This is the best place for it to be dealt with, and I hope that the Assembly introduces legislation at the first opportunity.

Ms Glanville: It is also very encouraging to hear the kinds of questions that you are asking us today about what could be changed or what could be different, and, actually, there is an opportunity for you to come up with an even better Bill and take the opportunities that were missed in Westminster.

Mr D Bradley: One of the aims of the Act is to strike the right balance between freedom of expression and protection of reputation and private life. Are you happy that the Defamation Act has achieved that?

Ms Glanville: We think that it is a significant improvement. Inevitably, there are compromises that everyone has had to make along the way, and, as we discussed earlier, there are areas — in the public interest defence, in particular — where we pushed for a very long time for something that was a little more radical than what we have. As my colleague identified, there are still gaps. However, we certainly think that it is an improvement.

The Chairperson: Obviously, Scotland has adopted only some aspects of this. Do you have any concerns about where Scotland stands now with the European Convention or libel tourism?

Mr Harris: What is interesting is that, because it is such a fundamentally different system in Scotland, we heard evidence that, first, costs are considerably lower and, secondly, it is less adversarial, so you do not get into the incredibly protracted legal argument that Peter outlined. Scotland will look to the Defamation Act as a basis for some of these defences. The cost issue is much less prominent. The access-to-justice issue is much less prominent in Scotland. So, what we are seeing is that Scottish advocates will take some hints from the Defamation Act. We do not think that there will be incompatibilities, but, if there are, they can be smoothed out via the Supreme Court. Then, you have Strasbourg, which, within that margin of appreciation, will look at the Act as a kind of framework. So, Scotland has never been a particular concern because of a very different system of law that is much less adversarial.

The Chairperson: What about the rest of Ireland? What is the position in Dublin?

Mr Harris: In Dublin, minor reforms were made in 2009. A responsible-publication defence was placed. It would be good for Ireland to look at this again. There have been concerns that it is still too claimant-friendly, and, again, it has the second-highest costs in the European Union for libel.

Ms Glanville: There is no cap on damages. That is a real concern.

Mr Harris: Based on the case of MGN v United Kingdom, the lack of a cap on damages could be in contravention of the ECHR, so I think that this will be looked at again. It was quite interesting to hear from the technology companies that we have involved in this campaign. We have heard not only from bloggers and civil society activists who use the internet but from big internet firms such as Facebook and Google, which are extremely concerned about archaic defamation laws because the one thing that they do not want to be doing is acting as judge and jury over content. They want the authors of the content to be responsible for what they have written, rather than them acting as a sort of low-cost judge and jury over content that they did not write.

Mr Cree: It is very interesting. Thank you very much for your evidence. We are, after all, here to take evidence and not to force our opinions on you. It would be regrettable if we were to have two or more defamation systems in the country. Mr Bradley covered most of the questions that I would have asked, on how we could make it better. You have answered those questions fairly well.

Ms Lane: Might I add something? I beg your pardon for interrupting.

Mr Cree: I was going to ask you to do that. If there is anything else that you want to add, please do so. *[Laughter.]*

Ms Lane: The changes that we described a moment ago to the Deputy Chairperson are not radical changes, as Jo described. They are things that are currently in common law, and have developed through case law.

The Derbyshire principle, for example, is a common law principle and it exists. We just want it put on statute and extended, so that any private company performing a public function is not on a different playing field from a public company performing such a function. More and more private companies are being contracted to perform public functions, and, right now, the playing field is such that if your mother's nursing home is maltreating her you can criticise it and talk about it, if it is run by the NHS, but not if it is a private nursing home performing an NHS function. It cannot be right that the playing

field is uneven. So, this is not a radical proposal, it is about putting it in statute and levelling the playing field.

The change to the public interest defence is the same. Already in case law, the Flood case, was it not, said that a judge should not look at what a defendant believed at the time, but at what he could have reasonably decided was in the public interest. So, the judge should look at how a person considered what he knew and the decision that he made. It was not, as I said earlier, to get into people's minds, but to look at whether they could reasonably have decided — given what they knew, who they had spoken to and what the facts were at the time — that it was in the public interest to publish a story or piece of information. As I said, that was in the Flood judgement, the case of Flood versus 'The Times', a year ago. This is not radical; it is just doing the best we can to put the best of common law into statute now.

Mr Cree: There is one point. In Peter's evidence, he referred to some doctors telling him, in private, of how their concerns about the English libel laws prevented them from reporting problems. Was that before or after the 2013 Act?

Dr Wilmshurst: It was before the Act. I first wrote about the problems with the English libel laws for people trying to expose misconduct in health in 1997, before I was ever sued for libel. With respect to this device, that was before the Act. My experience of being sued was in 2007 to 2011, so people were telling me then —

Mr Cree: Do you know whether those same people are satisfied, now that that risk has been removed?

Dr Wilmshurst: I do not know. I have not asked them. I am not sure that they would appreciate the difference. The Act has not been enacted, so it is not law yet, and I think that they would probably say that they would wait and see. It was specific to the company.

The truth was not the issue. During the process, in 2008, what I said about the device was proved to be true in journal publication, but the company continued to sue me for another three years until it went bankrupt. So, it was not an issue of truth. The truth was there, but the company could still sue me.

The Chairperson: Thank you very much for that. It was very informative. Will you pass on some of the information that we asked for?

Ms Lane: Yes.

The Chairperson: Thank you very much.