



Northern Ireland
Assembly

Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

Defamation Law Reform:
Department of Finance and Personnel

24 February 2016

The Chairperson (Mr McKay): I think that it is fair to say that the Committee has been waiting for this for a long time. I should add that Mike Nesbitt has been waiting for it for a long time as well. You said that the meeting was to take place at the start of March. Can you be any more specific on when the Department will receive the report and whether there is any chance that the Committee may get this before we break for the election?

Ms Laura McPolin (Department of Finance and Personnel): Dr Scott is meeting Lord Justice Gillen to look at the procedural aspect of things. We have been standing back. We have been reluctant to intervene for the very reason that Claire explained. In the normal course of events, the report would not come to us until it was completely finished, and the Law Commission would have controlled its own timetable on that. Dr Scott has set up a meeting with Lord Justice Gillen. We want to give him the space to have the meeting and to incorporate into the report anything that comes out of that, so that it is a more comprehensive and effective report. Some of the consultation responses highlighted procedural aspects of Northern Ireland law that they wanted to be investigated, so it is right and proper that he has the space to do that. He has not given a hard and fast date, but he said that shortly thereafter he would present the report. In answer to your question, I cannot give you a firm date, but we are certainly hoping that it will come to us in March.

The Chairperson (Mr McKay): You are confident that it will come to you in March, then.

Ms McPolin: Pardon?

The Chairperson (Mr McKay): It is coming to you in March.

Ms McPolin: I hope so.

The Chairperson (Mr McKay): You are fairly confident.

Ms McPolin: I would never say "fairly confident", for the reason that I do not want to compromise Dr Scott. We have tried to give him space and independence, because the last thing we want is for anybody to suggest that there have been any interventions. It is really important that he has the space to undertake any inquiries that he needs to. There is also the aspect of getting a proper report. If you say, "We want it by this date", there is always the worry that it will not be as comprehensive as it should be and you will end up doing the work at the back end of it. All things considered, I think that it is the right way. I am sorry that we cannot give you a firm date. It is some time since we spoke to you last, and I had hoped that, next time we came before you, we would be able to have that debate, which is how we develop policy, and have the report. It makes things so much easier for us when everything is on the table and everybody is having a discussion, they know what the recommendations are and it is an informed debate. However, we are where we are. The difficulties arose in the commission and from it going into suspended animation. We have had to pick up the pieces and then try to run with it.

The Chairperson (Mr McKay): To what extent is the review looking at legislation in other jurisdictions to ensure that the recommendations are based on best practice?

Ms McPolin: My understanding is that Dr Scott has an eye to other jurisdictions, such as the Republic of Ireland, and has been looking around. Obviously, the proposition was "Here is the 2013 Act: do you think that it is suitable for replication in Northern Ireland?". Also under active consideration has been whether any aspects of the Act should be amended or could be improved in their application to Northern Ireland.

Ms Hanna: I am new to the Committee, but I have kept an eye on this. It is bizarre really that the reform has not occurred and that it has been beset by the issues of the review and running out of funding. Most people just do not understand why the legislative consent motion (LCM) did not go through here.

I will pick up on some of the things that the Chair asked. Of course, the motivation for reform in GB was the feeling that courts were going to be or were being brought into disrepute, as libel law was kind of a playground for rich people to cover up inconvenient truths. Is there any sense of that moving over here or that our courts are cluttered up because of the gap in the law — because the law has not changed here?

Ms McPolin: We have not detected any indications of that. That said, we are necessarily reliant on figures that, really, do not tell us very much. Certainly, the last time we looked at the number of cases coming to the High Court and to the County Courts, there was not a big surge.

Ms Hanna: OK. It is complex, but, as I say, there seems to be quite a lot of support for reform. I was looking at a survey by the Libel Reform Campaign — presumably, they surveyed people with a relevant interest — and 92% wanted reform and a stronger public interest defence. They set out a couple of alternatives in the absence of formal reform. One was alternative dispute resolution through a civil procedure. Has that been considered, or is it viable?

Ms McPolin: It is already there. The courts already operate a system of alternative dispute resolution.

Ms Hanna: They are specific. The alternative libel project said that it could improve the situation here in the interim before we get reform.

Ms Archbold: That would be a matter for the courts.

Ms Hanna: Could I get a comment on it?

Ms Archbold: There is a division between policy and operations.

Ms McPolin: There is a big drive in the courts now to encourage people to resolve their disputes without going to court. Everybody recognises that it is difficult for all parties involved when people go to court. In all spheres in the courts — you can see it in the family courts, as well as the civil courts — there is a drive to encourage people to speak to each other.

Mr McCallister: I appreciate that this is not exactly your fault, but we seem to have been grappling with this for some time. We had the chance to do it with a legislative consent motion in 2012-13, when the law was changed in the rest of the country. We had another opportunity with Mike Nesbitt's private Member's Bill, which the Executive effectively managed to scupper by saying, "No, we are doing this", so then Mike was not able to access drafting facilities in the Assembly. We are still looking at the policy three years after the law has changed in the rest of the UK. We are no further on. We will have a report, but there is no guarantee that we will not be in Easter recess or, indeed, dissolved by the time we see it in this term, so there is absolutely no chance of any movement or even a general discussion of it. It is deeply disappointing that it is taking us so long even to develop a policy. If the report comes out in favour of changing the law here, we are then into drafting new legislation and changing that. We could have easily done it with Mike Nesbitt's Bill. We could have had all the Committee scrutiny and public consultation during that. I think that Mike actually had a fairly significant consultation —

Ms McPolin: He did.

Mr McCallister: — back in 2014 or when that happened. I just find it incredibly frustrating that we are still at the stage of waiting for a meeting to happen next Tuesday and to hear feedback from it.

Ms McPolin: I share your frustrations, and I think that everybody does. We are all anxious to see the recommendations. I am really interested in the topic and want to see the recommendations.

There are two points from what you said. The first is about Mike Nesbitt. Mike Nesbitt was incredibly generous. He undertook a consultation, spoke to people about the Bill and then realised that the Law Commission was looking at the area. He rightly recognised that it was a big area of law and it was appropriate for it to be subject to proper scrutiny and investigation by an independent body. He engaged with that. You are absolutely right. He stepped back from his opportunity to promote legislation, recognising that the greater good would be to allow the independent body to look at it and come up with recommendations, and then whatever is put in place at the end is hopefully tailored and suitable for the purposes for which it is intended.

The second aspect is the delay. People will always talk about not wanting delay, but sometimes delay can be a good thing. In this instance, in the couple of years since the legislation in England and Wales came into operation, we have had opportunity. The last time we spoke at the Committee, there was an impression given that, when you legislate, it changes everybody's view and makes the world right again and gets the balance between free speech and the right to privacy. At that stage — I do

not know whether you remember — I said that, when you legislate, it is words. Lawyers are used to interpreting words, and there is no guarantee that how you intended something to operate is how it will operate in practice.

Inevitably, all the provisions in the 2013 Act are open to interpretation. In the period since the legislation was enacted and has been in operation, there have been relevant developments that Dr Scott will be able to take on board. A big one is the whole hurdle of "serious harm". What constitutes serious harm? How do you handle it? At what point do you assess the serious harm? What about if somebody apologises? What impact does that have? There are really interesting cases like *Cooke v MGN*. Part of the motivation for the reform in England and Wales was the view that people were forum shopping and going to England because they were getting an easy deal on the libel front. There has been a case on the provision that relates to which is the most appropriate court to hear the libel action.

It is not great consolation, but it is some consolation that the period between when Mike brought forward his proposals and when we will get the report has not been lost. I hope and fully anticipate — I know that I will not be disappointed in this — that Dr Scott's report will be all the richer for having access to that case law.

Mr McCallister: I appreciate the answer. I just hope that you can take it up with Mike about whether he feels his generosity has been overextended on this one.

We often hear that about delay. I think that we heard it about the Legal Complaints and Regulation Bill. We had a report in 2007. We hear that, "Well, actually, it is a good thing because we have learnt some things along the way". It is frustrating that everything here seems to take so long. Certainly, the impression that I have got from DFP is that it has really been brought to this point kicking and screaming. It did not ever want to touch it. I think that it was Sammy Wilson who did not want to go down that road at the time of the LCM. Then, the Bill changed some of that. I just hope that, when the report comes, there is a serious attempt to change it. I have had the issue raised with me at what you would probably think was quite an unlikely event — an Invest NI event — around companies being concerned about coming to Northern Ireland and investing here because of our libel laws and the issues that that has raised. That should concern us all. If it is proving difficult to attract investment into South Down and Northern Ireland, that is a major problem. Companies are nervous about coming here.

Ms McPolin: Obviously, that point was raised during the discussion. The point was also made by the Libel Reform Campaign. If all things had been equal, we would have had the report in our hands in June of last year and would have been well advanced in critically assessing the recommendations and hopefully making policy recommendations. I am not ducking out: the reality is that we are where we are and we have to make the best of it. As I say, I think that what we get from Dr Scott will be well targeted and that Northern Ireland will benefit from it and can stand over the fact. The other aspect of it is that we can answer the question that we are not blindly following England and Wales. There is an evidential base for any agreed actions that will be taken. If we have an evidential basis for the action, it underpins the law and makes it potentially more effective. That potential is raised.

Mr McCallister: I have one quick question. I am grateful for your replies. You do not have the worry about Assembly elections, so what do you see as a realistic time frame to develop some policy ideas? If you get the report in the next few weeks, what do you see as the time frame to look at this and assess what policy and legislative change is desirable in Northern Ireland?

Ms McPolin: I am putting my hand to my face because I am conscious of the number of things that I have dealt with over the last number of weeks. We went in saying, "I will deal with A today" and then B, C and D came in and were urgent, different pieces of legislation that we have been dealing with. We would like to have a six-month period to assess the recommendations and then determine what policy recommendations will be made. Thereafter, it will follow the usual course. If legislation is to be introduced, you will have a draft that has been agreed with the Executive. A draft Bill will go out to consultation. Once it has gone through the consultation, we will make firm legislative proposals. It is difficult to say at this stage, but I would say that it would not be any less than a year before you would be looking at that.

Ms Archbold: We are really at the point now where we would be if we still had a Law Commission and its report came to the Department. From our point of view, that gives us an evidence base from which we can develop policy options for a Minister. When the Minister comes in and gives us a steer, the legislative process starts. We are ready and willing to run with legislation once the Executive give

us a direction. The thing that we will all need to bear in mind in the next Assembly is resource, and priorities will have to be identified among the Bills. If the Assembly wants to prioritise this Bill, we will prioritise it and run with it.

Mr McCallister: "Executive" and "direction" are not always two words that you hear together.
[Laughter.]

The Chairperson (Mr McKay): OK, members? Thank you all very much. We look forward to the report coming out in March.