Northern Ireland Assembly

Committee for Finance

OFFICIAL REPORT (Hansard)

Defamation Bill: Department of Finance

10 November 2021

NORTHERN IRELAND ASSEMBLY

Committee for Finance

Defamation Bill: Department of Finance

10 November 2021

Members present for all or part of the proceedings:
Dr Steve Aiken (Chairperson)
Mr Keith Buchanan (Deputy Chairperson)
Mr Jim Allister
Mr Pat Catney
Ms Jemma Dolan
Mr Philip McGuigan
Mr Matthew O'Toole
Mr Jim Wells

Witnesses:

Mr Michael Foster	Department of Finance
Mr Martin Tyrell	Department of Finance

The Chairperson (Dr Aiken): From the Department of Finance, I welcome Michael Foster, who is head of the civil law reform division, and Mr Martin Tyrell, who is the principal legal officer in the civil law reform division. I do not think that we have had either of you in front of the Committee before, have we?

Mr Michael Foster (Department of Finance): No, Chair. That is probably unusual. It has been an unusual period, obviously, but this is indeed the first time that we have been in front of you during this mandate.

The Chairperson (Dr Aiken): Well, welcome.

Mr Foster: Thank you.

The Chairperson (Dr Aiken): The following papers are relevant to this agenda item: the Clerk's briefing paper; the Department's briefing paper; the previous response from the Minister of Finance on the Defamation Bill; the Defamation Bill; the excellent Assembly Research and Information Service (RaISe) paper about the Defamation Bill; the alternative Bill from the Scott report; and a relevant extract from the 2017 Gillen review of civil law. This evidence session is being reported by Hansard. Are you leading off, Michael?

Mr Foster: Yes, Chair.

The Chairperson (Dr Aiken): It is over to you.

Mr Foster: Thank you. Given that this is, indeed, the first time that we have appeared before the Committee during this mandate, I thought that it would be of assistance if I were to set out what we do.

The Chairperson (Dr Aiken): Yes, please.

Mr Foster: I head up a very small unit that is housed within the Departmental Solicitor's Office (DSO). It is a policy office that, until recently, comprised Martin and me. Last year, we added another member of staff. Between the three of us, we are tasked with the rather broad remit of examining civil law and providing advice to the Minister across a fairly wide range of policy areas. By way of example, our current work includes a large commitment around marriage law. We recently brought to the Committee's attention a proposed consultation about belief marriage and age of marriage, which will launch very soon. We will no doubt appear in front of the Committee again as the policy proposals for that are developed and finalised.

Over the past number of years, we have undertaken work and provided advice on a variety of other issues relating to marriage law. We also have policy responsibility for private family law. I represent the Department on the shadow Family Justice Board. Among other things, we are working through live issues relating to parental responsibility and parenthood. We frequently input to other areas relating to private law matters. If that is not enough, we also have the remit for private international law, on which we engage with colleagues on a range of issues. We also work on property law, and we brought secondary legislation on the administration of estates to the Committee earlier this year. To complete the picture, we also have responsibility for the law of tort. As tort falls within our bailiwick, defamation, which is a tort, falls within our bailiwick. We are a small office, but we have a pretty broad portfolio, which means that we need to prioritise our limited resources effectively.

With your permission, Chair, I will turn to the specific issue of the Defamation Bill.

The Chairperson (Dr Aiken): Yes, please.

Mr Foster: The Bill, and work on defamation generally, predates both my time and Martin's in this post. As you know, this has been ongoing for a number of years. Back in 2012 and 2013, when the Defamation Bill was under consideration in England and Wales, there was considerable activity. The Northern Ireland Law Commission has examined the issue, and the very important Dr Scott report was commissioned, completed and delivered to the Department in the middle of 2016. Given that we are now in 2021, I can understand why, on the face of it, the question of why nothing substantive has been taken forward by the Department can legitimately be asked. I hope that I can answer that in a reasonably candid way.

Dr Scott's report arrived not long after the new mandate began. As I understand it, the officials who were then in the office considered that report, provided advice to the then Finance Minister and were developing early proposals around it. Then, at the start of 2017, we were faced with some of the difficulties that led to the institutions not functioning for a while. During that time, with Brexit and other essential work taking precedence, non-essential project work in my office was placed on hold, so no real meaningful work on that area was carried out during that time.

When Ministers returned, we provided initial advice across the range of matters within the portfolio that I just described to you. That included defamation law. The Minister indicated that he was keen to explore defamation law, with the overarching policy goal of balancing freedom of expression with protection of reputation. At that stage, he felt that the 2013 Act in England and Wales did not necessarily achieve that in the way that he would have hoped. He was aware of work that was ongoing elsewhere, which included —

The Chairperson (Dr Aiken): Michael, I apologise for cutting across you. What particular issues did the Minister think were not met in the English and Welsh legislation?

Mr Foster: The key issue in the Minister's mind was something that the ongoing review in the South was looking at. Amongst other things, it was looking at the extension of social media into our world. Compared with the landscape in 2012 and 2013, which is when the English were looking at their provisions, that extension had been meteoric. There was a general concern that the 2013 Act might not achieve the goal, which was, in the Minister's mind, to achieve that balance.

The challenges that were prevalent in 2013 are more prevalent now because of the growth of social media. Social media has, essentially, provided a much greater opportunity for the publication of

material that is injurious to reputation without necessarily pertaining to any public interest or meeting the standards of responsible journalism. For a legislator considering this in 2021, there is a more challenging aim of striking the proper target of protecting free speech in the public interest. The Minister is fully alive to that. He thinks that it is a welcome goal. However, he thinks that it should be done in a way that does not promote low-value speech that unjustly interferes with reputation.

Our analysis of the 2013 Act was that some of it was to be welcomed. It is not — this came out quite clearly in some of the responses that the Committee has received in its call for evidence — a panacea in terms of reform. We had been looking at that, and we liaised with colleagues elsewhere, including in the South, to see what work they were doing, simply because it would probably provide an up-to-date view on some of the issues that were of interest to us. Then, as we all know, in March 2020, the pandemic struck, and resources were diverted. I was working on a number of COVID policy issues, and our colleagues in Dublin indicated that their review had, effectively, been placed on hold. Although we were obviously keen to make progress, a number of factors prevented substantive work being done in this area.

The Chairperson (Dr Aiken): OK, thanks.

Mr Foster: As for the Bill itself, we have provided a briefing paper that sets out in some detail the private Member's Bill (PMB) and what has taken place over the past number of years. From the outset, we were aware that Mike Nesbitt had a private Member's Bill in 2013. Although no one currently working in our office had had any exposure to or interaction with it, we were aware that it had been prepared. It was annexed to Dr Scott's report, and we had sight of it. What took us a little bit more by surprise was its revival and the manner of its revival. We were informed by colleagues in TEO that the Bill would be introduced and have a slot secured in the Assembly only a few days before it was introduced. That was the first time that we, as departmental officials, were aware that that would be happening. Also, the 2021 Bill in front of you was, bar some very minor technical tinkering, exactly the same as the one that was drafted for England and Wales in 2013. Leaving aside the fact that this is a different jurisdiction — that is not to say that the 2013 Act would not work here — a broader concern that we, as a Department, had was that a lot had happened in the area since 2013. There had been eight years or so of the Act being law in England and Wales and quite a bit of opportunity to examine the lessons learned. In those eight years, there had also been the marked expansion in the use of social media that I referred to and a huge increase in the number and types of social media apps. In those eight years, the Law Commission has considered this; Dr Scott has reported; the review of civil justice, led by Sir John Gillen, has considered this issue; and other jurisdictions have developed their thinking. Those are the types of things that we would have expected fresh legislation to have considered and adapted to the best fit for this jurisdiction.

The Chairperson (Dr Aiken): Michael, I just want to close off that particular aspect. We have had eight years of lessons identified from the legislation in England. Can you point to anything that has happened there in that time that might substantially change your view on the 2021 Bill?

Mr Foster: Those are aspects of detail, which I was coming to next. Now that you ask the question directly, I will mention that, last week, Dr Scott was pressed on the central point of this Bill, which is, effectively, the serious harm test. The decision to move from trial by jury as the presumption to trial by judge as the presumption is — I am loath to use the expression "to a lesser extent" — to a different extent, another central point of the Bill. When the two are taken together, the lesson that seems to come from the English legislation is that — this is the principal concern of the Minister — in one analysis, it appears that the bar for the man in the street is now considerably higher. The Minister also indicated that he is concerned about aspects that relate to jury trials in this jurisdiction.

The English Act was designed with the main aim of promoting freedom of expression whilst trying, at the same time, to protect reputations. It appears, from some of the commentary that we have analysed on the serious harm test in particular, that the pendulum may have swung too far on freedom of expression. That said, the Department and the Minister recognise that that is a policy choice. It is one of the issues that the Committee will look at in a bit more detail. That is the purpose of its analysis. All those policy considerations are legitimate: whether there should be a serious harm test; whether there should there be jury trials; and what is the level or extent to which social media protection should be amended. For each and every one of those questions, there are arguments on both sides of the debate.

Our preference throughout has been that we should take a considered view and develop the Bill from first principles that would deal with the concerns of the Minister and the Department. However, we

accept that we are where we are with this. The Bill and its general principles have been accepted by the Assembly at Second Stage. The Minister indicated to the Department that he does not wish to present any obstacles to the progress of the Bill.

The Chairperson (Dr Aiken): Just say that again, please, Michael. Now that we have reached this point, the Minister —

Mr Foster: The Minister has no desire to place obstacles in the way of the Bill, other than, from our perspective, we want to ensure that nothing in the Bill damages the statute book, for want of a better description. On that point, a number of technical aspects to the 2021 Bill in front of you replicate the 2013 Act and will require attention. However, from a broader policy perspective, the Department is content to keep a watching brief on how the Committee's deliberations play out and how that work progresses.

The Chairperson (Dr Aiken): Michael, are you considering tabling any amendments to the Bill?

Mr Foster: No. We are certainly on hand to provide advice to you on certain technical aspects in the Bill. By way of example, the Bill is drafted in a manner that is inconsistent with the decision of the British Government to leave the EU. Clause 9 is not fit for purpose: it would not work and would need to be amended. We think that that can be discharged by the Bill Office, but we are happy to provide any assistance that we can on that.

A number of minor technical drafting changes would probably be recommended. Those would not affect the policy in any way. They are very much technical drafting to take account of how Northern Irish legislation is drafted compared with English legislation.

The Chairperson (Dr Aiken): OK. Thanks very much indeed.

Mr O'Toole: There are concerns about the removal of the jury and replacing it with a judge and about keeping pace with technological change in social media etc. What issues cropped up with the English legislation because it was drafted as the explosion in social media was happening? What issues that have cropped up in England are not addressed in this Bill?

Mr Foster: There may be two limbs to that. The first is the issue of social media. The provisions in the Bill at clauses 5 and 10 give protection to social media sites. Dr Scott's report was fairly critical of those, to the extent that he recommends that clause 5 should be removed and revised that and that clause 10 should be brought up for consideration.

There is commentary to suggest that, in 2013, whilst there was social media, there was not the same level or use as now. It is estimated that, in 2021, there are approximately 4·5 billion users of social media. That is a dramatic rise since the English legislation was being drafted in 2012 and 2013. The margin of error has increased, and the challenge to strike that balance with the protection of the public interest etc is slightly more nuanced than making sure that we do not promote low-value speech of the type that really does tend to interfere with reputation.

That there are so many more opportunities to do that now compared with in 2013 is a concern that comes through thematically from those with an interest in this subject. That is not to say that there are not ways to deal with that, if we were looking at a Bill from the perspective of first principles. We are keen to see what comes from the South, given that this is a specific issue that forms part of the terms of reference of the review there. However, we have also seen what Scotland did just this year with the Defamation and Malicious Publication (Scotland) Act 2021.We might have wanted to consider bringing aspects of that across into our legislation.

You mentioned trial by jury. The Minister has simply raised a concern that, in the context of this jurisdiction, where the importance of direct public involvement in such issues, as the civil justice review said, "should never be underestimated", there is a worry about leaving issues, particularly when measuring serious harm, with a judge alone. Is a judge on his or her own the very best person to deal with what constitutes serious harm for a man on the street or, indeed, for anyone in other walks of life? It is interesting to note that that review, which was after the 2013 Act and after the work by Dr Scott, came up with a different suggestion, which related to a judge's power under the Judicature Act, which is already referenced in the Bill: instead of removing the presumption of trial by jury, the powers under that Act could be expressly expanded to include a broad discretion to order trial without a jury in matters of exceptional complexity, for example.

We also recognise that, on the other side of that debate, certain commentary suggests that the removal of a trial by jury has other benefits, but, ultimately, those may be overstated. Equally, we have seen that moving the test for serious harm to an earlier part of the process and that not being tried by jury has led to, effectively, an upsurge in preliminary trials. The cost of those, based on some of the evidence that we have seen, can be very high. The civil justice review team noted that, if the aim of 2013 Act was to simplify and reduce costs, that might not necessarily be the outcome.

Mr O'Toole: For obvious historical reasons, there are particular sensitivities here. Is there not a slight danger of conflating the criminal and the civil here? The right to jury trial in a criminal context is very precious and important, and that is where most of the sensitivity has been in this jurisdiction, for very obvious reasons. There is a slight risk that we are conflating a question when there are other areas of civil and commercial law in which there are no juries. Is there a slight risk that we are introducing a sensitivity where there does not necessarily need to be one? I am just asking that question.

Mr Foster: As I said earlier, that is an entirely legitimate policy point and an entirely legitimate view. I do not think that the Department is saying that jury trials must stay in defamation cases only. You are right to point out that it is the one area of the civil law where a jury trial is the presumption. However, we have to put on record the fact that the Minister has indicated that he has those concerns and that it needs to be properly thought through.

Mr O'Toole: I should have declared an interest at the start, Chair, because I am chair of the all-party group on press freedom and media sustainability. We have done a call for evidence and are finalising a report that touches on the sustainability of the media. One of the consistent messages that comes from small media in particular is that Northern Ireland's defamation laws have a chilling effect on their reporting and, at times, can have a devastating effect on their financial position, in that it can have a vicious effect on their willingness to take the risks that are sometimes necessary in their reportage. How much of that have you looked at? Does the Department acknowledge that we have a particular challenge here because the defamation laws are perceived as having a chilling effect on local media? That, potentially, has a knock-on effect on the sustainability of titles and, therefore, on the civic democratic space on which we rely for media, particularly local media, which reports on the likes of court hearings and council matters — stuff that is even more small ball than the vast heights of the Stormont Finance Committee.

Mr Foster: You asked a question about the potential chilling effect on small media organisations. The simple answer is yes. The Department is alive to that argument. It has been well rehearsed and well made by a number of interested parties from the media side. There is a counterbalance, and others have made different arguments. I do not think that anybody wants to see small media organisations struggling with the legislative framework around this. The question is this: how do we fix it in a way that assists them in a meaningful way? Some of the commentary around the 2013 Act suggests that it has not had as big an effect on freedom of expression as one might have expected, but there are others who champion it as the means that enable the press and others to report in a different way. It leads me back to the points that I made about these being policy choices to make. Take the serious harm test: if you are convinced that it, taken together with the other aspects of the Bill, will have the effect of lessening the impact on freedom of expression, but not in a way that overfaces the protection of people's reputation, it is a legitimate policy position to arrive at.

Mr O'Toole: Some people would argue that publishers in Northern Ireland are in an even more unreformed and chilling position than those in England and Wales were in 2012, pre the Bill. Is it fair to say that, given that we have more small, family-owned publishers and media organisations, any chilling effect is likely to have a disproportionate effect here? Many local and regional newspaper titles in England are owned by Northcliffe, or whatever it is called now, or Reach, which was the Mirror Group. Do you acknowledge my point that there are smaller operators here, so, if there is a chilling effect, it is felt more disproportionately because our organisations are smaller and more financially vulnerable?

Mr Foster: I can see the academic force behind that argument. It makes some sort of logical sense. The overall difficulty with reform in this area is that much of the material that we have to consider is anecdotal. The number of defamation cases that reach court is very low. That may well be because publishers are not prepared to risk their money on defending cases.

Legislation was passed in 2013 in a neighbouring jurisdiction that has a very similar history with defamation law. From our perspective, if our jurisdiction was a lot more claimant-friendly, we would have expected many more actions to be brought here in the preceding eight years. That has simply

not been borne out by the evidence. We have no statistics or hard facts to suggest that Northern Ireland has become some sort of libel capital, even within these islands. In fact, if anything, the number of defamation writs seems to have dropped off.

Mr O'Toole: Is it not also the case that, in a sense, that could prove the opposite point? As the law is perceived to be claimant-friendly in the way that many people would argue, including, I think the Bill's sponsor, the fact that lots of cases are not going to court might be an indication that the legal provision is more claimant-friendly. Small newspaper owners are not necessarily making it up off the top of their heads. If the legal provision was robust, more publishers would trust a system of going to court and having the court test it, whereas what is happening is that, potentially and allegedly, lots of that stuff is happening, and writs are not being issued because lawyers can issue letters and it is just not worthwhile going to court. In a sense, the fact that cases are not going to court might prove the point that the system is more claimant-friendly because it is having a chilling effect.

Mr Foster: It is difficult to argue against that from an anecdotal perspective. When I said, "going to court", I maybe should have been slightly more elegant and said, "the number of writs issued".

Mr O'Toole: Yes.

Mr Foster: I take your point that it could be that the number of writs issued does not necessarily match the number of threats to take writs. That point has been well made and well rehearsed.

If any of Committee members have the time, I would ask them to catch up on Mark Carruthers's 'Red Lines' podcast with the Bill's sponsor, along with Sam McBride and Paul Tweed. I am sure those are names that are familiar to the Committee in the context of defamation law.

Mr O'Toole: Thankfully, I have never had a letter from Paul Tweed. *[Laughter.]* Yet.

The Chairperson (Dr Aiken): Yet. *[Laughter.]*

Mr O'Toole: Clearly, I am not doing my job right. *[Laughter.]* Sorry, Michael. Go ahead

Mr Foster: At the risk of misreporting him, I found it interesting that Paul Tweed indicated that he had not had any significant business in this jurisdiction over the past number of years. He said that most of his work was focused in London and Dublin but that that might change if the Bill was to come into law here because, in his view, a serious harm test would, effectively, allow a lot more scope for preliminary issues. Again, this is anecdotal, but some of the evidence on the other side of the coin suggests that costs for those issues can mount up very significantly.

That takes me back to my general point that these are balances and policy choices that we need to make. From the Department's perspective, ideally, we would like to work those through over the next number of months so that we are in a position early in the next mandate to think about a bespoke Bill for this jurisdiction. We know that the Bill is now up and running, so we will see how it plays out.

The Chairperson (Dr Aiken): OK. Thanks, Matthew. For information, Mr Tweed and Mr McBride will come before the Committee before the end of November.

Mr Foster: OK.

Mr Allister: Good afternoon. I have to confess that you have left me rather confused about the Department's position on the Bill. You identified a number of issues. I suppose that you are speaking on behalf of the Minister, who has concerns, for example, about clause 1, which is fundamental and which deals with serious harm. He has concerns about the adequacy of the Bill insofar as social media has moved on, yet you tell us that, notwithstanding those concerns, the Minister will not stand in the way of the Bill and the Department will not seek to amend it. If you have concerns, why do you not seek to express them through amendment?

Mr Foster: There are a number of points to that. From a practical perspective, amending the Bill significantly would require considerable resource from this office and, if we moved those amendments as Executive amendments, considerable resource from the Office of the Legislative Counsel (OLC). My understanding is that that office is already extremely pressed with Executive work over the short remaining period of the mandate.

Being frank, if the Bill had been introduced this time last year, for example, and if we had considerable time in which we could usefully develop policy with the Committee and the Bill sponsor, the Minister might have been able to present those concerns in a material way. However, the Minister is keen for our work at departmental level to continue on defamation law generally. We want to see what comes from the South. We want to consider in a bit more detail how the Scottish Act works in practice over the next year, and —

Mr Allister: Your work in the Department will be bypassed by the Bill if it proceeds. Why will you not take the opportunity to, in your view, improve the Bill rather than churlishly sit back and say, "We are taking nothing to do with it. Do whatever you like"? That seems to be the attitude.

Mr Foster: If you look at the Minister's concerns, which you highlighted, and particularly those around jury trials, serious harm and social media, you will see that, certainly, in our view, the serious harm test is what the Bill is, effectively, built around.

Mr Allister: Yes, I agree.

Mr Foster: If you take out the serious harm test, you will find that the Bill — I would be loath to use the word "meaningless" — would certainly lose the anticipated effect that those who are sponsoring it wish it to have. The Assembly has already agreed that general principle at the Bill's Second Stage.

Mr Allister: With the help of the Minister, because he did not oppose the Second Stage. That is part of the source of my confusion. If you think that the Bill is inopportune in its timing etc, why did the Minister sit on his hands when the Bill's principles were being approved?

Mr Foster: I think that the feeling in the House on that day was that there was sufficient support amongst other Members and other parties in the Assembly for the Bill to proceed. I am not a politician, so I cannot answer the general question in terms of its politics.

Mr Allister: Yes, but, as a Department, you give advice to the Minister that then manifests itself in actions. Is the advice to the Minister, then, "Sit back and do nothing here"?

Mr Foster: Our preference has been to develop our own legislation from first principles.

Mr Allister: Will that not be bypassed as the Bill progresses and if it passes?

Mr Foster: I suppose that, to an extent, that is right. At the same time, however, if the Bill passes and becomes the Defamation Act 2022, it will still be open to the Department over the next two or three years to amend the legislation and to bring forward a defamation Act in 2024 or 2025. It —

Mr Allister: Driven by Dublin.

Mr Foster: — is by no means our preferred way to work.

Mr Allister: A lot of what you are saying seems to be predicated on thinking, "Let's see what Dublin is going to do". Is there such a dearth of authentic thinking in the Department that you have to wait to see what a foreign jurisdiction will do?

Mr Foster: No. We are not waiting for Dublin, but we are looking with interest to see what it does, because the themes that it has developed are very much on a par with what the themes seek to do in defamation legislation across all these islands. As I indicated in my opening remarks, we have to prioritise our resources in a very small office. We have x number of different policy areas that we are working on. When we get the opportunity to learn and reflect on developments in neighbouring jurisdictions, we find it useful to do so. We are not by any stretch of the imagination suggesting that what the Dublin Government bring forward in their review will be the centre point of any changes that we will recommend, but we will take those measures on board, reflect on them and analyse and consider them in the round along with, for example, what the Scots did this year. A review of the Defamation Act in England and Wales is imminent. We can throw all those things into the pot when developing our own policy thinking on it. We feel —

The Chairperson (Dr Aiken): Michael, it is the Chair here. At the beginning of the meeting, you said that the Minister is not going to oppose the Bill's progress because it has been through its Second Stage and the rest of it.

Mr Foster: Correct.

The Chairperson (Dr Aiken): You have obviously done quite a lot of work to come before the Committee, which we are very grateful for. You have done a lot of the staffing work for the Bill. We want to make the Bill better so that it is more fit for purpose. You have some concerns, but you have also stated that you are not proposing to table any amendments. Will you reconsider that? You have done a lot of thinking on and given a lot of consideration to the Bill. From the Committee's point of view, with your very valued expertise and what you have done so far, it would be quite apposite for you to consider tabling an amendment. I know that you probably have to ask the Minister for his approval to do that, but you identified the fact that we need some specific legislation. We have spent a long time getting to this point. There is a real prospect that you can improve the legislative process and that we can get something that will go through the Assembly process that is close to being an 80% solution rather than just over a 50% solution.

Mr Foster: Those are valid points, Chair, and I am certainly open to considering them. By way of example, if we took the view that the Minister's concerns on the serious harm test are such that he wanted to remove the clause on it, in our view that would, effectively, knock out the effect of the Bill. If you are asking us to assist around the margins, I am sure that we could work with the Committee to do that, but we also have to recognise that the Minister is at the tail end of a mandate and has a lot of pressing business. At this point, I cannot say, as an official, that I can give that commitment to develop the Bill in the way that you set out.

Mr Allister: I agree that serious harm is the wrong way to go in the Bill, but anyhow. I ask the Department this: has that always been the Department's consistent view? Was it not the case that, some years back, the Department favoured bringing in what was, effectively, the 2013 Bill?

Mr Foster: I do not know the answer to that directly.

Mr Martin Tyrell (Department of Finance): Me neither. My understanding is that we had the Scott report, which gave qualified support to the 2013 Act. Dr Scott proposed certain replications, some modifications and innovations to the 2013 Act. I do not recall a period when a Minister in the Department supported straightforward replication. My understanding is that —

Mr Allister: When Simon Hamilton was Minister, were there not indications of support?

Mr Tyrell: At the time, Simon Hamilton's reaction was to commission the Northern Ireland Law Commission consultation, which led to Dr Scott's report. By the time Dr Scott's report was delivered in June 2016, we were into a new mandate, which did not progress. We know that, after that, there were three years during which, in effect, very little happened on the policy front. I do not recall a time when the Department was unequivocally behind the 2013 Act.

Mr Allister: I see. So, really, the Department's position flip-flops according to who the Minister is.

The Chairperson (Dr Aiken): Unfair. Michael, you do not have to answer that one. I have already remonstrated with the very honourable Member for North Antrim on that. I was quite happy to do that as well.

Mr Allister: OK. Thank you.

Mr K Buchanan: Thanks, Michael and Martin. I think that it was Michael, given that he did most of the talking at the start, who referred to the fact that the Bill would not assist the average man or woman on the street. Is that still your opinion?

Mr Foster: From an academic perspective, it is difficult to see how that it will. The current test for someone bringing a defamation claim does not include their having to show serious harm. Proving serious harm, particularly if that is taken in tandem with the provision to, effectively, place that decision

in the hands of a judge only and not a jury, will be more difficult for an ordinary person who is not, for example, in some sort of position of authority or does not have a profile in society etc.

Mr K Buchanan: Is the Bill in its current format fit for purpose?

Mr Foster: The Bill will work. If the Bill becomes law —

Mr K Buchanan: In whose favour will it work?

Mr Foster: It looks, on the face of it, as though it will certainly tip the balance in favour of those who wish to express their views, as opposed to those who wish to protect their reputations. It is probably accepted by those bringing a claim that they wish to tip the balance in their favour, because the view is that the balance has shifted the other way.

Mr K Buchanan: I am going to ask you another question. I do not know whether I should ask it, but I will anyway. Would you vote for the Bill? *[Laughter.]*

The Chairperson (Dr Aiken): I am giving you an awful amount of leeway, because you are the Deputy Chair.

Mr Foster: My answer is that I am grateful to be an official at this point. *[Laughter.]*

Mr K Buchanan: This question will, hopefully, be a bit more straightforward: what can journalists or the media not do today if they are telling the truth?

Mr Foster: If they are telling the truth, they should have nothing to fear from any action brought against them, be it under the current law or any revised law. There is the defence of truth and, as it is known at the moment, the common law defence of justification, which lists the defence of truth and which clause 2 seeks to replace. Nothing has really happened in the eight years of the legislation's existence in England and Wales to suggest that the courts are not simply applying to a plea of truth the principles that applied to a plea of justification. I do not think that the Bill will have any effect on people who are telling the truth.

Mr K Buchanan: If you look at the past eight years, be it in England or across the world, from where do you find most defamation claims have come? Have they come from social media or printed, paper documents? How big is social media as an issue in defamation?

Mr Foster: I do not have figures for which cases in either of those two categories attract the most writs. However, there is no doubt that, over the last eight years, there has been a marked increase in the accessibility, frequency and use of social media. There has been an obvious shift in societal patterns in where people receive their information from. Twitter and Facebook were around in 2012 or 2013, but the numbers of people using them have increased significantly in the intervening time. I remember, back in the early days of social media, I had access to Twitter, but I would still have bought one of the local papers to read, and I knew of many others who did the same. However, many more people are now accessing articles that still appear in the printed press, but they seem to be downloading them from links on Twitter or from the papers' websites.

Mr K Buchanan: I have a final point. The Minister's letter dated 8 October reads:

> *"I do not think this Bill has the capacity to achieve reform that will be effective."*

If the Minister is saying that, why are you not going to amend the Bill?

Mr Foster: To amend the Bill in a way that we hope would bring forward change would potentially require significant rewriting of it. As I said, I do not think that, at the moment, the resource exists to do that, given the very compressed time we have left to consider it.

Mr K Buchanan: OK. Thank you. I appreciate it.

The Chairperson (Dr Aiken): Matthew, do you want to ask a very short question?

Mr O'Toole: I will be brief. Thank you, Chair. On the point about amending the Bill, you said that you are reviewing what is happening in the South and in Scotland anyway and that the work on defamation reform goes on. That may be the case, but you think there will be too much work in rewriting and redesigning the Bill to make it precisely to your liking now. You are saying that defamation reform still needs to happen but in a more considered way. Would it not make sense to insert a clause in the Bill that would oblige a review that is based on information gathered from experiences in neighbouring jurisdictions 18 months or two years after Royal Assent? It would not quite be a sunset clause but a review clause that would enable or require you and the Assembly to return to it.

Mr Foster: I have seen similar provisions in other legislation. I understand why that might be considered useful.

Our work on this will continue. As I indicated, we have to balance this with the rest of the work that falls within our remit. The common rule of thumb is that you need between 18 months and two years to develop a Bill of this nature properly, have it drafted professionally by the Office of the Legislative Counsel and then take it through the various stages in the Assembly. There is probably not an awful lot of point in us trying to cut around a couple of the clauses in this Bill. There are broad policy issues at play. They would need to be properly developed. The policy proposals would then have to be agreed, probably at Executive level, and we would then need to translate those general policy provisions into concrete legislative proposals.

Given that we are three or four months away from the guillotine, I cannot see how that would be feasible. The idea of having a review clause, whereby the Department would review the Bill's operation two years after Royal Assent or commencement, is a reasonable one. I cannot see why, from a principled policy position, that would be a particular issue.

Mr O'Toole: That was my question: rather than rewriting the whole thing, could a review be included?

The Chairperson (Dr Aiken): Thank you, Matthew. Michael and Martin, thanks very much. We have a further couple of questions, but rather than prolong the session, do you mind if we write to you and get your response?

Mr Foster: Not at all. We will try to assist you in whatever way we can, Chair.

The Chairperson (Dr Aiken): OK, team. Thank you very much indeed. Again, I thank Michael and Martin for their evidence and for coming to the Committee.