Northern Ireland Assembly

Committee for Finance

OFFICIAL REPORT (Hansard)

Defamation Bill: Index on Censorship; English PEN

8 December 2021

NORTHERN IRELAND ASSEMBLY

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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 Maolíosa McHugh
Mr Matthew O'Toole
Mr Jim Wells

Witnesses:

Mr Charlie Holt	English PEN
Ms Jessica Ní Mhainín	Index on Censorship

The Chairperson (Dr Aiken): We will receive oral evidence from Index on Censorship and English PEN on the Defamation Bill. The session will be reported by Hansard. We have Jessica in person, do we not?

The Committee Clerk: We do. She is just coming in.

The Chairperson (Dr Aiken): Brilliant. Can we bring Charlie Holt into the spotlight? Charlie, is that you? Can you hear us OK?

Mr Charlie Holt (English PEN): It is, yes. I can. Hi.

The Chairperson (Dr Aiken): We are just bringing Jessica in. Hi, Jessica. Come on in.

Ms Jessica Ní Mhainín (Index on Censorship): Hello. Thanks a lot.

The Committee Clerk: Charlie is in Amsterdam.

The Chairperson (Dr Aiken): Is he? Charlie, are you in Amsterdam?

Mr Holt: I am indeed. Sorry not to be there in person.

The Chairperson (Dr Aiken): I would swap with you if I could.

Jessica is the policy and campaigns manager for Index on Censorship, and Charlie is the UK campaigns adviser for English PEN. Jessica, I think that you are leading off. I ask that you talk for about 10 minutes, and then I will ask Charlie to come in. We will ask quite a few questions as we go through. We have already received quite a bit of evidence. You might find that the questions that we ask are quite technical as we try to clarify our thinking. Over to you.

Ms Ní Mhainín: Thank you, Chairman and members, for having me here. Index on Censorship and English PEN have been working closely on this issue for many years. We are glad to give evidence, as we feel that it is an important issue. Index on Censorship was established 50 years ago as a champion of freedom of expression around the world. Although our work extends beyond media freedom, that is what I will focus on today.

A few weeks ago, I asked a leading defamation lawyer in London what publishers in England and Wales made of Northern Ireland defamation laws. He said:

> *"Overall, my sense is that clients regard Northern Irish defamation law as a sort of legal Wild West — very archaic, unpredictable, and if you are unlucky enough to be sued there, you risk getting bogged down in old-fashioned litigation for years".*

The Chairperson (Dr Aiken): We have heard that quite a few times. The Committee will be interested to know whether you have any specific examples.

Ms Ní Mhainín: I do, and I will also go into why examples are so hard to come by.

Northern Ireland's defamation laws are having a chilling effect in Northern Ireland, but not only in Northern Ireland. In some cases, the possibility of legal action here is enough to dissuade publication or broadcast, even if the information in question is accurate and in the public interest. In 2015, for example, Sky Atlantic's plan to broadcast the award-winning film 'Going Clear: Scientology and the Prison of Belief', which is about the Church of Scientology, was shelved because of fears that the broadcaster could be exposed to libel claims in Northern Ireland from members of the Church. Sky Atlantic believed that it could have broadcast —

The Chairperson (Dr Aiken): Jessica, do we have an evidential base for that?

Ms Ní Mhainín: Yes. At the time, 'The Guardian' reported on it, and it is included as evidence in our written submission. I can follow up by sending you the report from 'The Guardian'.

The film could have been broadcast in England and Wales without any legal consequences, but, because of the lack of suitable defences in Northern Ireland, the broadcaster did not feel confident that it could broadcast it here.

The Chairperson (Dr Aiken): I will make a declaration of interest. I have seen that film, and I actually saw it in Northern Ireland.

Ms Ní Mhainín: I am getting to that point. Before Sky Atlantic could broadcast it here, it considered cutting the transmission to Northern Ireland. That was up for debate at the time, but it figured that it could not do that for a single broadcast. The broadcaster decided against that, and the film was eventually shown throughout the UK, but 18 months later. It did so in a subtle way. I believe that it was released first in some theatres in England, and, eventually, the broadcaster was confident enough to release it throughout the UK.

To illustrate my second example, I have brought with me the article that I will refer to. You might have come across it before. In 2018, Jeffrey Donaldson issued legal proceedings against the media outlet openDemocracy in response to its public interest reporting. The proceedings were dragged out in Northern Ireland for two years, until May 2020, when the legal time limit to proceed ran out, and openDemocracy spent precious time and money, which it could have spent on its reporting, preparing for its defence. I have the article, if anyone is interested —

The Chairperson (Dr Aiken): Sorry, I have to stop you there. I need to make a declaration of interest. I know Peter Geoghegan from openDemocracy fairly well. I am very familiar with his work and do not want to imply otherwise during questioning.

Mr Catney: We can look at the article, Chair.

Ms Ní Mhainín: You can look at the article. The article states:

> *"if we went to court to defend our reporting, we risked bankrupting openDemocracy."*

Another part of the article states:

> *"when it comes to press freedom, Northern Ireland is still a place apart ... it's much easier to sue journalists in Northern Ireland".*

If you want to look at that, you can.

Mr Catney: Thank you.

Ms Ní Mhainín: A lot of people have difficulty pointing to examples. I have just given two. It is, however, challenging for us to point to specific cases. It is difficult to encourage people and to get them to speak on the record about the issue, because they fear that they may —

The Chairperson (Dr Aiken): Is that the chilling effect?

Ms Ní Mhainín: Yes, exactly. It is the chilling effect. Even when the lawsuit has concluded, they are still afraid to speak about it. You mentioned Peter Geoghegan. Just two weeks ago, I spoke to him in London about this case. He told me that openDemocracy recently found out that, for publishing that article and speaking about having faced a lawsuit, its insurance has gone up threefold this year. The chilling effect comes from several angles. There are many reasons why journalists feel discouraged from speaking out about this kind of legal harassment.

Moreover, the situation is even more difficult to monitor in Northern Ireland because of the number of cases that quietly settle here. A few weeks ago, you had Dr Mark Hanna here. His research has shown that only 17 of 140 defamation cases issued in Northern Ireland between 2014 and 2020 resulted in a judgement.

In 2020, one senior reporter in Northern Ireland told me that the amount paid out in settlements by his publication every year is about the same as his salary. He said, "It is probably on a par with what I earn every year, so to employ me as a journalist, effectively, costs double". Bear in mind that these expensive settlements, court cases and lawsuits are happening in the context of media organisations coming under increased economic pressure because traditional funding models have collapsed. The decreased financial resources at their disposal mean that media outlets are more inclined to settle, even if they believe that everything that they have published is completely accurate and in the public interest. Settling does not necessarily indicate an admission of wrongdoing. Settling, retracting and apologising are very often the quickest means for publishers to get rid of a case that could end up taking years and costing thousands, if not hundreds of thousands, of pounds. It is often a strategic and commercial decision.

Maolíosa McHugh mentioned the man or woman on the street, as it were. If we really had the interest of the man or woman on the street at heart, however, we would look to amend the defamation laws to ensure that people receive the information that they have the right to have and to which they are entitled. At the same time, we acknowledge —

The Chairperson (Dr Aiken): Just a moment, Jessica. We have heard that, no matter what, people will need to have substantial resource behind them to take a defamation case, because there is no legal aid in support of it.

Ms Ní Mhainín: Yes.

The Chairperson (Dr Aiken): We talk about opening up the process and making it more amenable to people to take a defamation case, if they think it appropriate. Increasingly, however, it sounds as though the Bill is specifically about allowing journalists not to feel that chilling effect. When we say that the Bill increases the democratisation of the process and enables more people to take a case, what evidence do we have of that? I am hearing that it reduces the chilling effect on journalism, but have we any evidence that it reduces the chilling effect on individuals looking to take a case?

Ms Ní Mhainín: When you talk about individuals, are you referring to the individuals whom journalists write about? I am focusing a bit more on media outlets, because they are the ones publishing. I know that social media has come up a lot in this Committee, but social media relates only to section 5 of the Defamation Act. It is not really a huge issue in this context; it is a separate issue, and it is being dealt with. The draft Online Safety Bill has been brought up. It would be a mistake to get too bogged down in social media when looking at this issue. Scotland, for instance, has sidestepped social media altogether. I do not want to get into that too much. I am focusing more on the media. We could also talk about academics, campaigners and others, but our focus is on public interest speech. The people who write tweets purposely to defame, anonymous trolls and so on are a separate issue. We should not get that muddled up with the Bill.

The Chairperson (Dr Aiken): You have seen Mike Nesbitt's definition of public interest in the Bill. Are you happy with that?

Ms Ní Mhainín: Yes.

The Chairperson (Dr Aiken): OK.

Ms Ní Mhainín: I want to come to some of the other issues. I know that some members are especially concerned about social media and jury trials. The fact that adopting this Bill could lead to an increase in costs has also come up.

First, on jury trials, the involvement of ordinary citizens in the administering of justice is important. On the surface, it certainly seems logical to have their participation in cases relating to defamation law. In practice, however, that is doing more damage than good. The Parliamentary Under-Secretary of State for Justice summed up the situation in 2013, when he said:

> *"In practice, few defamation cases actually involve juries, and a substantial majority are heard by judges alone. However, the retention of the right to jury trial creates practical difficulties and adds significantly to the length and cost of proceedings. That is because of the role that juries, if used, have to play, such as in deciding the meaning of allegedly defamatory material. It means that issues that could otherwise have been decided by a judge at an early stage cannot be resolved until trial, whether or not a jury is ultimately used. That means that proceedings take longer and cost more than they should."*

I asked Rupert —

The Chairperson (Dr Aiken): Sorry, Jessica. One important aspect of having a jury trial is that, because a jury is there, it is the best form of justice. Are you saying that you do not want jury trials because of results from jury trials that have not gone the way that was expected, is it just on the basis of cost, or is it because juries cannot understand the complex issues involved in defamation? What is your particular perspective on that?

Ms Ní Mhainín: Primarily, it is the last of the three. I mentioned Dr Mark Hanna's research on the really, really high proportion of settlements in Northern Ireland. A jury trial makes the process much more unpredictable than it otherwise could be. As I said, it increases costs and time. It is fair to say that it increases the chilling effect for journalists, who, to some extent, do not feel that they will get a fair hearing before a jury. They feel that they will not really get the —

The Chairperson (Dr Aiken): Did you really want to say that?

Ms Ní Mhainín: I know — I did not say that in the best way, but do you understand what I mean? It is the unpredictability. Very often, in defamation cases, there is a huge degree of complexity that juries cannot get to grips with. Charlie will speak a little about that as well.

The Chairperson (Dr Aiken): OK. We will listen to what Charlie has to say about that.

Ms Ní Mhainín: Yes, we can maybe delve into it a little more in the questions. It is a very complex area. I know that it may be an unpopular opinion, but, going beyond the superficial nature of it, it is an important issue. England and Wales do not have jury trials. It is still an option, but there is not a jury trial automatically. It has not become a problem.

I asked Rupert Cowper-Coles, who is a lawyer and expert in defamation law for the London-based law firm RPC, about the impact of the 2013 Act on costs. He told me:

> *"I can't see any logical reason why adopting the 2013 Act would increase Northern Ireland legal costs to equal those of London lawyers."*

He went as far as saying that any suggestion to that effect was "totally irrational scaremongering". He believes that the introduction of the Defamation Act 2013 in England and Wales was "relatively cost neutral for clients". He said that costs had been incurred in a small number of test cases in ascertaining the legal boundaries of new defences but that, if Northern Ireland were to adopt this legislation now, it would already have the benefit of the past seven years of jurisprudence, which means that the scope of the Bill would be considerably clearer for Northern Ireland in 2022 than it was for England and Wales in 2014. He said that he believed that there would, potentially, be savings for Northern Ireland:

> *"as the 2013 Act is likely to prevent parties from incurring costs on fruitless litigation."*

In summary, should the legislation be brought forward? Yes. It is not a silver bullet. We are not saying that it is. It is not intended to be, but it is a first step to providing a more enabling environment for media freedom and also, therefore, for human rights, the rule of law and democracy in Northern Ireland.

Mr Holt: Thank you so much for inviting me to give evidence this afternoon. My accent probably makes it unavoidably clear that I am not from Northern Ireland. I hope, however, that I can provide some insight into our experiences with the Defamation Act 2013. As Jessica said, English PEN and Index on Censorship together launched the Libel Reform Campaign in 2009, alongside Sense about Science. More recently, we have been working together to counter the abuse of the use of defamation law against those engaged in public participation, the so-called strategic lawsuits against public participation (SLAPPs) that Andrew Scott, I know, referenced in his evidence.

I will start by explaining whom we represent and what we promote. English PEN was established 100 years ago, in 1921, to champion the freedom to read and the freedom and write. The acronym PEN stands for poets, essayists, novelists. Since then, our scope has expanded to encompass all those engaged in the dissemination of the written word. I start with that because it is important to emphasise that our focus is not so much on media freedom but, more broadly, on the right to freedom of expression. In particular, we are concerned with the impact that structural inequality has on free speech. We find that the right to free speech tends to be particularly precarious in relation to those who have very little money or power. That is particularly true in the context of defamation. Much has been said already about the lack of appetite amongst big media organisations to fight expensive defamation lawsuits. Less has been said about the prospect of lengthy and complex proceedings on individual writers, freelance journalists, NGOs, bloggers or small newspapers.

Jessica referenced the long-term revenue decline of media organisations. It would, in any event, be a mistake to characterise the news industry as a sort of Goliath here. It is also important to emphasise the range of players involved in this debate. On that note, it is important to say that we take into account the broader problem that defamation law is inaccessible to anyone but the rich. There is some truth in that. The difference is that, with defendants, this inaccessibility does not impact on only the individual. We are talking about impacts on press freedom, democratic accountability, the public right to information and, ultimately, good governance. It is not just a tension between two rights; there are systemic implications for the way in which we govern ourselves as a free society.

With all that in mind, it is worth looking at the central purpose of the Defamation Act 2013. The draft law was described by Lord McNally, who was then Minister of Justice, as:

> *"a consolidation Bill, aimed at clarifying the law and putting it into a place where people can clearly understand it."*

This is not a radical law. At the same time, it would be wrong to say — as has been said in this Committee — that the Bill was not responding to a pressing social need. We noted in our submission that, in 2010, the House of Commons Culture, Media and Sport Select Committee published a report in which it described the abuse of our libel laws then as being a “national humiliation”. Professor Frost earlier referred to the US SPEECH Act, which was passed to block the enforcement of laws such as ours and which was prompted by a number of high-profile cases involving US citizens. We also put in

our report that the UN Human Rights Committee had attacked the UK's defamation law as serving "to discourage critical media reporting".

Despite this recognised need, the draft Defamation Bill was subject to an exhaustive process of review when it was introduced. It commanded support from MPs from all the main political parties and was the subject of pre-legislative scrutiny, public consultation and a careful review by a Joint Committee of both Parliamentary Houses. The final form, the Defamation Act 2013, represents a compromise and, frankly, a compromise that fell short of what groups such as ours were originally calling for. In providing greater clarity on the law, however, the Act provided greater certainty to those on the receiving end of aggressive legal threats. Therefore, it helped to counter the chilling effect that our law was having on public interest speech.

Our submission focused on five points in particular, but I will focus on three that I think are particularly important. Jessica has already discussed some of them, but I will try to complement rather than duplicate what she said. First, I draw the Committee's attention to clause 1, which concerns the harm test. That can provide a simple but crucial means of filtering out trivial or frivolous claims. It is important to note, as Andrew Scott did in his evidence to the Committee, that preliminary hearings on harm remain an exception, not the norm. It is important to bear that in mind. Where harm is a central issue of dispute, however, an early resolution can help to dispose efficiently of a claim. That goes to another issue that we will keep going back to: that of efficient case management, which the clause does so much to help.

There is a related issue in clause 11. Jessica has already spoken about clause 11, which deals with juries. That clause is important for a similar reason. Meaning is often the central issue that is in dispute in a claim. If meaning can be dealt with swiftly, claims are often settled one way or another. I know that Mark Hanna explained that in his evidence to the Committee. Without that swift resolution, such matters of fact are left to be determined by juries at the end of the litigation progress. As Mark Hanna said, more often than not, what therefore happens is that there is a settlement one way or the other, usually in a way that is disadvantageous to the defendant.

The Chairperson (Dr Aiken): Charlie, may I point something out to you?

Mr Holt: Yes, please.

The Chairperson (Dr Aiken): The basis for a lot of this is what is deemed to be in the public interest. The jury represents the public. Deciding whether something meets the serious harm test and whether it meets the interests of public interest should, in some respects, be a matter for the public to decide on. Two arguments seem to be running in parallel here. One is that we want to streamline the process to make it more efficient. In some ways, clause 11 is stating that we do not want to use a jury because of the prospect of the jury not having the capacity to deal with the complexities of the issue. That is one side. The other side is that a lot of this is based around the whole process of public interest, and the jury represents the public. How would you square those two things? I cannot do so from the evidence that I have heard.

Mr Holt: It is not so much about capacity or whether the jury is well equipped to deal with complicated meaning *[Inaudible owing to poor sound quality]* as it is about the efficient management of cases. That is what it really comes down to. There is a presumption that, in a jury trial, matters of fact that could otherwise be resolved quite quickly are left to the end of the process. That creates uncertainty and stretches out proceedings in a way that *[Inaudible owing to poor sound quality.]* I can give some more detail on how that worked in the UK.

May I very quickly raise a technical issue? I am hearing quite a lot of echo. I am nor sure whether that can be addressed.

The Committee Clerk: Perhaps if you switch off your camera. We sometimes have problems. The sound is a wee bit ropy. Try that. We will see how that goes.

Mr Holt: OK. I will try again. I am still getting the echo, but I will try to ignore it. We will see how it goes. I will go on.

On that point, I was going to say that, a few years ago, in England, the Queen's Bench Division of the High Court introduced reforms to push for early determination. In practice, that meant deciding on the central issue of defamatory meaning at a much earlier stage. It is important to note that we have seen

an increase in defamation cases following those reforms. That suggests that the Defamation Act 2013 has contributed to making defamation laws generally more accessible, in a way that is advantageous not just to the defendant but to the claimant. That is because expedited proceedings, or streamlined proceedings, which are what the Queen's Bench Division in England has introduced, are possible only if you remove the presumption of jury trials. Otherwise, questions of meaning, as well as questions of serious harm, have to be left to the end of proceedings. That means that that possibility that cases are disposed of in a quick manner, once issues that are really fundamental to the claim are resolved by the judge, is no longer a possibility. That is what I will say about juries.

The one other provision that I will mention before I answer questions is clause 4, which concerns the public interest test. That is important, because it is an example both of the conservatism of the Defamation Act 2013 and of its importance. Broadly, it is a core principle of democracy that everyone should be able to participate freely and without fear in discussions of public interest. That is why the European Court of Human Rights has identified a positive obligation on states:

> *"to create a favourable environment for participation in public debate".*

The reality is that the current law does not create that environment. The Defamation Act 2013 did go some way towards ensuring that that environment was there.

Mark Hanna testified to the fact that the Reynolds defence is essentially never used in Northern Ireland. I do not know much about that, but I can say that the same was certainly true in England before 2013, with most publishers preferring to settle rather than face the uncertainty of the defence.

In 2011, Lord Steyn said that, owing to that uncertainty, the Reynolds defence would:

> *"continue to complicate the task of journalists and editors who wish to explore matters of public interest and it will continue to erode freedom of expression."*

The Joint Committee on Human Rights in Parliament therefore recommended that the 10-point criteria list that is found in Reynolds be replaced:

> *"in favour of a clear, unambiguous defence of public interest."*

That is what clause 4 does here.

It is important to emphasise, though, that, just because the words "responsible journalism" do not appear in its text, clause 4 does not leave the door open for irresponsible claims. Clause 4(1)(b) requires a defendant to show that he or she:

> *"reasonably believed that publishing the statement ... was in the public interest."*

In practice, English courts require compliance with ethical standards of journalism in order to be able to meet that test of reasonable belief.

Are you still there? I think that I am breaking up. The echo may be gone, however.

The Chairperson (Dr Aiken): Yes, we are still here. We can hear you.

Mr Holt: That is great. I think that the problem has been fixed.

The courts examine whether the journalist believed what they said, whether it was based on a reasonable and responsible investigation, and whether it was a reasonable belief to hold. The public interest test therefore incentivises responsible journalism without the need for the confusing 10-point test found with Reynolds.

Circling back to my first point, I should note that clause 4 is not just reserved for journalists. The Reynolds defence was often misleading in its reference to responsible journalism. Clause 4 is therefore far better equipped to protect public interest speech in the age of the internet.

There is a lot more to be said, but I will end on that point. It is important to underscore the broader need for harmonisation. We have heard about how courts have interpreted "reasonable belief", how they have streamlined hearings to allow for early resolution, and how the serious harm test has been

developed over the past eight years. None of that is radical. Indeed, in one recent Supreme Court case, Lord Sumption explicitly said that he did not see the Defamation Act as representing a:

"revolution in the law of defamation".

What the Act did do, however, was to clarify, codify and advance developments in the law that have proven invaluable in restoring some balance to our defamation law.

As has been said before in the Committee, harmonising the law now will bring with it eight years of benefits, in the form of case law: eight years in which the courts have further clarified and streamlined the procedures and the tests that the Defamation Act 2013 introduced. I will end there, but I very much look forward to your questions.

The Chairperson (Dr Aiken): OK. My first question is for both of you. Should clause 11, "Trial to be without a jury unless the court orders otherwise", be amended to reflect the findings of the 2017 Gillen review of social justice, which suggested that judges should have discretionary powers to compel parties to undertake alternative dispute resolution (ADR) or face possible financial penalties? I am not trying to paraphrase what you said, but, if we take juries out of the equation and give the power to judges, should judges then be in the position of having discretionary powers to compel parties to undertake alternative dispute resolution?

Mr Holt: I am not so sure about the Gillen review, and I am not so sure whether amending clause 11 is the right way in which to do that. What I will say is that encouraging the use of ADR is indeed really important.

Other suggestions have been made about the way in which that is done. Again, I am operating in an English context, so you will have to forgive me for the fact that I am operating from some position of ignorance when it comes to Northern Ireland. In England, there has been some talk about amending practice directions, which is the guidance issued *[Inaudible owing to poor sound quality]* appropriate interpretation of civil procedure rules.

In those cases, having some sort of sanction in place, at the very least where claimants have unreasonably not engaged in ADR, is very appropriate. Again, it is about looking at all available mechanisms to be able to reduce costs and make the system as *[Inaudible owing to poor sound quality]* as possible. Where you have claimants who deliberately avoid the use of ADR, that is a good indication that the claim is abusive: that is, that its real intent is to drive up costs and harass the target. Having sanctions in place for that would certainly be appropriate.

I am afraid I am not in a position to say how exactly that could be done out of the Gillen review.

Mr O'Toole: Thank you both for your evidence. The Bill largely transposes the Defamation Act 2013 from England and Wales to Northern Ireland. Can you say a bit more about the specific added protections that you feel the 2013 Act has given to journalists and writers generally?

Ms Ní Mhainín: As a lawyer, Charlie can elaborate on this, but, as has been mentioned, the public interest defence has never been available to journalists in Northern Ireland. This is really important, as it will give journalists added protections.

When Paul Tweed was before the Committee last week, he said:

"the truth is the biggest sword of defence that any journalist can have."

Using a truth defence is difficult, however, because it is to assume sometimes that there is one objective truth on which everyone agrees. It is just not that simple or that easy.

The added defences in the Defamation Act are the truth defence, honest opinion and public interest. Those are important for ensuring that journalists can have confidence to go forward and defend themselves in court, which will hopefully reduce the number of settlements that we are seeing at the moment.

Mr O'Toole: Thanks. Do you have anything to add to that, Charlie?

Mr Holt: Another thing that Paul Tweed and others said is that a lot of the talk here has been about the chilling effect. The response to that was that that does nothing to address the problem of legal intimidation. That is something on which I would push back.

Pre-Defamation Act 2013, there was a lot of uncertainty about the law. Case law existed that provided a public interest defence: the Reynolds defence. There was a substantial harm threshold in the case of the Jameel principle. There was other case law that provided the mechanisms that you see in the Defamation Act, but there was a crucial lack of certainty about their application, and there was not that accessibility.

To some extent, the Defamation Act emboldened those on the receiving end of some of the spurious and more aggressive legal threats, as they knew that there were now defences and mechanism in place to protect them if they were pursuing responsible journalism in compliance with ethical standards. That has been really important.

We have seen one thing anecdotally from our conversations with those who are impacted. Given that both Jessica and I are working in the issue of SLAPPs now, I do not think that we want to suggest that the law is perfect or that you do not still get a huge amount of abuse of libel law from the mega-wealthy against those people who cannot afford to mount a defence. However, it is certainly harder to credibly put together a letter and intimidate someone on the basis of a frivolous claim. I emphasise that word "frivolous", in the sense that, in particular, the serious harm clause is important in filtering out those claims, both in relation to preliminary hearings and pre-emptively. It is easier to call their bluff in some of those cases, knowing that a court will not accept cases that do not reach a certain threshold.

Mr O'Toole: Your point is about accepting that legal intimidation is a practice. I think that there is pretty enormous anecdotal evidence that it is happening in Northern Ireland. From what Mr Tweed said, it sounded like he participates in legal intimidation — effectively, it is what he does for a living. Although he alleged that the trusty sword of truth is the best defence, to me, it sounded like he was an enthusiastic deployer of legal intimidation, from the way that he described what he did. Are you saying that it is harder to do that if the person on the receiving end of said legal intimidation from A N Other lawyer has greater clarity over how the court will interpret the law? I have put it in a very long-winded way.

Mr Holt: No, that is absolutely right. One of the reasons why I wanted to highlight the public interest test is that it is a really good example of that. If you were to say, "I was exercising my rights as a responsible journalist", it obviously begs the question of what a responsible journalist is. Someone will then say, "Well, just look to the case of Reynolds". When you look at the case of Reynolds, you get a 10-point list of criteria, and you have no real idea whether the judge in question will attach more significance to one point over another. We know of some cases, prior to the Defamation Act 2013, in which lawyers represented, or misrepresented, the Reynolds test as essentially being a 10-point checklist where you had to tick all the boxes. That was quite easy to do, because there was that uncertainty. In the Defamation Act 2013, you have the positive affirmation of the need for public interest journalism or other public interest speech more generally, and you are replacing that concept of responsible journalism with the concept of reasonable belief. If you have had that thorough investigation, you can be more confident that that reasonable belief will be recognised in court.

Mr O'Toole: OK. I have a question that may be for you, Jessica, in relation to the context. I have previously mentioned my chairmanship of the relevant all-party group. Obviously, this place is commonly thought of as having a particularly distinct challenge around press safety. If we accept the argument that defamation law here is currently litigant-friendly, from the perspective of an individual journalist, and how difficult it is to be a journalist here, is there a link between the stress around press safety and the stress around how overwhelmingly pressurised defamation law can be? Is there a link, or is it spurious?

Ms Ní Mhainín: I think that there is a link. The issue of the safety of journalists also contributes to a chilling effect. It is fair to say that journalists in Northern Ireland are operating in a really tight space, certainly compared with their colleagues in the rest of the United Kingdom and also down South, because of those safety issues. I do not think it is a stretch to say that, when you have verbal and physical attacks on journalists, it contributes to an environment where journalists become a viable target in general, and then also for lawsuits. As Charlie mentioned, English PEN and Index on Censorship also do a lot of work on the legal phenomenon that you might have come across — I think that Dr Andrew Scott mentioned it — of strategic lawsuits against public participation or SLAPPs, as

they are called. Donald Trump was a huge proponent of SLAPPs, and his anti-media rhetoric went alongside that. They are all media freedom issues and are linked in some way.

Mr O'Toole: I do not think that Donald Trump has ever litigated in Northern Ireland, though he may be watching the Finance Committee today. Hopefully, he has not got the idea.

Ms Ní Mhainín: He will start.

The Chairperson (Dr Aiken): We get people from all over watching the Finance Committee.

Mr O'Toole: We may be on Fox News tonight.

The Chairperson (Dr Aiken): Maolíosa?

Mr McHugh: Tá fáilte romhaibh uilig. You are both very welcome. I have heard the expression before about being the Wild West, but it was not in relation to litigation. It was describing the island of Ireland with a tap dancer or a step dancer on the top of a telephone box. At that time, it was not litigation that they were discussing, but the all-Ireland Fleadh. That definition implies that our law needs to be reformed in many ways. However, within that, there are still essential ingredients.

I accept that most journalists are responsible and seek to report the truth. However, at the end of the day, we have some journalists who sometimes report lies or even act with malice. Only last week, we had evidence given that it is OK to tell a white lie, as long as one is defending freedom of speech. Do you really think that freedom of speech, in itself, trumps all else? Both of you could answer that question.

Mr Holt: I will respond to that first, if it would be helpful. There is a distinction to be made — someone has made it before to the Committee, so I apologise for the repetition — between what is moral and what is ethical. We talk about lying being bad. It is bad, and I certainly do not want to suggest that I condone anyone telling lies. However, it is also worth focusing on what defamation law is supposed to do. Defamation law is not meant to stamp out the phenomenon of lies. It is not meant to prevent people from ever misrepresenting or misstating the truth. That is not what defamation law is there for. Defamation law is there to protect individuals from reputational harm. It is important to emphasise that. If there is no harm, there should not be an actionable claim. That is why clause 1 is important. It is right to filter out claims where the individual involved has not been harmed. When you are balancing out those two conflicting rights — on the one hand, the journalist's right to free speech, and, on the other, the right of the individual's reputation — the balancing act quite clearly falls on the side of the journalist where the individual who has been targeted has not been harmed. That is quite appropriate in the context of defamation.

More broadly on your answer, there are other laws that will address problems caused by misinformation and lies. However, in the context of defamation, it is important to make that point: the purpose is not simply to stamp out all lies and all misrepresentations.

Mr McHugh: You have alluded to the other problem that keeps arising: the definition of serious harm. You accept that what is serious harm to one person may not be serious harm to another. What will happen, if the Bill is passed, is that a judge will decide whether the harm is serious. The person who has been defamed may be told that their experience does not count. Is that a fair comment?

Mr Holt: It is worth looking at what the serious harm threshold actually does here. I made the point earlier when I quoted Lord Sumption as saying that he did not see that as representing a revolutionary change in defamation law. That was in the context of the harm test. What section 1 of the Defamation Act does is essentially put an end to the practice whereby the meaning of words themselves could be used to infer harm. Now you actually have to show, as a matter of fact, that harm has been caused. Again, that is important, because I think we are now beyond the stage of seeing individual words as always, universally, causing harm, regardless of the circumstances, which is a pretty outdated view and quite an outdated practice. A much more appropriate way of doing that is to look at the individual harm — the actual harm that was caused to the individual — as opposed to looking at the meaning of the words alone. That is what the Defamation Act does.

Mr McHugh: Jessica, do you think that the North of Ireland is likely to become not just the Wild West but the litigation capital, in the event of the new law's not being introduced?

Ms Ní Mhainín: I had a little difficulty hearing the last part of your question, but, as I have understood it, it basically referred to libel tourism. Is that right?

The Chairperson (Dr Aiken): That is it.

Mr McHugh: Yes.

The Chairperson (Dr Aiken): Will we become the global capital of libel tourism?

Ms Ní Mhainín: No.

The Chairperson (Dr Aiken): Can we fill our five-star hotels with lots of highly expensive lawyers?

Ms Ní Mhainín: No, I do not think so. I think that that was a fear, certainly, when Northern Ireland was left behind in 2013 due to the fact that the rest of the UK — or specifically London, I suppose — was such a libel tourism hub, and they were adopting that new legislation that was designed to stamp that out, and, then, in turn, Northern Ireland was not adopting that new legislation. There was a fear that libel tourism could be redirected here. Obviously, that has not come to pass. Libel tourism is not an issue in Northern Ireland. However, as we have discussed, there are lots and lots of reasons why this Bill should be adopted. Libel tourism is probably not the most relevant to our discussion here.

The Chairperson (Dr Aiken): Just for clarity and for the record, because we have heard differing views on libel tourism as we have come through: as far as you are concerned, we have not become the capital of libel tourism since the 2013 Act came in?

Ms Ní Mhainín: No. Just to clarify what we mean by libel tourism, we have heard of people elsewhere in UK being threatened with defamation law in Northern Ireland. If you are referring to libel tourism in that sense — threatening to use defamation law in other jurisdictions — then, yes, Northern Ireland does seem to be a problem. Again, it is difficult to get people to come on the record to speak about that and to point to specific cases. I guess that openDemocracy is one, because it is not based here in Northern Ireland. However, are we hearing of journalists who are based in the United States or, I do not know, the Middle East being threatened with lawsuits in Northern Ireland? No.

The Chairperson (Dr Aiken): I did not think so. OK. Thank you.

Mr McHugh: That is grand, Chair. Go raibh maith agat. That is me.

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

No other members have indicated that they wish to ask a question. Thank you very much indeed, Charlie and Jessica, for coming in. I hope that you enjoyed the session. It was a very interesting evidence session.

Ms Ní Mhainín: We did. Thank you so much.

Mr Holt: Thank you so much.