Northern Ireland Assembly

Committee for Finance

OFFICIAL REPORT (Hansard)

Defamation Bill: Department of Finance

15 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 Michael Foster	Department of Finance
Dr Martin Tyrrell	Department of Finance

The Chairperson (Dr Aiken): I welcome, from the civil law reform division of the Department of Finance, Michael Foster, head of division, and Martin Tyrrell, principal legal officer. I invite you to make opening remarks on the Committee Stage of the Defamation Bill and the correspondence that you have kindly provided.

Mr Michael Foster (Department of Finance): Thank you, Chair, and good afternoon. I do not know how much detail you want us to go into at this stage. I am conscious of the fact that you have had a lengthy evidence session with the Minister and that there is further business. We are perfectly happy to move straight to questions, if that assists the Committee in any way, or we can speak to the paper that we submitted to the Committee in response to the questions that were posed to us.

The Chairperson (Dr Aiken): Michael and Martin, will you quickly talk through the points that you raised in your paper so that those are in Hansard and are recorded as part of the evidence-gathering process? Thanks.

Mr Foster: OK. The paper sets out a few general points before addressing, in a little bit of detail, the questions that were asked by the Committee. The general points have been fairly well rehearsed, Chair.

We are conscious of the fact that the Bill is a private Member's Bill and not one that the Department developed from first principles. To an extent, that constrains us in how we interact with it. I would not, however, necessarily say that the Bill is like the usual private Member's Bill. A private Member's Bill tends to be proposed when a Member has a policy idea and wants to legislate for it. Such Bills are typically prone to being drafted in a way that lacks the expertise usually associated with an Executive

Bill. That, however, is not really the case with this Bill, because, essentially, it is a rewrite of 2013 legislation from England and Wales. Therefore, it is a well-presented and professionally drafted Bill, bar some minor technical points that relate to differences in drafting styles between England and Wales and here. One obvious flaw relates to clause 9, but it is clear that officials in Whitehall spent a serious amount of time with the Office of the Parliamentary Counsel in shaping the Bill and that it benefited from considerable scrutiny at Westminster. To that extent, the Bill is, broadly speaking, if you agree with its general principles, the finished article. If, for example, you agree with the serious harm test, the Bill appears to be well drafted. If you agree with the notion that the presumption of trial by jury should be replaced, the Bill reflects that very adequately.

The Department's concern, which was highlighted by the Minister in previous correspondence to the Committee and by our earlier oral evidence, is that the Department has reservations about the big-ticket items in the Bill. We do not think that some of it will have the positive effect that the Bill's sponsor and those who have spoken to you from the perspective of the media organisations would have you believe. The evidence from England and Wales is unclear. On one hand, we have heard that it appears to have balanced the scales towards freedom of expression and that there is now some sort of deterrent to bringing forward defamation cases, which has made the system quicker and more efficient. Equally, however, there are others who feel that the serious harm test has, for example, simply shifted the financial burden to earlier in the proceedings and that expensive and lengthy pretrial proceedings are taking place. The Committee heard that message clearly from the oral evidence that it heard, and it was interesting to note that, effectively, Dr Scott acknowledged that it is a policy choice. He hardly gave a ringing endorsement to the serious harm test, in particular.

There is concern about other aspects of the Bill: for example, the abolition of the presumption of trial by jury. On that point, the Minister's concern, which he elucidated at Second Stage, stemmed from the clearly important issue of jury trials in this jurisdiction. It is his view that the most desirable way for defamation cases to be tried is for cases to be heard in front of one's peers as opposed to before a judge, who might not be in touch with all of the aspects that are important to individual members of society or the ordinary citizen. As the evidence progressed, we took a little comfort from some of the views expressed on that point. We would have expected a much more forthright defence of trial by jury from the lawyers who gave evidence, but they seemed to be fairly neutral on that point. Whilst preferring jury trials, they seemed to suggest that a judge on his or her own would be able to discharge that function equally well.

Those are the two big-ticket issues that the Department has concerns about. The other big aspect is, of course, clause 5 and social media. That has been a theme of our concern. The Committee has heard much evidence on the point, and the view that comes across is that Google, Facebook and Twitter etc are where much of the reform in the area is needed. We noted the discussion about how to most effectively get those companies to engage in order to ensure that defamatory content is not transmitted or, when it is transmitted, is dealt with effectively. We heard from some members the idea of a pan-European approach to deal with those matters to ensure that the companies cannot take sanctuary elsewhere. As we have tried to convey in the notes to you, Chair, a lot of that discussion takes us outside the scope of the Bill and potentially into areas that are outside the competence of the Assembly.

The Chairperson (Dr Aiken): Do you have any visibility on what is going on with the draft online safety Bill in Westminster?

Mr Foster: No. The draft online safety Bill is a much broader piece, Chair. When you strip all this down, you find that defamation is a tort and, therefore, a narrow issue. The draft online safety Bill, as I understand it, develops themes that are to do with a range of matters that may well have some read-across into defamation law, but the Department has neither the remit nor the resource to take on the broader issue of online safety. As I understand it, that Bill will seek to examine areas that stretch far beyond the remit of any Defamation Bill, but we will monitor its passage through Westminster and how it will impact on the landscape here.

We have our concerns about how effective clause 5 and any accompanying regulations will be. Some of those who have given evidence noted that the regulations are yet to be developed, with the onus being on the Department to develop them from the provisions of the Bill. Given that they are in the framework of clause 5, they would necessarily be drafted along similar lines to the corresponding English regulations. Those do not appear to have been effective at all in England and Wales, and, indeed, there is quite a bit of evidence to suggest that social media companies and other website operators are not using the clause 5 defence but are relying on other avenues.

We think that the social media issue requires considerable further work, and that is one of the main reasons why the Minister felt that the Bill is not the best vehicle for proceeding on defamation. It is why the Department is keen to see how the area develops in the other jurisdictions that have reviewed it recently. We are seeing a little bit of that in Scotland, which has taken a slightly different approach from England and Wales. It is obviously one that we are keen *[Inaudible owing to poor sound quality]* which has been well rehearsed on what comes from the review that we expect to see shortly from counterparts in Dublin. Those are points that we, as a Department, are keen to learn from and interrogate further. That certainly does not represent a lack of original thinking on the issue in the Department; rather, it represents the need to assess and learn from neighbouring jurisdictions and to use those themes to develop sound policy proposals.

Those are fairly high-level concerns about the Bill, Chair. The rest of it does not appear to us to be particularly troublesome. We broadly support the codification of the defences on truth and honest opinion, for example, and the statutory remodelling of the public interest defence. We do not see any obvious requirement to tinker with them. While there has not, in our view, been any apparent restriction on academic or scientific comment in this jurisdiction, we have no particular concern about clause 6. Some of the other provisions, like the single publication rule change, are things that we can live with. Finally, it must be clear or reasonably clear to the Committee now, having heard evidence from people from both sides of the debate, that the supposed bogeyman of libel tourism has not really raised its head here in the time since the 2013 Act, as some back then predicted. On that point, clause 9 might not be needed, but, again, that is not something that the Department would die in a ditch over. We are happy to discuss that again in the context of the Bill. We can live with some of the other clauses, which appear to us to be reasonably sensible additions.

Those, Chair, are our general comments. I do not know whether you want us to look at the specific questions. We have attempted to set out detailed answers to those questions in our written evidence. If you are content with that opening statement, Dr Tyrrell and I are happy to take any questions that you might have.

The Chairperson (Dr Aiken): OK. Thanks, Michael.

Mr O'Toole: I should declare an interest — I intended to do this earlier — which is that I am chair of the all-party group on press freedom and media sustainability.

Thank you, Michael and Martin, for giving us evidence and for what was a relatively frank and straightforward presentation.

You talked about your high-level concerns or high-level observations, I suppose, or drawbacks to the approach, perhaps, that is being taken in the Bill. For the record, it is worth confirming that the Bill does not really place — or does it? — any significant bureaucratic or financial burden on the Department. It should not put any financial burden on the Department and no particular bureaucratic burden either.

Mr Foster: I do not think that there is any obvious financial burden as a result of the Bill. It depends what you mean by "bureaucratic". Our only concern would be that, if the Bill is passed in its current state, there would be a considerable amount of work attached to producing regulations in relation to clause 5. One of the criticisms that appear to be levelled at that is that those regulations are bureaucratic and fairly complex. The framework of the *[Inaudible owing to poor sound quality]* see how we could depart — *[Interruption.]*

Mr O'Toole: Sorry, Michael, you are just slightly drifting in and out. I realise that you are both giving evidence. I am asking questions, and you are giving evidence remotely. I do not know if there is a mic problem or something, but you are slightly drifting in and out, so I am not getting everything you are saying. I do not know if others are having that problem.

The Chairperson (Dr Aiken): No.

Mr Foster: OK, hopefully —.

Mr O'Toole: The question was about the bureaucracy. You mentioned how clause 5 might lead to work for the Department.

Mr Foster: It is difficult to know whether that is "bureaucratic" in the true meaning of the word. I was making the point that the regulations have the potential to be rather bureaucratic because they will have to be drafted within the framework of clause 5, if clause 5 stands part of the Bill. Other than that, there is no obvious bureaucratic or other issue for the Department.

Mr O'Toole: OK. That is helpful. I think that I am right in saying that it was you, Michael, who gave us initial oral evidence on this a while back.

Mr Foster: Yes.

Mr O'Toole: You mentioned the fact that you expected that the question of trial by jury would become a concern. That has not been raised as a concern, perhaps because there are obvious concerns around trial by jury here, but they tend to be more specifically around criminal trial by jury rather than the more niche area of defamation and libel law. Have you had any other concerns raised to you about trial by jury in relation to the Bill?

Mr Foster: It is not my intention to rehearse our previously outlined reservations on that. There are two aspects to it, Chair. At the higher level, the Rolls-Royce approach to defamation cases would be to have them heard by one's peers. The Minister's concern, which the Department has conveyed to the Committee, is this: if it is left to a judge alone, is that judge the person who is most in touch with everyday life and can hold in his or her hand a determination of what constitutes serious harm? You have to take both the potentially major changes to defamation law hand in hand: the serious harm test and placing that serious harm test with a judge sitting alone as opposed to with a jury of one's peers.

From what we have seen and heard so far from the written and oral evidence, it would appear that the lawyers who gave evidence — we might have expected them to be more forthright in their view that a jury would still be the best way to approach such cases — seem to be fairly neutral on the subject. I suppose that that is useful from their perspective. Ultimately, they have much more direct and day-to-day experience of such cases and how they are discharged. We are still nervous about the notion that jury trials will wither on the vine. There is absolutely no doubt that, with the similar change that was made in England and Wales, jury trials for defamation cases have become a thing of the past. That is indisputable.

The civil justice review came up with a different approach and took a slightly different slant. We know that the Committee is considering that, and we referenced it in our correspondence. That view was that a judge would be able to try defamation cases in particularly complex cases alone. As a Department, we think that that approach is worthy of consideration in the context of the Bill. It is not a straightforward case of saying, "Let's leave it to a judge. That is going to make it quicker and will remove the chilling effect". We have significant reservations about that, as does the Minister.

Mr O'Toole: OK. The Chair or someone else can correct me if this is wrong, but I think that it is fair to say that most of the opposition to the Bill that we heard was from libel lawyers and one particularly high-profile libel lawyer. However, the argument has been made to us repeatedly that the effect of Northern Ireland's, in a sense, relatively less codified libel regime is that it has a chilling effect on the media here. I have engaged with media representatives in my other role, and I should declare an interest there. The smallest weekly newspaper publishers through to the BBC, which is one of the biggest media organisations in the world, have consistently given us evidence that the Northern Ireland libel law regime has a chilling effect on their work and reporting. Is that not, by itself, convincing evidence that the chilling effect exists? If, by passing this law, some of the concerns that you expressed, which do not seem to be existential or profoundly problematic, are realised, the downside seems to be relatively limited, but the upside would seem to be much more confidence in the media to report without fear of being forced into financial ruin. I am not asking you to endorse every part of that statement. I guess that I am just asking you to comment on the overwhelming nature of the evidence from media organisations, large and small, that the libel law regime here has a particularly chilling effect on their work.

Mr Foster: I fully understand that. It is an entirely legitimate policy position from which to approach the Bill. It is probably not particularly surprising to hear that it is the media organisations that are pressing for the change.

The chilling effect on the media appears to centre around the fact that the existing law promotes an environment in which strategic litigation can take place. You will have heard that from Sam McBride in particular on the threatening letter to the publisher or author. We in the Department noted that

evidence, and, whilst it is, in some ways, anecdotal, we have no reason to dispute that that type of thing takes place. The question is whether the Bill will improve the lot of the publisher or author. Will clause 1, for example, mean that pre-action letters will be less common?

The Committee heard from Paul Tweed that he did not feel that that aim will necessarily be borne out in practice. One of the themes that appear to have emerged and that the Department has reservations about is the experience with the Defamation Act 2013. That is that what constitutes serious harm appears to be being litigated by way of almost a mini trial in which the costs involved are shifted rather than extinguished, so they basically occur earlier in the process. We note and share the concerns outlined by the Gillen review that the question of seriousness, for example, appears to have become such a preliminary trial in many cases in England and Wales, and the review highlighted in its paper the costs following the introduction of the Defamation Act 2013. I think that the costs for one case were £450,000 and, for another, they were £400,000. If the aim was to simplify and reduce costs, there is at least a question mark around whether section 1 has achieved that.

To taper the point off, it is worth noting that, since the 2013 Act was brought in, Dr Scott has studied delay. He found that, prior to the introduction of the 2013 Act, the mean number of days taken to determine meaning in a defamation case was 499. It was suggested that that would change dramatically under the Act with the end of trial by jury and the prospect of an early judicial hearing on meaning, serious harm and any factor of common questions that arise. He found that, post 2013, the average time taken rose to 698 days.

Those are the types of things that we are concerned about at a departmental level. We can see and understand where the media organisations are coming from. From an academic perspective, if you raise the bar for a defamation case to "serious harm", one would expect them to have that additional comfort where they think that they can press on in a more secure way. We have reservations about how that will play out in practice. When we hear people like Paul Tweed say that he might relocate to this jurisdiction if the Bill passes, that brings with it an attendant grave nervousness from our perspective about whether the Bill will achieve the aims that it hopes to.

Mr O'Toole: Is he not already here? I do not want to focus on one lawyer, but it is clear that he does lots of his work in London and Dublin. That is a product of the fact that more of his clients are there, because those are much bigger economic centres than Belfast.

This is my final point before I let others in. A counterargument to the idea that costs are being moved to earlier in the process is that we do not have data about how disputes are settled before writs are issued. One of the big points that are made to us repeatedly is that lots of things are getting settled not much earlier in the process than in England and Wales. In many cases, it happens privately here before writs are issued and on the basis of conversations between a libel lawyer at x media company and their insurance company. In the case of one notorious example that was outlined to us, you would imagine and certainly hope that, if the case was tested in court by a jury but not a judge, it would in no way meet not simply a serious harm test but any reasonable common-law threshold for defamation. The problem is, however, that too many cases are not getting to that point. At the minute, we just seem to have this huge world of pre-action settlement that happens behind closed doors.

Mr Foster: You have probably summarised quite efficiently the difficulty that policymakers have in the area, because there simply is not that obvious evidence base from which to make those decisions. I do not think that I can honestly say to you today that there is not an issue around such matters. It is about how they are dealt with and dealt with effectively.

As Dr Scott indicated in his evidence, it boils down to what is, broadly speaking, a binary policy choice: you either take the view that the serious harm test will help in those cases, or you say that the evidence in England and Wales does not necessarily show that. That is a matter that the Committee will need to wrestle with.

Mr O'Toole: OK. Thank you very much for your evidence.

Mr Allister: Is it a fair summation to say that the Department heard nothing in the evidence to change its attitude to the Bill?

Mr Foster: Broadly speaking, yes.

Mr Allister: One issue that I wanted to ask your opinion about was that, during the discussion about triviality in defamation, attention was drawn to the fact of the apparent inadequacy of the County Court jurisdiction, where it costs only £3,000, which is a much cheaper cost-limited option. Does the Department have a view on whether it is time to bring that jurisdiction up to a more credible level and thereby create the capacity to deal with more smaller libel cases in a cost-effective way?

Mr Foster: That is an entirely sensible proposal. I am aware that the Department of Justice issued consultation this year that specifically deals with raising the County Court limit for defamation cases from the existing £3,000. It was recommending a figure of £10,000. In other areas, I have seen that a figure of £30,000 has been suggested.

Mr Allister: Even at £10,000 but certainly at £30,000, it would enable small or moderate defamation cases to be disposed of at a limited cost for both the plaintiff and the defendant.

Mr Foster: I can find nothing to disagree with in that.

Mr Allister: Thank you.

The Chairperson (Dr Aiken): OK. Are there any more questions? Thank you very much indeed, Michael and Martin, for answering the Committee's questions.

That concludes our evidence sessions on the Bill.

The Committee Clerk: Maolíosa has a question.

The Chairperson (Dr Aiken): I am sorry; do you have a question, Maolíosa?

Mr McHugh: Thank you, Chair. Tá fáilte romhaibh, a Mhichil agus a Mháirtín. You are welcome, Michael and Martin. I have one question to ask. The Minister said that the Department was preparing its own legislation. In what way would the Department view the current laws to be inadequate? Would a private Member's Bill deal with any issues that the Department would also seek to deal with?

Mr Foster: It is not quite right that we are preparing our own legislation. As, I think, we noted in our letter to the Committee, we have undertaken some work on defamation law generally, but that is not at a stage where the extensive policy development that is required to shape legislation is ready for consideration by Ministers.

The second part of your question relates to the Bill. That said, there are aspects of the Bill that, if we were starting a Bill from first principles, we would take forward. As I indicated in my opening remarks, the material around the defences appears to be relatively non-controversial. In some ways, it puts on a statutory footing and provides a bit more certainty about and clarity on the defences to defamation, even though, arguably, they do not really change things in a particularly obvious way. For example, the defence of truth at clause 2 is largely the same as the common-law defence of justification. Nothing appears to have happened since the 2013 Act to suggest that the courts are not simply applying the principles that used to be applied in a plea of justification to a plea of truth.

Some of the Bill has some modest use. If we were taking it forward from first principles, we would need to think carefully about the big-ticket issues around serious harm. The Minister has expressed his reservations about that. We are concerned, in relation to serious harm, about how that would impact on ordinary citizens. The Minister has expressed his concerns around jury trials. In addition, the Bill, through clause 5, is not particularly well tailored to the challenge of social media. Those are the areas that, if we were bringing forward our own Bill, we would look to develop in more detail and test. However, if the Bill passes, whether it is amended or not, our work on the emerging challenge of social media in particular will necessarily continue, albeit there will be a body of legislation on the statute books that will deal with some of the other core elements of defamation law.

Mr McHugh: Earlier, emphasis was placed on the support for the Bill from the various media outlets and so on, but I am inclined to think, "Well, they would say that, wouldn't they?". I think that you implied something similar.

There is a review of defamation law under way in the Republic. To what extent are you informed about that? Is there anything that you hope to learn from that review?

Mr Foster: I will deal with two separate points there. As regards media organisations, I make it clear that strengthening the proposals is an entirely legitimate policy position to arrive at. I would not want in any shape or form to make it seem that that is not an entirely plausible position from which to approach the Bill.

As I think I said before, the Dublin work is something that we would want to put into the pot, if you like, along with, potentially, a review of the Defamation Act in England and Wales and the recent Scottish legislation, which is interesting. The work in Dublin will probably represent the most up-to-date thinking on the matter.

I will ask Martin to come in because he has a better feel for where exactly we are with the Dublin review. Martin, do you want to say a few words on that?

Dr Martin Tyrrell (Department of Finance): We have been waiting patiently for the Dublin review. Hopefully, our patience will be rewarded. We are interested in the Dublin review because the 2013 Act is eight, going on nine years old, and the Scott report, which included proposed legislation, is now five or six years old. The Dublin report is useful because it is up to the minute and will possibly have more to say on social media. Our concern about social media is that it has never been easier to defame somebody. It has never been easier to damage somebody's reputation and to circulate that damage globally — literally globally — very quickly. The comeback is often a retraction or a taking down of the post, which is not great for the person whose reputation has been damaged, as it is perhaps not commensurate with the damage that has been done. We will be interested to see what the Dublin review will have to say on online publication and how it will treat online publication. Will it treat website operators as neutral facilitators or suggest that sometimes they are more akin to publishers?

Mr McHugh: Go raibh míle maith agaibh, Michael and Martin. Thank you very much for your frank and succinct answers.

The Chairperson (Dr Aiken): Michael and Martin, thank you very much indeed for your evidence.