Northern Ireland Assembly

Committee for Finance

OFFICIAL REPORT (Hansard)

Defamation Bill: Mr Mike Nesbitt MLA

5 January 2022

NORTHERN IRELAND ASSEMBLY

Committee for Finance

Defamation Bill: Mr Mike Nesbitt MLA

5 January 2022

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 Nesbitt MLA - Strangford

The Chairperson (Dr Aiken): Mike, welcome back to the Committee for Finance. Will you make a few opening remarks on the Defamation Bill's Committee Stage and speak to the correspondence that you have kindly provided? Then we will get stuck in to some questions.

Mr Nesbitt: OK. Thank you, Chair. More broadly, I thank you, your colleagues and the Committee staff for the time and attention that has been paid to the Bill. Those are finite and precious commodities, and it is appreciated.

I have studied the published evidence since we last met, and, as an overarching comment, what strikes me is the breadth and depth of agreement that something has to be done, that the status quo is not desirable and that some reform is required. However, beyond that, there is quite a divergence of views about what needs to be done.

I have addressed the 12 questions sent to me by the Committee Clerk. I will not insult you by repeating those responses verbally. I would rather use the next couple of moments to talk about not so much the Bill's content but its timing. Departmental officials have made it patently clear that their strong preference is that nothing be done legislatively in this mandate and that they be allowed to get on with their scoping, preparation, investigation or whatever they are calling it. In fact, they went so far as to try to have the Second Stage debate stopped. I put on record my gratitude to Mr Speaker Maskey, who was very forthright in his response to the Department that it was none of its business and that it was out of order.

To be fair to the Department, it has given reasons for wanting to do nothing. It has said that the Government of Ireland may be about to reform their laws of defamation, and it seems to put great

store by the fact that there was a conference in Dublin towards the end of 2019. The Department also points out that Scotland has already done something in its Defamation and Malicious Publication Act. There is an argument, I accept, that we should wait and see whether there are lessons to be learned from those developments. However, there is a counterargument, which I will give to you in two ways, Chair: one is conceptual, and the other is contextual. Conceptually, I can put it no better than the great Russian writer, Ivan Turgenev, who said:

> *"If we wait for the moment when everything, absolutely everything, is ready, we shall never begin."*

That is true of defamation because it is an ever-evolving environment. Contextually, departmental officials argued that there is a risk in taking action. In their 11-page letter to you of 9 December 2021, they refer to the risks of taking action. They state that the legislation:

> *"might be insufficiently evidence-based".*

That is extraordinary given that the evidence base is Dr Scott's report, which was commissioned by the Department of Finance. They also suggest that the Bill may be "unfit for purpose". However, you know that I am simply replicating the Act as it applies in England and Wales. I have heard people say that the 2013 Act is imperfect. I have heard people say that it is not delivering the outcomes as intended. I have heard people say that it is obsolescent. However, until that letter, I had never heard anybody say that it is not fit for purpose or that it is bad law. Those officials have exceeded their brief, quite frankly.

If we are going to talk about risks, I will say that, if there are risks to action, there are certainly risks to inaction. I will give you two. There is an ongoing threat that one of the main parties of the devolved settlement is about to collapse it by walking away. There is also, apparently, a threat that, even if we get to an election in May, on the far side of that, we may not find the room to form the partnership in the Executive Office, which is an essential component of devolution. We know that, if we collapse, we can be out for years, and that, if we are out for years, we will be stuck with the current law, which nearly everybody agrees is not good enough.

I will also put on record a statement on page 1 of the same letter, which I find both outrageous and false:

> *"this Bill is a private Members Bill. The Department has previously outlined its concerns relating to the manner in which the Bill was brought forward, where no fresh thinking or further consultation had been undertaken since 2013".*

For the record, I started the process in 2013. I secured the services of Guy Black — that is, Lord Black of Brentwood — who, at the time, was executive director of the Telegraph Media Group in London, and who came into this very building to launch my consultation with an impassioned and argued plea for reform. I conducted an online consultation. I then paused at the request of the Law Commission. I met its then chief executive, Judena Leslie, and Dr Scott, whom you know, and they asked me to pause to avoid duplication and potential confusion amongst stakeholders and to allow them to do their deep-dive consultation, which was the foundation stone of Dr Scott's report of 2016.

After the three-year hiatus, when devolution returned, I worked with the Bill Office team, the Speaker's Office and the Northern Ireland Office to ensure that every clause of the Bill is competent. How dare officials make such inaccurate claims as to suggest that I have done nothing since 2013? If that letter was not privileged, those comments would be defamatory of my character, and I would be considering taking action against the Department for defamation of character.

The Chairperson (Dr Aiken): Mike, those comments struck me when I read them, given the amount of work that has been done and of evidence that the Committee has already received. After this, I will put it to the Committee that we write to the Department to ask it for clarification on that view, and whether it wishes to reconsider those remarks. Bearing in mind the work that has already been put in by you, the Committee and the people who have given us evidence, that is not representative of what has happened. It is inappropriate for the Department to make such remarks. I want to give it an opportunity to withdraw those remarks and apologise for them. I will ask the Committee that question once you have completed your evidence.

Mr Nesbitt: I appreciate that, Chair. Perhaps you would also ask the Department whether it is now dismissing Dr Scott's report, which was a consultation that happened after 2013. It contained fresh thinking, not least his bipartite proposal.

I am proposing that we return to being in lockstep with England and Wales on the laws of defamation, which is where we have almost always been. Officials are overstepping the mark by suggesting that fresh thinking is a more important policy outcome than the one that I am pursuing.

To finish positively, and without trying to circumvent the debate that we will, no doubt, have on the clauses, I will make a genuine offer to address the genuine concerns of Committee members. It is consistent with something that Dr Scott said in his oral evidence to you:

> *"the proposed Bill is sensible as a first step, subject to appropriate revision."*

It is clear that the opinion of the departmental officials, and maybe others, is that "appropriate revision" can happen only when we see developments in the likes of Dublin and Edinburgh. I propose an amendment to my Bill that places a statutory duty on the Department of Finance to continue the preparatory scoping work that officials say that they are engaged in; monitor the workings of this Bill and what is happening in other jurisdictions; and produce a report with recommendations within, say, two years of the Bill receiving Royal Assent.

The Chairperson (Dr Aiken): Thanks very much indeed, Mike. I think that the Committee really understands that there has to be change. There is a real need for a defamation Bill. As we have gone through the evidence base, three areas have come to the fore that we are particularly seized on and want to get some views on. The first is the role of judges and the importance of trial by jury, and how we make sure that that recommendation remains part of the process. The second is the issue of serious harm. It is about trying to get to where that lies, the definition of serious harm, and how that can be done most appropriately.

I put on record my abhorrence of the atrocious social media attacks on some of our elected representatives, particularly Diane Dodds. It is despicable that we are not able to hold social media companies to account. That is quite apposite in our considering the Bill, because the third issue that we have discussed is how to deal with social media companies and how that would be done through some of the clauses.

Those are the three key areas that the Committee has honed in on. You have seen the evidence that we have seen. It is a broad spectrum of evidence — there is a left arc and a right arc — and it has raised quite a few questions about where we want to be.

I will go through a couple of points, and then open up the session to the rest of the Committee. In your written statement, you indicated that clause 11 will not prevent defamation cases being heard by a jury but will, instead, merely remove the presumption of a jury trial, and that parties can still apply for a jury trial. Is it your intention, therefore, to table amendments that give the judge the discretion to have the case heard by a jury?

Mr Nesbitt: That is the intent. A jury trial would not be the norm or the presumption but it would not be entirely ruled out, if a judge thought that that was the most appropriate way to handle a specific case.

The Chairperson (Dr Aiken): OK. On the suggested amendment to clause 2, "Truth", you comment:

> *"in order to include a requirement for pre-trial hearings which would amend ... the Rules of the Court of Judicature ... in order to require the judge to determine a single meaning for the words complained of."*

The issue that we are trying to get there is when it comes to the description of serious harm and how that process is arrived at.

Mr Nesbitt: I am not quite following you, Chair.

The Chairperson (Dr Aiken): It goes to the nature and specifics of serious harm. The Department and others have argued that the serious harm test in England has led to a shifting of legal costs but not a reduction. Therefore, do you accept that there are real concerns about how clause 1, "Serious harm", is created?

Mr Nesbitt: I do not, but I acknowledge that there are those who do. I will give you one example, from my own experience, of the difference in the tests. The test that we have now is whether the ordinary man or woman on the street would think less of you having heard the statement in question, which seems, to me, to be a different test. Some years ago, when I was a broadcast journalist with Ulster Television, I was reporting on an event, and I mentioned that everybody involved with the event had served time at Her Majesty's pleasure for terrorist offences. I was wrong: one of the number had not. When that was pointed out to us, we were extremely concerned. Frankly, we were preparing to offer a substantial out-of-court settlement. As it happened, the individual chose not to pursue it.

Under our current regime, would people have thought less of that person because of what I said? Yes, I think that that threshold would have been met. If we had gone to court, we would have been in danger of losing badly. However, because he was a spokesman for one of the groups that — to use the language of the day — was close to the thinking of a terrorist organisation, would saying that he had been to prison have caused him serious harm? I do not think so. It is a different test.

The Chairperson (Dr Aiken): OK. I will move on to the intent of clause 5, "Operators of websites". Although the intent is to be helpful to local media outlets that host websites and may struggle to police their content, is it not the case that that clause could be used by bigger social media players? You are probably aware of the Online Safety Bill that is going through Westminster. We have taken action to try to get some oversight of what that Bill is likely to do and where it will lead. This goes to the crux of one of the main issues that we have.

Mr Nesbitt: First, I also formally record my disgust at the Twitter attack on Diane Dodds and her family. I looked at the account that the attack came from and discovered that I had blocked it some time ago. The owner of the account, obviously, has form.

My intent is not to protect Twitter and Facebook. The intent is that someone who has been defamed by something that has been posted on one of those sites will have the right to go to Twitter, Facebook, BelfastLive, or whatever it may be, and say, "You must identify for me the author of those words, and do so in a way that makes it possible for me to take legal action against them and sue them for defamation. If you do not or cannot do that, we will go for you".

I know that the focus, particularly after the Diane Dodds episode, is on the big global players, but I am also thinking about local organisations and media outlets, such as local papers, the subregional weeklies or BelfastLive, which allow readers to comment on reports that they publish. They simply do not have the money and resource to monitor those comments in live time. I am saying that, if you allow people to post, you have to take the consequences. The first consequence is that, if it is a defamatory statement or one that the individual thinks is defamatory, you have to provide them with the information to take legal action. That is reasonable. If you do not do that, you, as the secondary publisher, become liable. There is a chilling on freedom of speech, particularly for our weekly and regional newspapers, because they are finding finances very tight at the moment. Therefore, their having the resources to properly police and cut out defamatory comment at source is probably too much of an ask.

That is the intent of the clause. However, I accept the evidence of some of the witnesses that this is not something for just a regional devolved Government like ours or even the national Government at Westminster, and that it probably needs a pan-European, if not a global, approach.

The Chairperson (Dr Aiken): OK. Thanks.

Mr Wells: There is no doubt that you have done us all a service by taking the Bill forward. What has happened subsequently has revealed the value of Committees and their scrutiny role, because it has brought up a totally new raft of information about the whole issue. To be honest, I would like to go somewhere between the present situation and your Bill. There is so much that I am now not that certain about. What clauses would you die in a ditch over?

Mr Nesbitt: At Second Stage, I said that I would not die in a ditch over any of the clauses. However, I have seen the evidence and was particularly taken by Professor Andrew Scott's written response to the Committee of 29 October. It is very significant that he said that the move to judge-only trials has had highly beneficial consequences. At paragraph 10, he said:

"The importance of this change — the move to judge-only trials — cannot be overstated."

At Second Stage, I was probably of a mind to say, "Well, if you really want to dig in on jury trials, I will go with you". However, Dr Scott's evidence, in particular, is so strongly in favour of going for judge-only trials, with the serious harm test, which means that everything can be decided at the start of the process. That is why the money can be redistributed, which will mean a huge saving, rather than the cost being spread out over a long trial. If you put it into a serious harm test, judge-only trial, you front-load because the judge makes the determination, upfront, on the single meaning of those words. Currently, with a jury trial, he can only knock something out if the claimed meaning is perverse. I am now keener on judge-only trials and their partner, the serious harm test, than I was when I introduced the Bill.

Mr Wells: You raised, with validity, the whole issue of the instability of the institutions. They do tend to face crisis after crisis. I take your point about what could happen in May — in fact, it could happen before May, never mind in May. If there was guaranteed stability, would you have a different view about allowing us to come back to this in the new mandate, when the various developments will have occurred? In other words, is there a lot of merit in rushing it through simply on the basis that we are running out of time, rather than giving it the thought that it requires? This Bill, in particular, requires a wee bit more mature debate before we go ahead and approve it.

Mr Nesbitt: Mr Wells, the "rushing it through" expression jars with me given that I started, upstairs with Lord Black, on 19 September 2013. I really cannot accept that this is a rush.

Mr Wells: Yes. However, of course, circumstances outside of your, or anyone's, control meant that there was a long hiatus in that process.

Mr Nesbitt: Yes; which I have admitted.

Mr Wells: We face Bills that we are happy with, bar a bit of tinkering, or are totally opposed to. Your Bill falls into the category of possibly having considerable merit, but maybe just not yet. I would have thought that, in an ideal world, the best way forward here — certainly, we have done a lot of scrutiny — is to let the hare sit until things develop, particularly in Scotland, and then come back to it in the new mandate. I take your point that there might not be a new mandate to come back to. I accept that and, therefore, see your difficulty. However, our problem is that we have just been advised about how tight the deadline is for the Bill. I am just a bit worried that we might rush something through that we regret.

Mr Nesbitt: I will answer the question with questions, if you do not mind. How long do we need to be sure about the impact of the new Defamation and Malicious Publication (Scotland) Act 2021? What are the Dublin Government going to do? Will they do anything? If they do something, how long after they do it do we have to wait to understand the implications? Their defamation laws date back only to 2009, and already they are talking about reform. Therefore, if we are to make the Bill an Act, we should think about its shelf life in years, not decades. I am making the offer that, if we do it now, we build in a duty on the Department to come back with recommendations within, say, two years of Royal Assent.

Mr Wells: That is helpful, I must say; that is an important development. However, does it not concern you that the main practitioner in defamation law in Northern Ireland has come out so stridently against your Bill?

Mr Nesbitt: It does not concern me, because he came upstairs on 19 September 2013 and told me so. I have had those discussions. There are divergent opinions, as you know from the evidence that you have taken. I think that there is great strength in getting back into step with England and Wales. Dr Scott makes that point in his evidence:

> *"Consistency with English law: now arguably a more pressing issue .... It will ... become increasingly inappropriate for Northern Irish judges to rely on English law as a guide to the operation of the common law defences retained in this jurisdiction."*

We get so few defamation cases going to law, rather than being settled out of court, that it will take a long time to build up our own discrete case law.

Mr Wells: A few days ago, we had the disgraceful incident involving an MLA. How do you feel that your Bill, if it were enacted, would make it easier for the lady concerned to — quite rightly, in my opinion — get, frankly, punitive damages as a result of that horrendous message's being put out?

Mr Nesbitt: Presumably, she would retain an appropriate legal person, such as Mr Tweed, who would contact Twitter, ask for details and say, "You have to identify the person who posted that tweet, and do so in a manner that allows us to take legal action against them".

Mr Wells: Why would it be easier to do that under your Bill than at present?

Mr Nesbitt: My Bill would make it a duty in law. You have heard evidence — we all know from day-to-day life, anecdotally — that those big global institutions are extremely awkward when it comes to identifying the people who have posted and who hold accounts.

Mr Wells: Thank you.

Mr Nesbitt: I will add that it needs legislation, at least at Westminster and, preferably, as broadly as possible.

Mr McHugh: Tá fáilte romhat, Mike. You are very welcome, Mike. Bliain úr faoi mhaise duit fosta. Happy new year to you as well.

Mr Nesbitt: And to you.

Mr McHugh: Mike, in your previous answer, you referred to the serious harm test in clause 1. It divides opinion. How essential is clause 1 to the Bill?

Mr Nesbitt: It is essential because it goes with clause 11, which would mean that there is a non-jury trial. The judge would be able to make a determination, as early as possible in the proceedings, as to whether the case should go ahead. At the moment, because there is a jury, the judge has to give the jury its place. Effectively, all he can do is say, "No, I think the claimant's interpretation of the words is utterly perverse. Basically, the claimant is making it up; squeezing it in. I'm not going to allow it". Then, the single meaning only gets determined at the end of the trial. If you allow it upfront, you speed everything up. You may not reduce costs as much as you might have wished — because, obviously, there are costs in all these processes — but you would dispatch the case in a timely and appropriate manner.

Mr McHugh: Are you saying, then, that clause 1 is still essential to the process?

Mr Nesbitt: Sorry. I did not catch that.

Mr McHugh: How essential is clause 1 to the Bill? Do you think that it is essential?

Mr Nesbitt: I think that it is very important. Yes.

Mr McHugh: Many respondents were also very clear that, in practice, it would not reduce costs, may not even shift the balance towards freedom of expression, and would block the ordinary citizen from defending their reputation. How do you respond to that, Mike?

Mr Nesbitt: I am not sure that I agree that it would block the ordinary man or woman in the street from taking action. I suggest to you that not very many ordinary men or women in the street have cause to take action for defamation. From speaking to some of the people who you have had in this room giving you evidence, you will know that it is people like you and me — politicians — and wealthy people, influential people and journalists who take cases for defamation. I am really not sure that the ordinary man or woman in the street takes a case that often or, indeed, has cause to take a case that often. Remember that, in recent years, the number of cases has been in and around three dozen per annum. What we are really talking about here is the chilling effect of a lawyer sending a letter to a media outlet saying, "If you go ahead and publish what you're proposing to publish about my client, we will take you". That would have a huge chilling effect that is much more significant than the potential impact on the ordinary man or woman in the street.

Mr McHugh: I am not so sure that, when you include councillors, politicians fit that snugly in with the more wealthy. On the case of Mrs Dodds — and it is despicable that anyone should attack an MLA or any other person in that way — I heard a comment yesterday that something like £20,000 would be needed for her to even instigate action to attempt to get redress or raise the issue. As I said, it is not just the wealthy; in fact, this can apply to anyone. In some respects, would clause 1 remove that defence from the individual?

Mr Nesbitt: What I will say to you about clause 1 is that I do not think that there is any good reason in law or policy why a claim should be allowed to proceed, with all the costs and the resources that that entails, if there is no reasonable prospect of establishing serious reputational damage.

Mr McHugh: By whom would that evaluation of serious reputational damage be made?

Mr Nesbitt: The judge.

Mr McHugh: Is he the person in the best position to make that judgement for the ordinary man in the street?

Mr Nesbitt: Judges have very significant experience of and training in getting to the truth of matters. Yes.

Mr McHugh: Thank you, Mike, for your answers. Go raibh maith agat.

Mr Nesbitt: Thank you.

Mr Allister: Good afternoon, Mike. You have made a couple of references to the fact that you will be tabling amendments. Will we see those before we start our deliberations, which, effectively, will be next week?

Mr Nesbitt: I have talked about one amendment, Mr Allister. I would need to liaise with the Bill Office, I imagine, but it would effectively be an amendment to put a duty on the Department to bring forward a review within two years. Does that sound like a reasonable amount of time?

Mr Allister: Is that the only amendment that you are thinking of?

Mr Nesbitt: I will also have to table a pretty technical amendment, because — I cannot explain this except to say that it is a case of not being able to see the wood for the trees — the Bill as drafted has us remaining within the European Union.

Mr Allister: Yes. Clause 9.

Mr Wells: That is pretty fundamental.

Mr Allister: I will second that amendment for you. *[Laughter.]*

Mr Nesbitt: The Bill has been through many hands, but it took the Committee to point that out. I will certainly take that on the chin.

Mr Allister: Listening to you today, you have firmed up on the centrality of clause 1, "Serious harm", which, I suspect, is the very clause that is causing the most serious harm to your Bill. At the end of the Second Stage debate, you indicated that the Bill could live without that clause. You now seem to be saying to us, "No, that is essential". If clause 1 was removed, what would be the future for the Bill?

Mr Nesbitt: The Bill would become poorer. I base that and my change in attitude largely on the evidence from then Dr, now Professor, Scott. In his note of 29 October 2021, he said that the test "remains desirable".

Mr Allister: Professor Scott has been the least impressive witness that we have heard from on the Bill, but that is only a personal opinion. You still have the problem of the fundamental denial of the opportunity to pursue defamation by the imposition of serious harm. You are saying, in effect, that a

journalist, a broadcaster or any defendant can tell a lie as long as it is not too big a lie. As long as you do not cause serious harm, that is OK. In my book, that is a fundamental flaw in your Bill and remains so. Are you saying, however, that if clause 1 was removed, the Bill would still stand, or would you, for example, fail to move the Final Stage?

Mr Nesbitt: I would have to reflect on that. I note that, on several occasions, you have talked about the "little lie". You have never made reference to the "little error".

Mr Allister: Take, for example, what you said to us at the beginning of your evidence. You said that the departmental letter — from, I think, back in October — suggested that you had been indolent on this matter and that, in other circumstances and but for the letter being privileged, you would have sued the Department for that suggestion. Would you cross the serious harm test in doing that?

Mr Nesbitt: Probably not. I think that I would cross the current test much more easily.

Mr Allister: Does that not illustrate the point that someone who is injured, defamed and belittled by something that is said would, under your Bill, just have to grin and bear it?

Mr Nesbitt: As politicians, we should have thick skins.

Mr Allister: Indeed. Speaking of politicians, we were all appalled by the episode involving Diane Dodds. Your Bill would give greater protection to Twitter, would it not? All Twitter would have to do is identify the miscreant to buy itself immunity.

Mr Nesbitt: That is certainly not my interpretation. My interpretation of the intent is that it would make it easier for the person who has been abused and defamed to identify the person responsible for those words and to take legal action against them.

Mr Allister: But not against the body that platformed the remarks.

Mr Nesbitt: Sorry?

Mr Allister: Not against the body that platformed the remarks.

Mr Nesbitt: Only if the party that platformed them was unwilling or unable to identify the person responsible for the words that appeared on that account.

Mr Allister: Yes, but once it identifies them, it buys itself immunity under your Bill.

Mr Nesbitt: What is your objection to that?

Mr Allister: The person whom they identify may well be a man of straw. Therefore, effectively, there is no remedy for the person complaining, and the complainant cannot proceed against the body of substance, namely Twitter or Facebook, because they have bought themselves immunity by identifying the man of straw.

Mr Nesbitt: Anybody can be defamed by a man or woman of straw at any time on any communications medium.

Mr Allister: Yes, and is that not why we have always had the fallback whereby the publisher of the libel can still be pursued, never mind the initial libeller, because the they publicised it, and, as a commercial interest, are not a man of straw? Therefore, you always had recourse to a remedy against the party that facilitated and published it. Your Bill removes that facility in the circumstances where the man of straw is identified, and, therefore, the publisher, be they Twitter or whoever, escapes.

Mr Nesbitt: What would be the effect on, for example, the 'Belfast Telegraph', 'The Irish News', the 'News Letter' or BelfastLive, if they had to moderate every single comment before it was uploaded? The effect would an enormous chilling of free speech, because they simply do not have the money, resource, manpower or personpower to do that.

Mr Allister: Do most of them not have insurance for that very purpose?

Mr Nesbitt: As I have previously said in front of the Committee, when I was at Ulster Television, we had insurers, but, on every occasion that we had a defamation case, they instructed us to settle out of court. They would not cover us for a court case, because the jury could find against us and award a settlement of an extraordinary quantum.

Mr Allister: Yes, but the defendant was in the luxurious position of knowing that they had the safety net of insurance. The hapless plaintiff never has that: he does not have legal aid or anything else.

Mr Nesbitt: The insurance was effectively withdrawn.

Mr Allister: Yes, but that contrasts with the plaintiff who has to bring the case at his own cost and risk with no safety net. When you consider the commercial interest of the publisher, the two are totally incomparable. You want to create the situation where a person who has risked their own money to bring a case against something that has been tweeted may find out that, having spent their money, the person is a man of straw and that the publisher of the tweet is able to escape in the smoke. How is that just?

Mr Nesbitt: I do not accept that. Let us take a situation where you see that you have been defamed on Twitter by an account called "ABC123". At the moment, if you want to take action, you will find it extremely difficult, because we are told that the big global players are incredibly reluctant to engage. However, if my Bill becomes an Act, you will have the right to say to that global organisation, "Identify ABC123 in a manner that allows me to take action against them in the courts for defamation or I will take action against you for defamation". That is a much better position for the individual.

Mr Allister: Would the much better position not be to have the statutory duty to identify without sacrificing the right to pursue the platformer, so that you could sue both, if necessary?

Mr Nesbitt: What do you think the effect on freedom of speech would be if you introduced that chilling effect?

Mr Allister: If you are going to have your provision, whereby the initial libeller or defamer must be identified, you could say that that will have a chilling effect on freedom of speech. I am simply guaranteeing that those who defame do not get away with it and can be identified and that the publisher of that can also pay the price.

Mr Nesbitt: It is my impression that many people who are defamed simply want justice. They want a correction and the truth to be published. They are not interested in large quanta of financial compensation.

Mr Allister: I thought that one of the arguments from your side was that libel was out of control and that you had to put some brakes on it because companies like UTV and others could not afford to pay.

Mr Nesbitt: That is an interpretation that I did not intend you to take.

Mr Allister: Right, I see.

Let me ask you one other thing about the issue of serious harm, which really is related to the extent of the quantum of the libel. You do not seem to have given much thought to the fact that by increasing the jurisdiction of the County Court, we could take care, at very low cost, of a lot of minor defamation cases. At the moment, that jurisdiction is at the farcical level of £3,000. However, if it was raised to an appreciable level, a defendant who says, "Well, this may have caused you harm but it has not caused you serious harm", could make an application before the Master in the High Court to remit the case to the County Court. If the Master agrees that it is not a serious libel, although potentially is a libel, it is remitted and you are then in a situation where costs are limited for both sides. Is that not a much more practical way to approach the problem of small defamation cases?

Mr Nesbitt: The approach that I have taken is to bring us back into line with defamation law as it applies in England and Wales. That said, what you are proposing sounds to me to like it has a significant degree of merit. Perhaps the Department could take that on board if we were to accept an

amendment that put that statutory duty on it to continue to scope out and investigate other reforms. That goes back to Dr Scott's idea that what I am proposing is basically a good start but it needs to be appropriately amended as we go forward.

Mr Allister: Thank you. I will leave it there.

Mr K Buchanan: First, I add my comments to those of others members on the despicable words that were used against Diane Dodds, which were absolutely disgusting. No doubt, it happens to all of us to some extent, though not exactly day and daily. Some people on social media wish you a happy new year, yet, two hours later, they are attacking you over something. In such cases, the happy new year and the change that those people talk about does not last too long. It is up to everybody to be man or woman enough to come and speak to a person at their office. I am not saying that you should go to their doorstep, but go and talk to them; do not do it over social media. Those people are not as big in those circumstances as they are when they are sitting on their sofas. Anybody out there that that applies to needs to listen to those words.

Mike, you referred to a "little lie" and a "little error". A journalist, who was sat in your seat a few weeks ago, referred to a "little lie" and the definition of "a lie" to get a story. A little lie could be defined as being a little error, but it could have a big impact. Is it acceptable to tell lies to get good journalism?

Mr Nesbitt: No, absolutely not. Absolutely not.

Mr K Buchanan: How do you, then, not control but police journalism? They cannot say what they want, so how do you get that balance right, and is the balance tipped the wrong way currently?

Mr Nesbitt: There are bodies that investigate and regulate journalism. The balance, as I said when I was previously in front of the Committee, is between two competing rights: the right to freedom of expression and the right to protect your reputation. So, it is always going to be a balance, and it will be necessary, from time to time, to adjust the balance.

Our laws predate the internet, so there is a prima facie case for saying that we need to look at our laws to take account of the new broadcasting communications medium. That medium is incredibly fast and can be marvellously informative, but, as we all know, it can bring out the absolute worst traits of the human condition.

Mr K Buchanan: Just on your point about who polices the journalists, we have a document in members' packs from Professor Chris Frost from the National Union of Journalists that states that there have been three complaints about its members in Northern Ireland in the past 15 years. My understanding — correct me if I am wrong — is that complaints can only be lodged by other journalists, so members of the public cannot even complain to the National Union of Journalists to say that there is an issue. There have been only three complaints about its members from Northern Ireland in the past 15 years. If a member of the public cannot complain about journalists, who can?

Mr Nesbitt: Sorry, did you say there were three complaints to the National Union of Journalists?

Mr K Buchanan: In the past 15 years.

Mr Nesbitt: Yes, but there is also —. Sorry, I am having a mind blank.

Mr K Buchanan: There are more than that, obviously.

Mr Nesbitt: There is an independent —

The Chairperson (Dr Aiken): The Independent Press Standards Organisation (IPSO).

Mr Nesbitt: Yes, there is IPSO.

Mr K Buchanan: OK. There is also a point that both Jims picked up on with clause 5, which concerns operators of websites. What is the difference today? Give it to me in layman's terms, Mike. What recourse does an individual have today, and what recourse would they have if your Bill came in? What

can an individual do today to go after the websites? What is the strength in clause 5? I do not want to pick Diane Dodds as an example; I am talking about whomever.

Mr Nesbitt: The difference is that it introduces a statutory duty on the operator of the website to give you the information that you need. If ABC123 has a go at you at 5.00 pm on any website — maybe it is one of the local newspapers, BelfastLive or whatever — and you say to the operator of that website, "I need to know who ABC123 is. I am going to take them for defamation", you are entirely in their hands when it comes to whether they tell you or not. The Bill says, "You will tell. If you don't, you're going into the witness box. You're responsible".

Mr K Buchanan: Going back to Jim Allister's point, what if the you get a straw man; an individual does not exist? If the operator gives you such a person, you will be chasing your tail trying to find them. What more can you do to say to operators of websites, "No, those people must be identifiable. They can't be ABC123; they must be Mike Nesbitt from wherever". Can that not be put in the Bill?

Mr Nesbitt: In theory, you could put that in, but, again, what would the effect of that be on free speech? To what extent would that chill free speech? To what extent would the operators of the website say, "We're not going to do this. We're not going to take reader comment. We're going to publish our story in our newspaper and put it up online, but we're not allowing any comment from the readers"?

Mr K Buchanan: As you know, you cannot walk up to a man or woman on the street and just say what you want.

Mr Nesbitt: No.

Mr K Buchanan: If it is more in-your-face, people know that you cannot do that, but people can do it online. If you want to say something to somebody online, you should be doing it on the same basis as if you are talking to them, face to face, but —

Mr Nesbitt: You should; yes.

Mr K Buchanan: — people hide behind the screen. What is the problem with asking people when they are setting up a new Twitter account for information, such as where they live? If they were told, "You can, within reason, say what you like, but it will come back and bite you if you cross the line", what would be the issue with that?

Mr Nesbitt: Now you are —

Mr K Buchanan: You talk about free speech. I can say what I want, but, if I go too far, the buck stops with me.

Mr Nesbitt: You can do something separate from the Bill. If you are the operator of a website — say that it is www.niassembly.gov.uk, and all the other 89 MLAs can go on and type whatever they want — you could say, "Before you get an account, you must sign a contract with me. In signing that contract, you guarantee that you will not defame anybody, and that, if you do, you will take full responsibility". However, that is a separate issue.

Mr K Buchanan: Yes, fair enough. Thank you, Mike.

Mr O'Toole: Thank you for being really thorough today, Mike. Today, and at other evidence sessions — in fact, some of the questions that Keith just asked go back to this point — in scrutinising the Bill, I sense a conflation of the questions of online harm, bullying and the horrible vile abuse from people online and defamation. Those are two separate things. I should add, like everyone else, that I was utterly disgusted by the remarks made to Diane Dodds. That was possibly one of the most shocking examples that we have seen here of the depths of the depraved comments that people are willing to make anonymously on social media. Is it not important that we distinguish between abusive, bullying speech and defamation because they are two different things?

Mr Nesbitt: They are, but they conflate. I do not want to get into the detail of the tweets that were aimed at Diane Dodds, but one that I read was clearly defamatory as well as abusive. It was clearly defamatory in ascribing to herself and her husband attitudes and behaviours. It was totally defamatory.

Mr O'Toole: OK.

Mr Nesbitt: I take your broader point, which is why the proposal in clause 5 goes a certain distance to address issues. We need legislation that is beyond the remit of this jurisdiction to look more broadly at online defamation and cover the full gambit.

Mr O'Toole: I agree. The point is well made that social media platforms are not being properly held to account for the Wild West situation that exists when it comes to online speech and for their role as publishers of the content. In one sense, at least your Bill introduces a little more legal obligation or recourse for people who have been defamed on those platforms than exists at present. At the minute, there is very little recourse at all. You may be fortunate enough to have a good lawyer: certain lawyers are expensive — Paul Tweed talked about this — and have the means of finding out VPNs and where people have posted information from using the VPN address of the device that they used. However, at the moment, there is no legal certainty on that. Not only is there no legal certainty, you have to be able to find the right lawyer who has the equipment and technical expertise to find the person. At the minute, it is a total Wild West situation.

Mr Nesbitt: Yes, I agree.

Mr O'Toole: OK. The point about the body of law has come up in our evidence on multiple occasions. Previously, judges, and indeed lawyers, in Northern Ireland could draw from case law in England and Wales, but the divergence post-2013 has meant that that cannot happen. Will you reflect on the risks of not taking action or not passing this legislation or any legislation? Doing nothing will mean that Northern Ireland will have even less case law to refer back to and will be much more of a place apart for defamation law. Will you say a little more about the risks of not taking action and what that might mean for the application of defamation law here?

Mr Nesbitt: I repeat what Professor Scott said at paragraph 19 of his note:

> *"It will therefore become increasingly inappropriate for Northern Irish judges to rely on English law as a guide".*

On building up case law, the number of defamation cases that go to trial is in and around 30 to 36 per annum. So there is not a huge volume of cases to generate case law precedents. We are better off with acting now, as Dr Scott argues. Arguably, it is now a more pressing issue than it was back in 2016.

Mr O'Toole: Indeed, one of the lawyers whom we took evidence from, Mr Tweed, confirmed that, very often, his work simply involves a phone call to a publisher, whether they are in Belfast, London, or elsewhere, to have a conversation about content. In those circumstances, the situation is not just settled out of court; it is settled long before a writ is even drafted let alone issued. Is there a risk that that simply becomes evermore the default position in the absence of reliable case law?

Mr Nesbitt: I think that the danger is that it becomes more prevalent without a serious harm test. I am going to admit to something that I am not at all proud of. Some years ago, I felt that I was being followed, let us say, on Twitter. There was a particular correspondent who, every time that I posted something, would post something critical of me. I got a solicitor to contact that person and basically say, "If you don't stop, we'll see you in court". They stopped, but they did not stop. By that, I mean that they stopped posting against me and started posting against somebody else. That is not great, is it? We need better, and, if you have a serious harm test, the phone call or the letter from the lawyer will no longer necessarily carry the same weight.

Mr O'Toole: Indeed, because there is a piece of legislation against which the claims can be tested in court, so the publisher or, indeed, the poster of the information has the choice of whether to defend what they have said in court or not. Thank you very much.

Mr Catney: Thank you, Michael, for coming. Happy new year.

Mr Nesbitt: Happy new year to you.

Mr Catney: I echo the comments by members on the awful post against Mrs Dodds and her family.

Mike, I want to start with the responses to the Bill that have come back, clause by clause. I do not want to spend too much time on that, but I support your opening comments. First, I find it awfully difficult to accept that the Department wrote to you to say that the Bill is a private Member's Bill. It should have been giving you all the help that you required from 2013. Its letter stated:

> *"The Department has previously outlined its concerns".*

I have to question what help it has given to you or whether it is engaging in a blocking process. The longer that I stay here, the more that I feel that some officials are trying to pull you back. I have to commend you, as a fellow Member, for trying to bring forward the Bill. The people and the organisations who have responded to it show that its provisions are much needed. I want to address that. Chair, you stated that you intend to write a letter.

The Chairperson (Dr Aiken): With the Committee's approval.

Mr Catney: With the Committee's consent.

The Department's letter states:

> *"Some of these issues, particularly around social media, are likely to require broader consideration that would be both outside the remit".*

You are trying to bring it within that remit. That is what you are trying to do here, and the Bill strengthens the debate and the argument. At least it is moving and showing movement. You said that you are open for two years, if we can make better law. Is that correct?

Mr Nesbitt: Yes.

Mr Catney: Can we speed this up? Can we help you in the remainder of this mandate? Can we get the brakes off, which, having listened to the evidence today, I feel are being put on you as a private Member? Are you hopeful that we will be able to progress your Bill in the limited time that we have?

Mr Nesbitt: It is possible to get the Bill over the line before the end of the mandate, which, I believe, is 25 March. Time is not generous to us, but it is certainly available to achieve that.

On cooperation from the Department, in fairness, because I was basically transposing existing legislation — the Defamation Act 2013 that applies in England and Wales — there was no call on drafting and no particular need to go to the Department. There was a need to go out to consultation, which I did following Guy Black's intervention in September 2013, but then Simon Hamilton, who was then the Finance Minister, decided that he would like to bring in the Law Commission and task it with a deep dive review. Some people said that that was kicking the can down the road, but I took an alternative view. I could have pressed on when I met Judena and Andrew in the Law Commission's offices, but I took the view that my online review and consultation had been shallow enough. It had attracted the likes of English PEN and the National Union of Journalists — the usual suspects, if you like — but Andrew went much deeper, and I felt that that was a good thing. When his report came out in 2016, it was very welcome. He took a different tack to me on certain aspects, but he said that my Bill and his alternative Bill were both desirable. He has not moved from that position, because, in his verbal evidence to you the other day, he said that my Bill would be a good starting point. I am happy with that.

As regards the officials, I do not know them. I have never met them, and I would not know them if they were to walk through the door next. However, I am really taken aback: they have overstepped their mark.

Mr Catney: That is the point that I was trying to make to you.

Mr Nesbitt: I cannot speak for the Minister, but I would be really surprised if he were entirely content with everything that the officials have done and said.

Mr Catney: I doubt that the Minister is content. That is my personal view. I can see the amount of anguish and hurt that it has caused you, because it is difficult to take on a private Member's Bill.

Mr Nesbitt: I was just taken aback by the attitude, but it is what it is. I am much more focused on the fact that Professor Scott, as he is now, has moved since 2016, considers the non-jury trial to be a much more significant development than anybody imagined and considers that consistency with England and Wales is a more pressing issue than it was five or six years ago. If we go with the Bill, but put in the clause that says —

The Chairperson (Dr Aiken): Two-year review.

Mr Nesbitt: Is it two years? Is it 18 months? Is it three years? I do not know; whatever seems reasonable. However, if you say that we have got to wait to see what the Dublin Government do or how the new —

The Chairperson (Dr Aiken): Scotland.

Mr Nesbitt: — Scottish law pans out, what happens if, as we are coming to that conclusion, Westminster says that the 2013 law needs to be updated? We will have to wait again. Why not go with the Bill as a good start, as Professor Scott has described it, but recognise that its shelf life will, potentially, be very limited?

Mr Catney: Thank you.

The Chairperson (Dr Aiken): There are no further questions.

Mike, thanks very much for coming to give evidence.