DEFAMATION BILL: CLAUSE BY CLAUSE SCRUTINY

RESPONSE FROM THE BILL SPONSOR TO TWELVE QUESTIONS ASKED ON 26 NOVEMBER 2021

1.Some respondents to the Committee Stage have suggested that Clause 1 (Serious Harm) should be strengthened in order to incorporate a provision to enable parties to apply to the court at an early stage to have the action struck out if it is established that it is without merit and/or merely strategic litigation to censor free speech e.g. from NGOs etc. Can you advise if such a measure is necessary and beneficial?

As I understand it, existing pre-trial protocols could easily be adapted to enable such an application to be made. The removal of the presumption of trial by jury would enable the presiding judge to takes powers beyond the existing right to merely exclude perverse meanings, determine a single meaning for the words under scrutiny and enable an early judgement on whether or not the action has sufficient merit to proceed to trial.

2. Some respondents have suggested that Clause 1 (Serious Harm) in England and Wales introduced uncertainty for claimants/legal advisors and has significantly increased costs which has served to reduce access to justice for individuals who have been defamed. They also argue that the NI Rules of Court and Common Law already include provisions to allow claims without merit to be struck down. They argue that Clause 1 is therefore not required. Can you advise on the merits of this argument?

I am not moved to support this argument. Defamation cases in England & Wales had, and in NI currently have, uncertainty of outcome at their core. I believe an early determination, by a Judge, of core issues, such as a Single Meaning, would hugely increase the opportunity for early resolution, with associated reduction in costs. How the 21013 Act in England and Wales has been applied is not necessarily how it might be applied in NI, depending on how the judiciary conducts pre-trial protocols.

I note Dr Scott states regarding the application of Serious Harm through the 2013 Act that "Irrespective of one's attitude towards the impact on the presumption of harm, the s.1 test remains desirable …" (Dr Scott's Note on the Defamation Bill (NI), 29 October 2021, para 17)

3. Some respondents have suggested that Clause 1 (Serious Harm) should be further strengthened in order to include provisions which prevent companies or public authorities from bringing defamation actions. They argue that the protection of reputation is deemed necessary because it impacts on 'personal identity and psychological integrity' and that such a justification should not apply to any kind of

company or public authority. Can you advise on the merits or otherwise of this proposition?

I suggest, strongly, that any organisation that can demonstrate an evidence base of harm, such as lost sales, decreased income etc, should have the opportunity to argue, through an evidence base, the downward trend is directly as the result of the defamatory statement(s).

4. Can you advise if the Bill as currently drafted establishes a test for Serious Harm as a matter of fact rather than as a matter of inference? Does the Bill require amendment in order to make the Serious Harm test clearer?

I believe there is an onus on the claimant to adduce evidence of actual Serious Harm caused. However, it would be self-defeating for a claimant to wait for damage to emerge, if there was legal recourse available that would prevent such damage at the earliest opportunity. Therefore, I believe it is both reasonable and desirable for the claimant to offer evidence that builds a credible inference that Serious Harm is likely to be a consequence of the publication.

5. Some respondents suggested that Clause 2 (Truth) should be amended in order to include a requirement for pre-trial hearings which would amend (Order 82 Rule 3A of) the Rules of the Court of Judicature (which presently allows for either party to take an application to determine whether the words complained of are capable of bearing the meanings pleaded) in order to require the judge to determine a single meaning for the words complained of. Can you advise if this might be a necessary and beneficial amendment?

That would be consistent with my intent

6. Dr Scott has suggested that Clause 3 (Honest Opinion) should be amended in order to make clear that a defence of honest opinion can apply in respect of facts the defendant reasonably believed to exist at the time the statement complained of was published. Can you advise if this might be a necessary and beneficial amendment?

Agreed. I accept Dr Scott's conclusion that this may have been an oversight and therefore requiring rectification.

7. Some respondents have suggested that Clause 5 (Operators of Website) is unnecessary. They contend that operators of websites will gain an exemption (or very significant limitation) of liability as the term "operators of websites" is not defined and may be used by social networks who not only host content but also control/influence content alongside providing the platform/network which permits mass publication. Can you advise on this clause and the benefit of further amendment in respect of the clarification of the term "operators of websites"?

The Committee has focused, perhaps understandably, with global players such as Facebook (Meta). My intent is locally managed websites such as the online versions of the Belfast Telegraph, New Letter, Irish News, Belfast Live and the many online editions of the sub-regional weekly newspapers. Moderating all user-generated content requires resources and funding of a scale that would discourage opening these platforms to the public, thus curtailing free speech. My intent is to ensure anyone defamed by user-generated content has the opportunity to identify the source of the defamation so that legal action can be initiated.

Tackling the global players and their platforms, such as Twitter and Facebook, is a matter best suited to the UK Government, given Telecommunications is a Reserved matter and I required the permission of the Secretary of State for Northern Ireland to legislate in this area. Indeed, as contributors to the Committee's perusal of the Bill have commented, concerted action on a pan European front may prove the most effective remedy.

8. Can you advise if Clause 9 (Action against a person not domiciled in the UK or a MS) amounts to an additional and unnecessary hurdle for someone seeking to take defamation action against a person not domiciled in the UK or a Member State?

I accept that there has been no evidence of so called "libel tourism" since the enactment of the 2013 Act in England and Wales. That said, I see no merit in removing Clause 9. I argue it makes sense to leave it as a safeguard in an ever-changing world of evolving media platforms.

9. Can you advise if Clause 10 (Action against the person who is not the author or editor etc.) needs to be amended in order to specify that authors or are not those who print and distribute materials in order to replace the Common Law defence of innocent dissemination?

I would have no difficulty with an amendment that defined on the face of the Bill, author, editor and publisher.

10.Can you comment on Clause 11 (Trial to be without a jury) and the suggestion that this should be amended in order to reflect the findings of the 2017 Gillen Review of Civil Justice which suggested that judges should have discretionary powers to select trial by judge-only in the case of complex defamation matters and that judges should have discretionary powers to compel parties to defamation actions to undertake Alternative Dispute Resolution or face possible financial penalties?

No other UK jurisdiction has a presumption in favour of trial by jury for defamation cases. I accept there is a particular resonance to non-jury trials in this jurisdiction, based on legacy issues, but that is with regard to criminal cases. My clause does not put any bar on trial by jury, rather it removes the presumption. As stated, this allows

for an early definition of a single meaning to the words under dispute and consequently an opportunity for earlier resolution.

I reproduce Dr Scott's comment that "The importance of this change – the move to judge-only trials – cannot be overstated. It was perhaps under-appreciated and hence understated in the 2016 report." (Dr Scott's Note on the Defamation Bill (NI), 29 October 2021, para 17)

I have no objection to empowering a judge to compel engagement with an Alternative Dispute Resolution process.

11.Can you comment on the suggestion that the Defamation Bill should be amended in order to abolish the single meaning rule in conjunction with the introduction of a jurisdictional bar on claims based on meanings of publications that had been corrected or retracted promptly and prominently - the so-called bipartite proposal?

I do not support this suggestion. All those involved publication should put a premium on accurate reporting, first time. I fear this proposed bipartite approach would only (i) encourage a less rigorous approach to fact checking and / or (ii) open the door to those who want to be deliberately inaccurate, salacious and defamatory, knowing an early clarification absolves them of any further punishment.

12.Can you comment as to whether the Defamation Bill should be amended in order to support and encourage the use of discursive remedies including prompt and fulsome retractions coupled with a jurisdictional bar to defamation actions in these cases

I am unsure how this might differ from empowering a judge to compel parties to undertake an Alternative Dispute Resolution process.

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