Department of Finance
An Roinn Airgeadais
www.finance-ni.gov.uk

Mr Peter McCallion
Finance Committee Clerk
Northern Ireland Assembly
Parliament Buildings
Stormont
Belfast BT4 3SW

Private Office
2nd Floor
Clare House
303 Airport Road West
BELFAST
BT3 9ED
Tel: 028 9081 6216
Email: private.office@finance-ni.gov.uk

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Dear Peter

Defamation Bill - Committee Stage

Your letter of 12th November raises a number of issues relating to the Defamation Bill on foot of the oral and written evidence you have received from the Department.

The Committee has firstly asked about the Department's intentions regarding possible amendments to the Bill. At the evidence session, officials noted that it was not the intention of the Minister to bring forward substantive amendments to this Bill. Previous correspondence has outlined the concerns that the Department and the Minister have around this Bill. Root and branch change would require the significant input of resource at the expense of other important areas of work at the tail-end of this mandate. As has been noted previously, any such attempt would also effectively be an attempt to superimpose one vision of reform onto another.

However, the Department notes that your letter appears to suggest that where there are errors in the drafting of the Bill, the Department would not assist. Officials pointed out during oral evidence that there were potentially a number of issues relating to the current drafting of the Bill, particularly around the existing clause 9. Others relate to more technical drafting styles that are preferred in this jurisdiction and which may be picked up by OLC if engaged by the Bill Office, but these points are not substantive in nature. Officials are content to liaise with the Committee Clerk and the Bill Office where necessary to ensure that such drafting errors are highlighted and remedied.

Your correspondence also raises questions around the Review of Civil Justice ("the Review") led by Sir John Gillen and which reported in 2017. A chapter of that report examined the issue of defamation. Although the consideration by that group was largely focussed on procedural aspects of defamation, it did highlight a number of substantive areas upon which it had reservations. You have raised specifically the issue of jury trials and note that the Review recommended that judges should have discretionary powers to select trial by judge only in complex cases.

The Minister has already highlighted his concerns in principle about the de-facto abolition of jury trials in defamation cases, which would seem to be the end-product of clause 11 of the Bill as drafted. Trial by jury has a particular significance in this jurisdiction, although the Department notes that the provisions of clause 11 are central to the aims of the Bill as quoted by the Bill sponsor in removing the chilling effect for freedom of speech and streamlining the process for defamation cases. The recommendation of the Review around this issue appears to be well considered and the Department notes the narrative contained at paragraph 21.44 of the relevant report. Such a change, if agreed, could be relatively easily drafted and wouldn't necessarily disturb the architecture of the Bill, albeit that it is likely to be heavily criticised by those groups in favour of the existing provision as drafted. Should the Committee want to consider an amendment of this nature, there may be merit in seeking the views of the shadow Civil Justice Council ("sCJC"). The Council is scheduled to meet again on 9th December, 2021.

The issue of judges being able to avail of discretionary powers to compel parties to undertake Alternative Dispute Resolution is also highlighted. The Department understands that this particular issue has been the subject of further consideration by a sub-group of the sCJC in the context of development and amendment of the Defamation Pre- Action Protocol 2011. Enclosed is a link to that Protocol for the attention of the Committee

https://www.judiciaryni.uk/sites/judiciary/files/decisions/Pre%20Action%20Protocol%20in%20Defamation.pdf

As further development of that Protocol is underway, and believed to be at an advanced stage, substantive legislative provision may not be required. The Committee may wish to seek further information from the sCJC on this particular issue.

Your correspondence asks about the serious harm test as it relates to public corporations. We believe that this refers to the higher threshold for serious harm that the 2013 Act applies to bodies that trade for profit. Under the Act, if a body that trades for profit wishes to show that a particular statement has caused it serious harm, it must first demonstrate that that statement has either caused it or is likely to cause it serious financial harm. It is sometimes suggested that this feature of the Act deters business organisations from using the threat of a defamation action to prevent a particular statement, which might in fact be perfectly accurate and legitimate comment, from being published. However, we have seen no evidence that such threats have become less common in England and Wales since the commencement of the 2013 Act, nor evidence that threats of this kind are, proportionately, less common in England and Wales, than in Northern Ireland. As previously noted, we know of no publication that is available in England and Wales but not Northern Ireland because its publishers were deterred by our defamation law.

The final point relates to peer-reviewed scientific reports that appear in non-peer reviewed journals. The Department has noted that the existing legislative framework in this jurisdiction does not obviously appear to have suppressed academic or other debate, but nevertheless we have indicated that the provision at clause 6 of the Bill is broadly welcomed. Equally, the Department would have no particular difficulty with an

extension of that clause – should this be agreed – to include the types of reports that you have highlighted.

Yours sincerely

Andy Monaghan

Andy Monaghan
DEPARTMENTAL ASSEMBLY LIAISON OFFICER