From the Minister of Finance

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Dear Steve

DEFAMATION BILL—DEPARTMENTAL COMMENTARY

I have read your letter of 7 January 2022 and been briefed on the evidence presented to the Committee by Mike Nesbitt on 5 January.

My letter submitted to the Committee on 9 December 2021 was in response to a series of detailed and complex policy questions issued by the Committee. The Department had, on previous occasions, both orally and in writing, indicated its reservations with the Defamation Bill, and its concerns that all involved were working to particularly challenging timeframes. I have made it clear that my preference is for bespoke legislation. I do not favour replication of the Defamation Act 2013, which is what the PMB will achieve, and I do not believe there is enough time remaining under the current mandate to amend the PMB to the point where it might address satisfactorily pressing issues such as online defamation. Nevertheless, full and reasoned answers were provided to the Committee in order to assist members with their deliberations on the particular provisions.

Mr Nesbitt has taken issue with the suggestion at paragraph 3 of my letter that no fresh thinking had been undertaken and no further consultation had been done since 2013. I recognise that since Mr Nesbitt undertook his consultation in 2013, further work was undertaken by the NILC and Professor Scott. The point remains that simply replicating the 2013 Act does not reflect any of the thinking there has been on defamation law

since then. As a result, the Bill does not reflect any of the concerns or criticisms set out in the work of the NILC and Professor Scott. And the Bill does not – my Department's main concern –consider any of the developments in a fast-moving area of law that have taken place more recently. Issues around social media in particular have progressed significantly since 2013 and, indeed, since 2016, and this concern has been raised repeatedly to the Committee during its consideration of this Bill.

In terms of consultation with my Department it is a well- established principle of policy development that the "owner" of a Bill – whether it be Executive or an MLA – is under an obligation to ensure that all of those interested in the Bill are fully sighted on both the provisions in the Bill, and the proposed timing of the Bill. My Department – as the Department with policy responsibility for the law of tort, including defamation – along with other interested parties, should have been formally apprised by the Bill sponsor of his plan to bring back this Bill to the Assembly. While I understand that he brought his Bill to the Speaker in January 2021, and then spent some months in discussion with the NIO around competence, the first occasion that the Department was officially made aware of the PMB was by way of an e-mail sent by TEO officials to officials in my Department on the day before the Bill was introduced.

Notwithstanding this, and the subsequent surprise of receiving news that the Bill had been introduced in the Assembly, my Department analysed the Bill, and provided advice to me. I set out, in a letter to Mike Nesbitt in July 2021 (copied to the Committee), my concerns with the Bill and invited him to meet to consider how he might be able to work with me and my officials to develop legislation in this important area. No response or acknowledgement of that correspondence was received until, at second reading of the Bill, Mr Nesbitt suggested that he had been expecting someone to follow up on that letter. I therefore take exception to the suggestion that there has been "an unwarranted lack of co-operation by the Department with the Bill sponsor" in circumstances where the opportunity to foster such co-operation has clearly been extended but not taken up.

More generally your letter refers to a perceived lack of support from the Department in relation to this PMB. Officials have been as constructive as possible – in difficult circumstances where finite and extremely limited resources have been re-routed to deal with the many and complex issues relating to the policy in this Bill – in order to assist the Committee with its deliberations. Officials have participated in lengthy evidence sessions on two occasions, giving frank answers to queries posed by members, and have undertaken – despite the reservations outlined – detailed consideration of all of the written questions that have been set out by the Committee. All of that work, and the contents of the letter of 9th December, were considered, developed and approved by myself. On that point, your letter refers to "commentary from officials in Departmental correspondence". It is a long-standing convention that when officials present evidence – whether it be oral or written – to a statutory Committee, that they represent the views of the Minister. All the correspondence provided to the Committee is therefore either from me as Minister or is provided with my approval.

Mr Nesbitt has also expressed particular concern with the suggestion that the Bill may not be "fit for purpose". For the record, my correspondence expressed the concern

that given the short period of time left in the mandate there was a risk that the end product might be insufficiently evidence-based, flawed or, indeed, unfit for purpose. It is entirely reasonable for this Department to express concern at the possibility of the Bill being amended, perhaps significantly, at an unhelpful pace. The Department has expressed its concerns – around some of the concepts of the Bill, the policy choices that come with it, and the issues around the ever-increasing pace at which social media has advanced - and has legitimately noted that it may not be possible for this Bill to cater for those things.

To be clear, my concerns are in relation to the policy intentions of the Bill rather than the drafting. In the oral evidence on the 15th December, my officials expressed the view that this Bill was unusual in the context of PMBs which can, on occasion, be prone to the requirement of significant drafting assistance after introduction. Officials noted that if Committee members were content with the policy, then this Bill did not require much further development on the basis that, as a replication of a Westminster Bill, it necessarily benefited from the professional drafting afforded to it at Westminster in 2012/13.

Finally, your letter asks specific questions around the only amendment being proposed by Mr Nesbitt. He is seeking to include an amendment that would require the Department to review the legislation within a specified period. I understand from the evidence provided on 5th January that he has suggested this should be effected within some two years of the Bill receiving the Royal Assent. I am committed to reforming defamation law early in the mandate but given that a different Minister may be in post I am in principle content with the amendment. However, I would point out some issues that may be worthy of further exploration.

First, the date of Royal Assent should not be confused with the date the provisions of the Act will come into operation. As part of this Bill, provision is made, particularly in relation to clause 5, for subsequent detailed regulations to be considered, promulgated and effected by the Department. The Act will not be able to be commenced until those are in place. Those regulations must be laid in draft at the Assembly and therefore debated. Given this Bill is already under significant time pressure to pass through its remaining Assembly stages before the end of this mandate, it will not be possible for the subsequent regulations – that in themselves will require a considerable resource to develop and draft – to complete, or even begin, their passage before a new mandate. Even when a new mandate is in place, it can take some time for affirmative resolution regulations to make their way through and it is unlikely that this Bill will be ready for commencement until some considerable time after Royal Assent is obtained. Therefore, if the Committee is wedded to the policy of including such a provision, I recommend that time should start when the Act is commenced, as opposed to when it receives Royal Assent. This policy has been adopted in other legislation.

Secondly, and perhaps more importantly, if and when the PMB receives the Royal Assent and is subsequently commenced it will be important for my Department to be able to assess properly how the legislation is operating. It could take some time for legislation of this type to “bed down”. The experience in England and Wales tends to point to there being quite a few years before the impact of the legislation is properly understood. Professor Scott implicitly noted this in his work which took place 3 years after the England and Wales Act. There will naturally be a lapse in time before cases,

and therefore case law, filters through in a way that would permit meaningful review. I would therefore again suggest that the Committee consider a more appropriate timeframe in which any review would take place.

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CONOR MURPHY MLA
MINISTER OF FINANCE