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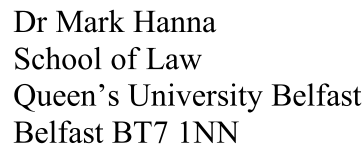

Northern Ireland Assembly
Committee for Finance

13/10/2021

Dear Members of the Committee,

<u>RE: Committee Stage: Defamation Bill</u>

Thank you for inviting my comment on the Defamation Bill. I hope I can be of some assistance to you. In general, I recommend the Bill. The reform is modelled on that already undertaken in much of the rest of the world. It is not a reform that will leave the right to reputation or the right to privacy unprotected in Northern Ireland. It is a reform that will simply strike at a more equal and precise balance between that right and the right to freedom of expression.

The current law here has some chilling effect on free speech (I will hopefully explain to some degree why that is so below). It is therefore necessary for the legislature to step in and change the law. The Assembly must recognise that the right to freedom of expression is important to furthering peace and prosperity in Northern Ireland. The Bill should be recognised as reflecting the will and design of a new generation in Northern Ireland, the will of an emerging majority here who feel the responsibility of public engagement, and who can find unity and strength in their expressed differences.

This is not to say the Bill is perfect. This is a difficult issue, that is hard to perfect. Moreover, as it stands, the Bill appears to be largely a carbon-copy of the Defamation Act 2013 adopted in England in Wales. Northern Ireland is its own place of course, with its own unique conditions and needs its own bespoke solutions. In some ways that may even require going further in the direction of freedom of expression to achieve a more accurate balance. No doubt Assembly Members will wish to tweak the Bill here and there to suit local conditions, just as Scottish Members did in passing their own Defamation and Malicious Publication (Scotland) Act 2021. However, the spirit of this Bill must be carried through to the letter of law. The core value of the Bill lies in *striving* towards a fairer balance of rights, and the Assembly should seize the opportunity to achieve that, and send a message to the people of Northern Ireland that it takes this responsibility seriously.

I will suggest only one amendment, or rather raise a somewhat technical question about clause 7. I will follow that with more substantive comments on three separate clauses: 1, 4 and 11. These three clauses represent the heart of the Bill, and I wish to take this opportunity to explain why they should be realised in law. There are no doubt other clauses worthy of comment. I suspect, however, you will receive enough comment in relation to those, while I fear sometimes not enough is said about 1, 4 and 11.

After commenting briefly on clauses 7, I will then turn first to clause 11 because much flows from it, and it will help explain the issues then in relation to clauses 1 and 4.

Clause 7: Reports Privileged

Is the Committee aware that much of clause 7 of the Bill has already been achieved with paragraph 53(a) of Schedule 18 of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010? Oddly, however, that 1998 amendment does not seem to include "summaries" of reports. I assume this is a simple mistake lost in the thicket of legislative amendments over the years. Nonetheless, it is important that "summaries" is included (as it is in clause 7), as there could often be situations, for example, where journalists, or others, will need to 'summarise' the information in an official report in the public interest. Both England and Wales and Scotland ensured such protections through their recent defamation law reform (s 7 of the Defamation Act 2013, and schedule 1, paragraph 9 of the Defamation and Malicious Publication (Scotland) Act 2021).

You may want to ask those tasked with drafting legislation for Northern Ireland to look into that?

Clause 11: Mode of Trial – Juries

As you will be aware, Northern Ireland currently favours jury trials in defamation cases. The presumption of jury trial is guaranteed by s 62(1) of the Judicature (Northern Ireland) Act 1978. The party setting down the action must specify the mode of trial he or she prefers, and plaintiffs in Northern Ireland generally opt for trial by jury—which will be explained below to be a matter of strategy. Defendants can attempt to thwart this and apply for a judge alone trial of course, but they have to be quick to do so, and the procedure is somewhat cumbersome.[1] What is more, judges here have not made much use of exception to jury trial that the English common law had already employed in the run up to the 2013 Act.[2] In my research in this area I could only find one instance of such an exception used in Northern Ireland.[3]

In 2014, the Northern Ireland Law Commission warned in its report on defamation law in Northern Ireland that the continued presumption of jury trials in defamation cases was aggravating the costs of defamation proceedings, and that it was effectively deterring defendants from fighting cases, and enticing them to settle instead (NILC 2014, at 2.26 and 4.03). The Commission explicitly recognised it as a problem for defendants in particular: "it seems clear that the prospect of a costly trial by judge and jury is an important factor weighing in defendant-publishers' decisions as to whether to fight cases or to settle". It also noted that "very few cases ever reach full trial" in Northern Ireland, and that "in recent years an increasingly high proportion of those that do [i.e., few] are tried by judge alone".[4]

[1] Rules of the Court of Judicature (Northern Ireland) 1980. Order 43, Rule 4(1). This is arguably not so cumbersome for those who can afford adequate legal assistance, but it is worth noting that legal aid is not available in defamation proceedings.
[2] See *Gatley on Libel and Slander* (2013, 12th edition) at 34.1, on the problem of juries in defamation cases, how judges in England had long ago recognised this and worked to reverse the presumption, and how trial by jury had already by 2012 there become a "rarity" before s 11 of the 2013 Act definitively reversed the presumption.
[3] In the case of *AB Ltd and Ors v Facebook Ireland Ltd*, but which is subject to reporting restriction.
[4] As noted by the Northern Ireland Law Commission, many complaints never reach the stage of the initiation of proceedings. From 2014 to 2020 there were a total of 140 defamation claims issued in Northern Ireland, only seventeen of which resulted in a judgment. 'Queen's Bench Writs and Civil Bills Disposed with a cause of

In other words, the presumption of jury trial raises the costs and complexity of cases, disproportionately discriminates against defendants, and still, in the end, juries are in practice rarely even employed in such cases. On that basis, the Commission recommended that the law should be reformed to reverse the presumption of jury trial in Northern Ireland. The Commission's recommendations were never adopted, and thus this presumption of jury trial continues to have a "profound impact" on the development of law here (The Scott Report 2016, at 2.119).

Both England and Wales and Scotland have reversed the presumption of jury trials in defamation cases and have thereby claimed the benefits of efficiency and fairness in such cases. Why should Northern Ireland not adopt similar reform to secure those advantages?

In his report on the Northern Ireland Law Commission's consultation on libel law reform in Northern Ireland, Dr Andrew Scott hints at the "historical and constitutional importance of the jury trial in the Northern Irish context." (The Scott Report (2016) at 2.121) Obviously, this refers, in some part at least, to Northern Ireland's troubled past. One may think of the dark reputation of the 'Diplock courts' that were introduced under the Northern Ireland (Emergency Provisions) Act 1973, and that allowed for the expedition of criminal trials of suspected terrorists without the right to jury trial or much of the due process we would now expect under current standards of criminal justice or human rights jurisprudence.

No one can doubt the need to guard against ever falling below those common standards again. No one can doubt that juries continue to confer some democratic legitimacy to court proceedings in law general. However, one must recognise that these virtues of jury trials simply do not translate over to the complexities of defamation law. Even though provision is made for juries in defamation claims, they are rarely employed in the end, and yet their looming prospect causes defamation cases to settle early, and allows the system to be gamed by plaintiffs to postpone any application of a threshold test (explained below).

If the rationale for retaining the presumption of jury trials is that many questions must be answered from the perspective of the 'ordinary, right-thinking member of the community', it must be recognised that this has limited practical value when juries are, in the end, rarely employed in defamation cases. If the rationale for retaining the presumption of jury trials is that juries are seen to enjoy greater constitutional legitimacy as the trier of fact, then it must be recognised that, in practice, it is unelected judges who will nonetheless most often decide complex factual issues in defamation claims in Northern Ireland.

In sum, the presumption of jury trials in defamation claims is inefficient and disproportionately unfair to defendants. The protracted costs of jury trial must hang over the defendant like Damocles' sword. Faced with the risks and uncertainty of a long and arduous battle in the Northern Irish courts—which will be shown to remain, on the balance of things, disposed more towards the interests of plaintiffs—most defendants will consider it a better strategy to settle early. In effect, the retention of the presumption of jury trials in defamation claims in Northern Ireland is antithetical to all of the constitutional legitimacy that juries are supposed to hold.

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action of Libel or Slander', provided by Northern Ireland Courts and Tribunal Services, 18 May 2021, FOI 023/21.

The full scale of this problem can only be appreciated, however, once we consider the specific issues that clause 1 and 4 seek to address.

Clause 1: The Harm Threshold

Some may worry to you that the provision in clause 1 will leave reputation unprotected and tip the scales too far in favour of freedom of expression. There is no evidence to support any such claim, however. Section 1 of the Defamation Act 2013, which this clause mirrors, has hardly proved revolutionary in England, and like it, clause 1 will only have a modest effect in raising the bar ever so slightly to block a very slim band of cases that may otherwise pass under the current law.[5]

If the effect of the clause is so modest, then why is it necessary you may ask? Because the slim band of cases that it would knock out are cases which on a more fact-sensitive approach will be revealed to have no just claim for damages. Secondly, because even if it only makes a moderate change to the law, it is still an important fine tuning of the balance of rights, and something therefore which the law should be seen to endorse and strive towards. Thirdly, because if it is provided in tandem with clause 11, it can operate to ensure a more practical, just and expedient adjudication of defamation claims.

The application of a harm threshold is essential to any modern defamation law system, yet it finds little application in the current law in Northern Ireland. The law in Northern Ireland continues to reflect the old English approach based on the Fox's Act 1792, which guaranteed the constitutional importance of the jury as the trier of fact, and which therefore reserved the question of defamatory meaning to juries. Thus, with the presumption of jury trial, the judge's role is limited to determining whether the statement complained of is 'reasonably capable of bearing the meaning attributed to it in the complaint'. The judge's function is "no more and no less than to pre-empt perversity".[6]

This is a much lower standard than the threshold of harm test, and thus the application of any proper harm threshold is postponed until the jury are finally empanelled to hear the case. Yet, since most defamation cases in Northern Ireland settle before it ever reaches that stage, there is in effect little use of a harm threshold to scrutinise claims.

Moreover, even in those few cases which reach a stage where a harm threshold could come into play (e.g., where it is set for trial by judge alone), the courts in Northern Ireland tend to eschew a more fact-sensitive approach to the question, and opt instead for brief judicial inference of harm, or postpone the test if they can to a later stage in the proceedings. In *Coulter* v *Sunday Newspapers Ltd* [2016] NIQB 70, for example, the court cites the English case of *Thornton* v *Telegraph Media Group* [2010] EWHC 1413 as authority, yet there is none of the considered and careful application of the harm test that one finds in *Thornton*, or the sensitivity to freedom of expression that was deemed necessary to such a harm test in the case. The court in *Coulter* was satisfied with an "overall impression on reading the article" (referring to the plaintiff as "scrooge") that the publication caused the requisite 'substantial harm' to reputation. On appeal (*Coulter* v *Sunday Newspapers Ltd* [2017] NICA 10), there

[5] I limit my comments here to clause 1(1). I make no comment on clause 1(2), as it seems plainly sensible to impose that factual harm threshold for bodies that trade for profit, and because it has obviously proved less controversial in the practice of the corresponding s 1(2) of the Defamation Act 2013.
[6] *Jameel* v *Wall Street Journal* [2003] EWCA Civ 1694, at [14].

was no contest in relation to such a ready inference of harm, and the Court of Appeal makes no mention of it in reviewing and agreeing with the judge's determination of meaning at first instance. In *Stokes* v *Sunday Newspapers Ltd* [2015] NIQB 53, the judge agreed the action should be tried by judge alone (because the *Reynolds* defence had been raised, see below), but still considered that at that "stage of proceedings the role of the court is to delimit the range of meanings of which the words are reasonably capable of bearing", and could only go so far as to admit that, at some point in the future, the application of a harm test "could well be appropriate".

The general approach to a harm threshold misses the opportunity to strike a finer balance between the rights of both parties in defamation cases. Clause 1 would adequately address this problem, and should therefore be adopted.

What clause 1 would achieve is a foregrounding of a more fact-sensitive harm test in defamation claims in Northern Ireland. What it would require is that the plaintiff demonstrates that the statement complained of has caused, or is likely to cause, harm as a proposition of fact. This does not mean that judges can no longer make any inference of harm. The diffuse and obscure nature of reputation means that inference of harm can never be excluded from defamation claims. Some allegations, for example, of serious crimes or immorality, will always be of such gravity that fact of harm will be a trivial matter. But what clause 1 would achieve is shifting away from this approach of relying purely on a judicial inference of harm, to one based on a combination of (i) the meaning of the words, (ii) the situation of the defendant, (iii) the circumstances of publication, and (iv) the inherent probabilities of harm.[7] This is a fairer, more sophisticated and fact-sensitive approach to defamation law.

Some may also worry you that clause 1 would introduce too much complexity into proceedings, that it would generate expensive mini-trials, or that it would place too onerous a burden on plaintiffs. There is little evidence to support such claims also, however. The courts in England have shown themselves quite adept at managing the costs and complexity involved in the application of the serious harm test under s 1 there, and have proved reasonable in deciding on an ad-hoc basis whether it is necessary to apply the test at a preliminary stage. When Scotland came up against this question, and investigated it properly, they also concluded there was "no reason why courts should not be able to control costs by effective case management", and went on to adopt the provision.[8]

As to imaging what clause 1 would look like in action here, one can test it out, for example, on the very recent libel case of *Foster* v *Jessen* [2021] NIQB 56. In that case, even if the harm could not have been inferred from the facts, the test would likely have been easily satisfied by the evidence that was already presented when, in application for summary judgment, the plaintiff attended court to give evidence of the harm suffered. Many of the libel actions filed in the Belfast courts would likewise easily clear the minor obstacle introduced by clause 1 reform.

Perhaps the only case that has been knocked on s 1 in England since to 2014 that may have been allowed to proceed under the current law of Northern Ireland is the case of *Nwakama, Ihenakaram and O'Nwere* v *Bartholomew Umeyor* [2020] EWHC 3262. There the meaning

[7] Based on the sensible reading s 1 of the Defamation Act 2013 received in *Lachaux* v *Independent Print* [2019] UKSC, at [14].
[8] Scottish Law Commission Report No 248, Report on Defamation, December 2017, at 2.10.

of the words complained of may have been judged to have an *inherent* tendency to cause harm to reputation, but the court's careful analysis of facts under s 1 revealed that the statement was published only to a very small number of people, that no one believed the allegations anyway, and that the claimant's accounts on examination were found to be unconvincing and exaggerated. Arguably, one of the only cases that has succeeded in Northern Ireland since 2014 that may have been knocked out by a clause 1 type test is *Coulter*. But even there it is not clear, as the plaintiff could have, if requested, proved as a proposition of fact that the allegation that he was a "scrooge" did constitute a serious harm to his reputation.

Clause 1 imposes no onerous burden on the plaintiff, but only a reasonable one. For so long we have imposed heavy burdens on defendants here in Northern Ireland. What clause 1 would achieve is a more precise and fairer balance between the parties. It would move away from pure judicial inference of harm to a more objective fact-sensitive approach, and it would allow a practicable foregrounding of the test in proceedings to triage claims and to address the problematic practice of kicking this vital test into the long-grass of protracted litigation and prospective jury trial.

Clause 4: The Public Interest Defence

The hollow and unrealised nature of the public interest defence in Northern Ireland is, I think, a great shame on us all. I could not find one instance of the successful application of this important defence in Northern Ireland.[9] The courts in Northern Ireland cite as authority here the English case of *Reynolds* v *Times Newspapers Ltd* [2001] 2 AC 127, but in practice give it a restrictive and claimant-friendly reading. They tend in that respect to focus on the conduct of the defendant and treat the so called 'Nicholl's factors' from that case as a checklist or series of hurdles for defendants to overcome in full (they were never intended as such). Moreover, in comparison to other jurisdictions, the courts here afford less allowance to editorial judgment, and appear more willing to impose a purely judicial construction of the standard of 'responsible journalism'.

Confidence in the recognition of the public interest defence is apparently so low in Northern Ireland that lawyers may actively avoid it. In *Loughlin* v *Century Newspapers Ltd* [2014] NIQB 26, for example, the defendant's failure to check the veracity with the plaintiff was considered by counsel an automatic bar to a public interest defence in Northern Ireland, and the defence was mounted instead on qualified privilege pursuant to s 15 of the Defamation Act 1996. With that, the case was kicked into the long grass of jury trial, and settled by the defendant to avoid protracted costs.

When it is asserted, it will invariably receive a restrictive reading. In *Coulter* v *Sunday Newspapers Ltd* [2016] NIQB 70, for example, the *Reynolds* defence was raised, and the court agreed that the publication complained of was in the public interest. However, the court loaded everything onto the question of whether there had been 'responsible journalism', and after a relatively brief analysis—which focused mainly on "the degree of stress and harm to the plaintiff", and the "seriousness of the allegation"—concluded that the defendant's failure

[9] The only real judicial affirmation of the defence, or the potential thereof, comes in refusals to strike out the pleaded defence under Order 18, Rule 19 of the Rules of the Supreme Court (Northern Ireland) 1980, see e.g., *Stokes* v *Sunday Newspapers Ltd* [2015] NIQB 53.

to verify "did not amount to responsible journalism". The Northern Ireland Court of Appeal admitted that the judge had failed to properly apply the defence, but did not in the end cure the defect either. There was no further analysis of facts or circumstances extraneous to the narrow focus of the judgment at first instance, and the court was willing to imply from that brief and somewhat one-sided analysis that the defendant had fallen afoul of the latter two elements of the *Reynolds* defence.

Other examples can be cited, but in summary it can be said the defence has been hollowed out or emptied of its substance in the current legal framework. The ominous implication is that the law here has for too long had a chilling effect on speech that would have otherwise been in the public interest to discuss openly. You should remember also in this respect that 'law' is not just what registers in reported judgments or statutes, but it is to be found also in lawyer's letters and in threats of expensive and uncertain litigation.

The adoption of clause 4 would address this problem. The clause carefully avoids any reference to the 'Nicholl's factors', and while those factors may continue to have some relevance to interpretation of the provision, the clause will exclude the insistence on strict compliance with the factors that has emptied the defence of its proper effect in the common law. Furthermore, the clause omits any reference to the responsibility of the defendant's conduct, and replaces it with a requirement of 'reasonable belief'. The change may appear slight, but it is important because in law 'reasonableness' is grasping towards and more 'objective' standard, and will shepherd the courts away from imposing their own judicial construction of journalistic standards, and will point them instead towards considering a broader range of factors that are now relevant to the defence.[10] Finally, clause 4(4) explicitly directs the court to give proper allowance to editorial judgements in those matters.

There is, finally, another important dynamic worth noting here, between the continued presumption of jury trial and the public interest defence in Northern Ireland. There is no clear rule about the respective role of judge and jury in relation to the defence. However, it is well recognised that the defence raises complex factual issues that may leave juries 'mystified', that it is therefore unsuitable for trial by jury, and should, as far as possible, be tried by judge alone. Nonetheless, difficult questions about the division between judge and jury in relation to the public interest defence remain. I will not unpack all of that here, except to raise the obvious question as to why judges should be so willing to usurp the role of juries in relation to the public interest, when they are so reluctant to do so in relation to the harm threshold. Obviously, all the difficult questions about the role of juries in the public interest defence could be avoided if the presumption was reversed by clause 11.

In conclusion, considering all of this, one must ask, what we have to fear in adopting clause 4. Why should we not reform the law to ensure the same level of protection that public interest speech now enjoys in many other jurisdictions around the world? Again, clause 4 would make only a modest change. It would provide no defence in the great majority of cases where the publication complained will enjoy no legitimate public interest, or where they will fall below the standard of 'reasonableness'. It only poses a more objective standard and a more fact-sensitive approach to the defence that strikes at an equal balance between the rights involved.

[10] See for guidance *Economou* v *De Frietas* [2018] EWCA Civ 2591; *Serafin* v *Malkiewicz* [2020] UKSC 23; *Lachaux* [2021] EWHC 1797, referring for guidance to defendant's own press code.

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The chilling effect on public interest speech should be of particular concern to the people of Northern Ireland. The political structures that were established as part of the peace process mean its citizens must rely heavily on the conduct of government and public administration. Moreover, the long shadow of the conflict also necessitates robust protection of public interest speech. Peace was only secured by power-sharing between two extremes of sectarian division, and the political system is still prone to the factious, guarded and hidden arrangements that sectarianism begets. Brexit too added another rationale for better protection of public interest speech in Northern Ireland, revealing in stark terms Northern Ireland's central location in a complex web of international governance, and how decisions taken in the Northern Irish political system can have important consequence for the public here, and a public even beyond its borders. The promotion of legitimate public interest speech is a promotion of democracy and good governance.

There are also logistical issues pertaining to the media in Northern Ireland that must be considered. Much of the broadcast and print media in the province are owned by parent companies located in Dublin, London, or other parts of the United Kingdom. Somewhat remote from the Northern Irish public, they do not feel so invested in the public interest here that they would risk their money, and take their chances, in a legal system that still adopts a restrictive approach to the defence and which remains notoriously claimant-friendly. The record shows those remote parent media companies prefer to settle, rather than try their luck in a legal system that appears conspicuously unresponsive to the defence.

No one is fighting for our right to public interest speech. I hope the Assembly as our elected representatives seize the opportunity to do so.

Conclusion

People from other parts of the world have asked me why Northern Ireland has such an outdated form of defamation law, and why Northern Ireland appears not to value free speech. Why does Northern Ireland not give equal footing to the rights of reputation and freedom of expression?

It has occurred to me that, like so many things here, it has something to do with our troubled past. There is a professor at Melbourne University in Australia, Andrew Kenyon, who writes a lot about defamation law. He said free speech introduces a certain level of 'conflict' into society. He was talking about a constructive form of societal 'conflict', where people can peacefully disagree, respect one another's differences, and, through that, learn and progress as a community. But maybe Northern Ireland is weary of conflict? Maybe we fear the offence that must attend robust free speech? Perhaps we fear freedom of expression as posing a zero-sum game that threatens a descent back into social unrest and political violence?

I have realised, though, that even if there was ever any truth to that, the argument is quickly becoming a chimera. The 'conflict' that threatens Northern Ireland has never been a product of free speech. It has always been a product of the opposite of free speech, the product of a society divided against itself and sectioned off in separate narratives and identities. The spectre of *that* conflict may continue to haunt us for some years, but, at this century mark in its history, it must be recognised that a new generation is emerging in Northern Ireland. It is a generation that has not grown up in the troubles, a generation which appears less disposed to

the bitter rivalry of sectarianism, and more tolerant of a diversity of opinion and identity in Northern Irish society. Maybe they are willing to entertain the kind of conflict that Andrew Kenyon referred to? I would argue it is one of the last key rights of our peace process. This Bill cannot deliver on that alone, but it must be recognised as an important step in that direction.

I am happy to elaborate on any of the above points if it would be of assistance to you.

Sincerely yours,

Dr Mark Patrick Hanna