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NIA Bill 25/17-22 – EFM

Defamation Bill - Call for Evidence - Committee for Finance

"Is reform required? Again, the best answer comes from Dr Scott at paragraph 1.05 of his report, where he states that the former Northern Ireland Law Commission consultation paper suggested:

"the key imbalance in this area is arguably not that in favour of reputation over free speech or vice versa ... [but rather] that between litigants who can afford to defend their publications or to vindicate their reputations, and those who cannot".

Therefore, he suggests very strongly that the current law is not about the law. It is about the money. It is about who has the deepest pockets, and they win."

([Official Reports \(niassembly.gov.uk\)](http://Official Reports (niassembly.gov.uk)) (last accessed 29 October 2021)

Introduction to KRW

KRW LAW LLP (KRW) is one of Ireland's leading suppliers of public law and human rights law services. We also have a prestigious reputation in media law, reputation management, defamation and information rights.

KRW is the Legal Aid Practitioners Group (LAGP) Legal Aid Lawyer Awards (LALY) Regional Legal Firm of the Year 2020 and is listed in Chambers and Partners.

KRW does not wish to be considered to give oral evidence to the committee.

KRW Response to the Bill

We endorse the intent of the Bill is designed to ensure Northern Ireland is not disadvantaged by having less favourable defamation laws than other parts of the UK.

We note that the Bill has twelve policy objectives:

Make it easier and less expensive to take legal action when you have been defamed.

- We agree with this objective

Make it harder for the rich and influential to chill free speech

- We agree with this objective

Introduce measure to exclude trivial claims

- We agree with this objective subject to a strictly regulated, accountable and accessible criteria for exclusion

Protect the rights of scientists and academics to engage in robust debate

- We agree with this objective subject to human rights considerations in terms of proportionality and discrimination

Protect the right of journalists to conduct responsible and necessary investigations

- We agree with this objective with the proviso that continue to operate at all times in accordance with the codes of conduct and regulations that control and secure press freedom and responsibilities

Protect the work of Non-Governmental Organisations

- We agree with this objective

Take better account of the impact of the internet

- We agree with this objective and seek international and global co-operation regarding multinational internet suppliers such as Facebook and Instagram

Require claimants to show that they have suffered serious harm before suing for defamation

- We agree with this objective subject to a strictly regulated, accountable and accessible criteria to define serious harm depending on individual circumstances and without setting the threshold of harm so high as to exclude meritorious claims

"Although the Act must be construed as a whole, the issue must turn primarily on the language of section 1. This shows, very clearly to my mind, that it not only raises the threshold of seriousness above that envisaged in *Jameel (Yousef) and Thornton*, but requires its application to be determined by reference to the actual facts about its impact and not just to the meaning of the words."

Comment on s1 Defamation Act 2013 (England and Wales): *Lachaux (Respondent) v Independent Print Ltd and another (Appellants)* [2019] UKSC 27 Lord Sumption at 12.

We note the following:

"My first question is this: how is it possible for any judge to quantify fairly what constitutes serious harm? It seems to me that the clause will set up an evidence threshold that will block ordinary citizens from taking libel action. It is OK for corporations or high-profile public figures in the media or politics who can point to a drop in, say, sales or viewership or whatever, to prove that damage done by

defamatory statements has affected their reputation, but how does the clause help the ordinary man in the street whose reputation has been unfairly damaged? How does he protect his name?"

"What is "serious harm", and how appropriate is it that a judge, who may not be the person most in touch with everyday life in our society, makes that decision? Is it appropriate that a judge and a judge alone should make that decision about an ordinary citizen, an elevated citizen or someone in the public eye? If harm has been caused to someone's reputation by a lie that was told, surely it is far better to rest in the current situation, whereby you reflect the seriousness of that in the damages awarded, rather than putting in place too high a bar to let the person get the defamation case off the ground"

"Serious harm to one person might not be serious harm to another. In the eyes of a plaintiff, the harm might seem very serious but, in the eyes of an outsider, it might not seem serious at all. Our concern should be for the person affected — the little man. Clause 1 creates a hurdle that says to the little man, "It is not only that you have to take all the financial risks. It is not only that you cannot get insurance against being libelled when those that you have to sue do have insurance. Now, even to venture to sue, you need to be satisfied that you can prove serious harm. Then, if you get to the point where the judge says, 'Sorry, there is harm but, in my view, it is not serious harm', you will have lost, and you will pay everyone's costs, because costs follow the event. The individual who takes the risk — a risk that is present in libel in any event but would be enhanced risk by having to seek to show serious harm — and fails, having not got past that point, emerges in a far worse position, even though he has already suffered harm. He emerges with a huge bill to add to the harm that he has already suffered, but it was not enough harm to be called serious." ([Official Reports \(niassembly.gov.uk\)](http://Official Reports (niassembly.gov.uk)) (last accessed 29 October 2021)).

Remove the current presumption in favour of jury trial

- We agree with this presumption but note that here would no bar on a judge deciding what the single meaning is

Introduce a defence of "responsible publication on matters of public interest"

- We agree with his objective dependent on the intended interpretation/definition of 'responsible publication'

Provide increased protection to operators of websites that host user-generated content, providing they comply with the procedure to enable the complainant to resolve disputes directly with the author of the material concerned

- We agree with this objective

Introduce new statutory defences of truth and honest opinion to replace the common law defences of justification and fair comment

- We agree with this objective.

ENDS

