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Mr. Peter McCallion
Clerk to the Committee for Finance
Northern Ireland Assembly
Room 349
Parliament Buildings
Stormont
BT4 3XL

1st November 2021

Dear Mr. McCallion

Re: Committee Stage Defamation Bill

I thank you for your correspondence 17th September 2021 received via the Bar Council offices.

I provide the following link to my Doughty Street Chambers Associate Tenant Profile which provides a summary of my involvement in defamation litigation in Northern Ireland.

<https://www.doughtystreet.co.uk/barristers/peter-girvan-associate>

With regard to the contents of the Draft Defamation Bill and the Policy Objectives:

1. In my experience, there is no pressing need for the introduction of a “serious harm” or other threshold test in this jurisdiction.
 - (a) The introduction of a test similar to that contemplated in the Bill in England & 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.

- (b) The common law as applied in this jurisdiction already prevents defamation claims which do not amount to a “real or substantial tort”. In this regard, the Committee may wish to consider the judgment of Mr. Justice McCloskey (as he was then) in *McDonnell (t/a Microclean Environmental) v Adair* [2009] NIQB 93.
 - (c) The common law test above and the provisions in respect of strike out of claims under the Rules of Court already operate to exclude “trivial claims”.
 - (d) A further difficulty with the draft Bill is how “trivial claims” would be defined and determined, particularly when reputational rights form a core constituent of an individual’s Article 8 ECHR right to family and private life.
2. It is unclear to me why NGOs should benefit from some exemption or limitation of liability in a defamation action. There also needs to be a very clear definition of an “NGO” for this purpose. For example, in this jurisdiction, some NGO’s are not registered as charities or companies. An NGO could be established as a mere pseudonym for an individual/s in order to avoid liability.
 3. Sections 5 and 10 of the Bill are particularly concerning:
 - (i) They appear to provide an exemption (or very significant limitation) of liability to internet intermediaries or “operators of websites”.
 - (ii) It is not particularly clear how “operators of websites” is to be defined but it would doubtless be relied upon by social networks who not only host content but also control/influence content alongside providing the platform/network which permits mass publication (a core determinant of damages in a defamation claim)
 - (iii) The exemption/limitation appears to be far beyond the defence/s under the E-Commerce Regulations.
 - (iv) It is unclear to me why a defamation claim (as opposed to a data protection or privacy claim) should have additional hurdle/s inserted upon it, especially if the aim of the legislation is to “*make it easier and less expensive to take legal action if you are defamed*”
 - (v) The notion that the claimant has to bear the burden of establishing that the identity of the “person” who posted the content “cannot be established” is extremely unfair, particularly in circumstances in which website operators located outside the jurisdiction do not willingly provide information from which the “person” can be identified but are supposedly the secondary defendant insofar as an individual cannot be identified.
 - (vi) The equivalent “Regulations” in the English legislation¹ are not workable and have not worked in practice.

¹ The Defamation (Operators of Websites) Regulations 2013

- (vii) If the Assembly is contemplating adopting sections 5 and 10 it should do so with complete visibility around the content of the Regulations.
- (viii) It is not immediately clear to me whether section 9 acts as a yet further burden on a plaintiff seeking to claim against a website operator who operates outside the UK or a Member State- it seems the test in the legislation is higher than that applied at common law – see *Galloway v Google Incorporated* [2016] NIQB 7.
- (ix) It is unclear to me how the Draft Bill “takes better account of the internet” (Objective 7).
- (x) It is now an outdated notion that “website operators” (particularly if this term includes big tech/social media companies) are mere middle-men who are entitled to protection from legal claims made in defamation. I would dispute that Objective 11 is a valid objective.

If it assists, I am willing to attend before the Assembly to provide oral evidence.

Your Sincerely,

Peter Girvan