

From the Minister of Finance

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Our reference: CORR 1239/2021

Date: 8 October 2021

Dear Dr Aiken

DEFAMATION BILL

Thank you for your letter of 17 September, 2021, in which you enclose information about the call for evidence issued by the Committee for Finance on the Defamation Bill introduced by Mike Nesbitt, and issue an invitation to appear at Committee to consider written evidence gathered.

You will have seen already my correspondence to the Bill sponsor, which was copied to you separately, and you will have heard my contribution to the debate at second reading on 14th September. I am supportive of reviewing and reforming aspects of defamation law. Indeed, I believe that the speed at, and extent to which, social media has consumed the world around us makes such an examination all the more important. Unfortunately, as I outlined in my letter to Mike Nesbitt, and which I reiterated to the Assembly, I do not think this Bill has the capacity to achieve reform that will be effective.

I believe it will be useful to set out again why I think this Bill is not the best way to proceed, but in the context that I will not stand in the way or place any barriers in front of the work that the Committee has ahead. While I would have preferred for us to take the time to undertake a properly considered, state of the art, piece of legislation on this topic, I respect the view of the Assembly that this Bill should continue its passage and be considered by the Committee. However, I do not want that to distract from the ongoing work started in my Department. Work that has already examined and analysed the Scott report – which in itself is now 5 years old – and which awaits with interest the more current thinking around of all of these issues, not least how to handle

the important piece around social media. I anticipate that the research and review shortly expected from the Dublin Government will assist us with our own work as the most current piece of work available on these islands.

I do not think this Bill has the capacity to do that. Time is not on our side as regards its legislative passage, and if we want to carefully consider this issue in a proper way taking account of the needs of society as we approach 2022. Scrutiny of the Bill will be necessarily constrained by the compressed amount of time left during this mandate. While the Committee may endeavour to shape the Bill and improve it, it is difficult to see, in the time available, and with other competing priorities and resources, how it will be feasible to shape bespoke reform on top of a Bill designed in 2013 to take account of the landscape in another jurisdiction at that time. It would require the super-imposing of one vision of reform over another, and I do not believe the end product would match that of a properly considered review.

My letter to Mike Nesbitt has already set out a summary of those general concerns on the Bill. At that general level it is a cut and paste of the 2013 Act in England and Wales. While I appreciate that consultation was undertaken at the time, and the work of the Law Commission and Dr Andrew Scott in 2014-16 also covered a lot of ground, no further consultation or research appears to have been carried out since then by Mike Nesbitt, and which could have led to a Bill that is more aligned to the legal and social landscape now. It is a Bill for 2013, not 2021, and that is not a sound foundation upon which to make progress.

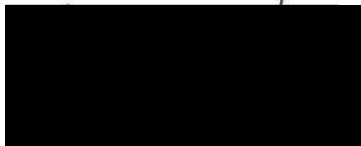
Specifically, I have concerns around the serious harm test. It does not seem to me that much analysis has been undertaken of how that test has impacted upon practice and procedure, and how it might do so if introduced here. I also hold significant reservations around the provision currently outlined in the Bill that would see jury trials become the exception in defamation cases. Given that in England and Wales it appears that no such cases have been heard before a jury since the Act became operational, this should be approached with particular caution. I also do not see how the Bill will significantly enhance the ability of ordinary people to launch a case when their reputation has been impacted. Indeed, one might argue that the test for serious harm, to be determined by a judge, will close off that particular avenue in an even more acute way than before. The provisions relating to social media in the Bill do not, as far as I can see, go anywhere near far enough to act as a deterrent for people using social media platforms to defame others. This particular issue is undoubtedly the trickiest element of all to grapple with and, as aired during the second reading, things have moved on in an unrecognisable way since the 2013 Act was developed. I believe that this aspect in particular needs properly thought-out consideration and policy development, and I do not see how we can viably do that in a short timeframe and using the architecture of this particular Bill.

That said, there are other aspects of the Bill upon which I do not have strong views, and indeed, in parts, support. The provisions that translate current common law defences into similar statutory defences do not appear to me to be particularly troublesome, although the Bill sponsor may wish to reflect on the views of Dr Andrew Scott relating to the defence of fair comment/honest opinion and how they might be further revised in the hope of better reflecting the personal and social interests in free speech. And while I have not heard of any specific problems relating to academic or

scientific research in this jurisdiction – I have already made the point that you can buy the same books, journals and articles in Belfast as you can in Dublin, London or elsewhere – I take no particular issue with the provisions intended to improve that position outlined in Clause 6 of the Bill.

It is therefore my intention at this stage to observe the work the Committee undertakes on this Bill. Unless there is something I consider will be particularly damaging in the end product, and which might impact upon the work my Department is currently undertaking, I do not intend to actively intervene in terms of the manner which this Bill finishes its journey at Committee stage and beyond. I know you and the Committee will interrogate the Bill, and will take evidence from others interested in its development from all sides of the debate around this issue. In tandem with that, work on defamation within my Department will continue with the aim of developing robust policy proposals, based on current thinking and evidence, both from across these islands and elsewhere, and in order that a future Finance Minister and Executive can consider well thought out, and up to date, legislative change. I am content for my officials to give evidence to the Committee and that will give the Committee the opportunity to explore further the ongoing work being undertaken on this subject, and for officials to provide any other information you deem appropriate on the provisions currently contained in the Bill.

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**CONOR MURPHY MLA
MINISTER OF FINANCE**