

## Committee for Finance - Committee Stage Defamation Bill

### Written Response to the request of the Committee Clerk - letter of 17 September 2021

*Dear Peter McCallion*

Thank you for your letter. I make the following observations which I hope may be of some assistance to the Committee in their consideration of this important proposal for law reform.

1. I have been a practising solicitor in Belfast over forty years. In that time I have acted both for plaintiffs in libel actions and also for some defendants, in particular, for a time advising a Northern Ireland newspaper: including pre-publication advice as well as acting in defence litigation.
2. I have also an active interest in law reform and in particular, in this context the reform of our defamation law.
3. My approach, in this area of law, as in my practice generally, has always been that the lawyer should not be 'captured' by any 'side' or 'interest group' in society but should always remain willing to advise and act for anyone, without fear or favour, or pre-set ideological commitment.
4. So that is my overall approach to the proposal to reform our defamation legislation.
5. I believe there are particular reasons why such reform is pertinent to Northern Ireland and to the health of our democratic system.
  - To approach this, I must first of all touch upon the constitutional settlement, achieved in 1998, which underpins devolution in Northern Ireland. I continue to support that settlement as the only way which in a society, still divided on constitutional issues, can come together to support and engage in our devolved institutions.
  - This entails the participation of all the main parties in the Executive. The 'downside' of that is, of course, that we lack a functioning opposition of any major party or parties. That is so, despite the valiant work of a few MLAs, either in smaller parties, not represented in the Executive, or acting as independents.
  - All this is preamble to the point that the price we pay for functioning devolution is the diminution of open political dialogue (upon which democracy should thrive).

- All is not lost, because the media and commentators generally can provide at least some challenge role to the decisions and actions of the multi-party Executive.
  - This makes it all the more important that we should have a legislative base that protects so far as reasonably possible all open political debate. Open political debate of course entails robust political debate. So on the one side we must encourage the maximum possible freedom of expression to encourage and protect open, robust political debate. On the other side individuals should be protected from personalised defamation which causes serious reputational harm. The question, of course, is where the line should be drawn.
  - I believe that this legislation strikes the right balance and that it should be supported as it is drafted.
6. The impact of liability for legal costs is a central factor in any defamation litigation. The parties to defamation litigation face from the inception crippling litigation costs risk. This inevitably closes off any realistic prospect of entitlement to have their case determined in court. This is because the prospects of losing are so calamitous. The losing party will almost inevitably be faced with a court order that they must bear almost all the winning party's legal costs. Then they must also bear the totality of their own legal costs. Thus the costs may well far exceed the amount payable in damages for the defamation (as assessed by the court). So very often the parties will be compelled into a settlement on the strong advice of their legal team because the prospects of losing in court are so horrendous. This underlines the imperative need for defamation law reform in Northern Ireland.

In closing, I commend the Committee for engaging in consideration of this law reform proposal. Because of a decision by the Department of Justice some years ago there is no funding in Northern Ireland for any body or group of experts dedicated to consideration of law reform in Northern Ireland. All the other jurisdictions in the United Kingdom and in Ireland have the benefit for their citizens of independent bodies of law reform experts (known as Law Commissions). It is shameful in my view that Northern Ireland is the sole common law jurisdiction without the benefit of a functioning law commission for the benefit of law reform for all the people of Northern Ireland. I can only hope that the work of the Finance Committee on this particular project of law reform may encourage the Department of Justice to re-establish the Northern Ireland Law Commission – in accordance with the statutory duty that there should be such a law reform body in Northern Ireland.

I shall be happy to answer any questions that members of the Committee may have.

Kind regards

*Neil*

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*1st November 2021*