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Defamation Bill

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This paper provides an overview of the Defamation bill which was introduced on 7th June 2021. It draws comparisons with defamation law in England & Wales, Scotland and the Republic of Ireland as well as a discussion of the key provisions contained in the Bill.

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Executive Summary

The paper provides an overview of the proposed changes to defamation law in Northern Ireland contained in the Private Member's Defamation Bill, introduced on 7th June 2021. It also examines recent changes to defamation law in England and Wales, Scotland and the Republic of Ireland.

The Bill seeks to reform defamation law in Northern Ireland by essentially replicating the Defamation Act 2013 that applies in England and Wales. The Explanatory Memorandum states that the Bill wants to ensure that a fair balance is struck between the right to freedom of expression and the protection of reputation.

Halsbury's defines defamation as "…a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to disparage him in his office, profession, calling, trade or business."[1]

The Defamation Act 2013 made the most substantive and procedural changes to the law of defamation since the Defamation Act 1996. These changes included a new "serious harm" threshold to prevent people bringing trivial claims; codifying and updating the common law and statutory defences of justification, fair comment and privilege; and the tightening of jurisdictional rules in order to restrict libel tourism.

The Defamation and Malicious Publication (Scotland) Act 2021 implemented the substantive recommendations made in the Scottish Law Commission's Report on Defamation. Some of the provisions in the Act reflected the 2013 Act, while others were specific to Scottish law.

Defamation in the Republic of Ireland is currently legislated for in the Defamation Act 2009. The Programme for Government, published in October 2020, committed to "Review and reform defamation laws, to ensure a balanced approach to the right to freedom of expression, the right to protection of good name and reputation, and the right of access to justice." Work to review the law on defamation has commenced but was delayed to the need to focus on Covid-19 and Brexit

Defamation law in Northern Ireland has developed through common law with some aspects codified in statute. It is essentially the same as the law in England & Wales as it was prior to the implementation of the Defamation Act 2013. The most recent piece of legislation amending defamation law in Northern Ireland was the Defamation Act 1996.

The then Minister for Finance refused application of the Defamation Act 2013 to Northern Ireland via a Legislative Consent Motion. Subsequently, the Northern Ireland Law Commission was asked to examine the issue. This work was then taken

[1] https://www.lexisnexis.co.uk/legal/commentary/halsburys-laws-of-england/defamation/defamatory-statement

on by Dr. Andrew Scott (now Professor) of the London School of Economics who produced a report for the Department of Finance. The sponsor of the current bill, Mike Nesbitt MLA, had at the time brought proposals to reform the law. The lack of a functioning Assembly and Executive meant that this work was not progressed.

The report by Dr. Scott recommended Northern Ireland-specific legislation to reform defamation law, based on the 2013 Act, but tailored to local needs. This is different to the current PMB, which replicates the 2013 Act.

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1 Introduction

This paper has been produced to inform consideration of the Defamation Bill, introduced by Mr. Mike Nesbitt MLA. The Bill will reform the law of defamation in Northern Ireland and aims to:

> *reform the law of defamation to ensure that a fair balance is struck between the right to freedom of expression and the protection of reputation. The Bill makes a number of substantive changes to the law of defamation, but is not designed to codify the law into a single statute*.[2]

The Bill replicates the Defamation Act 2013, which reformed defamation law in England and Wales.

The paper is divided into the following sections:

- **Section 1** provides a brief introduction;
- **Section 2** discusses the Defamation Act 2013 in relation to England and Wales;
- **Section 3** examines the Defamation and Malicious Publication (Scotland) Act 2021;
- **Section 4** provides an overview of developments in relation to defamation law in the Republic of Ireland; and
- **Section 5** details the current situation in Northern Ireland.

Defining defamation

Defamation is an aspect of civil law. There is no single statutory definition of defamation, although the Defamation and Malicious Publication (Scotland) Act 2021 defines it as:

> *a statement about a person is defamatory if it causes harm to the person's reputation (that is, if it tends to lower the person's reputation in the estimation of ordinary persons*.[3]

This is similar to the common law[4] definition which came from the 1936 case of Sim v Stretch.

The Northern Ireland Review Group's Report on Civil Justice states that:

[2] Explanatory Memorandum to the Bill
[3] Defamation and Malicious Publication (Scotland) Act 2021: https://www.legislation.gov.uk/asp/2021/10/part/1/crossheading/actionability-and-restrictions-on-bringing-proceedings
[4] The common law is the law declared by judges, derived from custom and precedent: https://www.iclr.co.uk/knowledge/topics/the-english-legal-system/

> *The purpose of defamation law is to protect an individual's reputation from harm caused by the publication or broadcast of false and damaging statements. The remedies include damages but, significantly, might also include a right to a public apology, both of which vindicate the reputation.*[5]

Halsbury's defines defamation as "…a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to disparage him in his office, profession, calling, trade or business[6]."

2 England and Wales

There have been a number of changes to defamation law in the UK over the years. The last major reform before the Defamation Act 2013 was the Defamation Act 1996.

The Defamation Act 1952 was the first significant piece of UK law in relation to defamation which included provisions relating to slander, justification, fair comment, certain defences relating to broadcasting, privilege, agreements for indemnity and evidence of damages.

This was followed by the Defamation Act 1969, which includes provisions relating to responsibility for publication, offers to make amends, limitations, the meaning of a statement, summary disposal, evidence and statutory privilege.

Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) covered defences for internet intermediaries who transmit material not created by them.[7]

The Defamation Act 2013 fulfilled a commitment in the Conservative and Liberal Democrat Coalition Agreement to reform defamation law. The Act received Royal Assent on 25 April 2013 and came into force on 1 January 2014.

The legislation had been the culmination of pressure exerted over many years to reform the law in this area, with concerns over the practice of so-called 'libel tourism'. This meant that people could bring claims of defamation in England & Wales even though the case had little connection to the jurisdiction, believing that they had a better chance of winning compared to other jurisdictions. For example, in the United States, the burden of proof rests heavily on those bringing a claim of libel.

[5] Review of Civil and Family Justice in Northern Ireland Review Group's Report on Civil Justice, September 2017: https://www.judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/Civil%20Justice%20Report%20September%202017.pdf

[6] Lexis Nexis, definition of defamatory statement: https://www.lexisnexis.co.uk/legal/commentary/halsburys-laws-of-england/defamation/defamatory-statement

[7] The Scottish Parliament's Justice Committee noted that: The influence of the European Court of Human Rights and its jurisprudence on the right to respect for private and family life and the right to freedom of expression is a critically important part of the legal framework surrounding defamation: https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2020/10/14/Defamation-and-Malicious-Publication--Scotland--Bill--Stage-1-Report/JS0520R17.pdf

The last change to UK defamation laws had occurred with the Defamation Act 1996, which included which included provisions relating to responsibility for publication, offers to make amends, limitations, the meaning of a statement, summary disposal, evidence and statutory privilege.

The Human Rights Act 1998 brought the European Convention on Human Rights into UK law, Article 8 of which protects a right to private and family life and Article 10 protects a right to freedom of expression.

The situation in the UK was perceived to have a chilling effect on freedom of expression. At the time, the Government "also recognised worries that the threat of libel proceedings might be used to frustrate robust scientific and academic debate or to impede responsible investigative journalism."[8]

The 2013 Act was designed "to ensure that a fair balance (was) struck between the right to freedom of expression and the protection of reputation".[9] It made a number of "substantive and procedural changes to the law of defamation"[10]. These included:

- A new "serious harm" threshold to prevent people bringing trivial claims, and a requirement that bodies trading for profit show serious financial harm.
- Codifying and updating the common law and statutory defences of justification, fair comment and privilege.
- A new defence of qualified privilege for the publication of articles in peer reviewed academic and scientific journals.
- A new defence of publication on a matter of public interest.
- A new defence for operators of websites hosting third party content, provided a specific process is followed to facilitate contact between claimant and the author.
- A single publication rule to prevent repeated claims in relation to the same material.
- Tightening of jurisdictional rules in order to restrict libel tourism.
- A new defence for secondary publishers where it is reasonably practicable to pursue an action against the primary publisher.
- Reversing the presumption in favour of jury trials.[11]

[8] House of Commons Library, *Defamation Bill*, May 2012: https://researchbriefings.files.parliament.uk/documents/RP12-30/RP12-30.pdf
[9] As above
[10] House of Commons Library, *The Defamation Act 2013*, January 2014: https://researchbriefings.files.parliament.uk/documents/SN06801/SN06801.pdf
[11] As above

There were also “changes to civil procedure rules and costs rules designed to reduce the length of cases and consequent chilling effect brought about by the threat of disproportionate costs.”[12]

Key provisions of the 2013 Act

Section 1 of the Act established a threshold of serious harm whereby a statement cannot be defamatory unless the claimant can show that “...its publication has caused or is likely to cause serious harm to [his/her] reputation...”. Its intention was to deter trivial claims.

Section 1 has been labelled as the “Act’s most opaque, albeit well-intentioned, innovation” whose “…practical effect…polarised legal opinion from the outset”.[13]

It was put to the test in 2014 when two British newspapers, *The Independent* and *The Evening Standard*, reported allegations made by a British woman about her husband, Bruno Lachaux. Mr. Lachaux was a French resident living in Dubai. The newspapers reported that, among other things, he had been abusive towards his wife.

The High Court rejected the newspapers arguments that the statements were not defamatory because they did not meet the serious harm threshold in the Defamation Act. However, analysis of the case stated that:

> *…the judge at least agreed that s1 was a game-changer, adopting the defendants' analysis that s1 demands evidence of serious harm. So far so reasonable—a significant step forward for freedom of expression, if not for these defendants*.

In 2017, the Court of Appeal dismissed the newspapers' appeal, and it has been argued that:

> *The incremental result was a 70% increase in defamation claims from 2017 to 2018, according to statistics published by the RCJ*.

The case came before the Supreme Court and Lord Sumption noted that:

> *…although a statute is presumed not to alter the common law unless it so provides either expressly or by necessary implication, the 2013 Act 'unquestionably does amend the common law to some degree.'…*
>
> *Moreover, the reference in section 1 to a situation where the statement has caused serious harm is to the consequences of the publication, and not the publication itself. Lord Sumption said that this 'points to some historic harm, which is shown to have actually occurred' and 'is a proposition of fact which can be established only by reference to the impact which the statement is*

[12] House of Commons Library, The Defamation Act 2013, January 2014
[13] Romana Canneti, *Rewriting the Defamation Act?,* New Law Journal 169 NLJ 7845, p7, 21 June 2019

> *shown actually to have had.' This depends not only on a combination of the inherent tendency of the words but also their actual impact on those to whom they were communicated. In the court's view, the 'same must be true of the reference to harm which is "likely" to be caused.' For in this context, 'the phrase naturally refers to probable future harm'.*
>
> *So in the Supreme Court's view 'the defamatory character of the statement no longer depends only on the meaning of the words and their inherent tendency to damage the claimant's reputation.' It is to that extent that Parliament intended to change the common law. As Lord Sumption indicated, section 1 supplements the common law by introducing a new condition that relevant harm must be 'serious' and in the case of trading bodies that it must result in serious financial loss.*

Essentially, "the appeal was dismissed on the facts, but the newspapers won on the law."

The draft Bill had originally contained the phrase "substantial harm", which the Joint Committee on the Defamation Bill had recommended be changed to "serious and substantial harm". The Government responded that introducing two terms may be confusing, but agreed to change it to "serious harm".[14]

Section 2 provides for the defence of truth. It "renamed the common law defences of justification and fair comment as ones of truth and honest opinion and were intended to make the law simpler and clearer to understand and apply".[15] Subsection (1) "provides for the new defence to apply where the defendant can show that the imputation conveyed by the statement complained of is substantially true".[16]

The Explanatory Note accompanying the Act states:

> *This subsection reflects the current law as established in the case of Chase v News Group Newspapers Ltd, where the Court of Appeal indicated that in order for the defence of justification to be available "the defendant does not have to prove that every word he or she published was true. He or she has to establish the "essential" or "substantial" truth of the sting of the libel".*[17]

The Joint Committee had recommended that the draft bill be amended to include the phrase "substantial truth", but this was rejected by the Government as it believed that the "substance of the clause already makes sufficiently clear that the defence will

[14] Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, February 2012: https://www.parliament.uk/globalassets/documents/joint-committees/draft-defamation-bill/government-response-cm-8295.pdf

[15] Ministry of Justice, Post-Legislative Memorandum: *The Defamation Act 2013*, October 2019: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/838398/post-legislative-memorandum-defamation-act-2013.PDF

[16] Explanatory Memorandum to the 2013 Act: https://www.legislation.gov.uk/ukpga/2013/26/notes/division/5/2

[17] As above

succeed where the defendant can show that the imputation conveyed by the statement complained of is substantially true".[18]

Section 3 of the Act replaced the common law defence of fair comment with a new defence of honest opinion.

A defendant has to meet three conditions to be able to rely on this defence:

> (1) That the statement complained of was a statement of opinion;
>
> (2) That the statement complained of indicated, whether in general or specific terms, the basis of the opinion; and
>
> (3) That an honest person could have held the opinion on the basis of any fact which existed at the time the statement was published or anything asserted to be a fact in a statement published before the statement complained of.

The defence is defeated if the claimant shows that the defendant did not hold the opinion. This is a subjective test. This reflects the current law whereby the defence of fair comment will fail if the claimant can show that the statement was actuated by malice.[19]

Section 4 created a new public interest defence. Previous research explained that:

> *In order to be able to rely on the defence, the defendant must show that the statement was, or formed part of, a statement on a matter of public interest and that he reasonably believed that publishing the statement complained of was in the public interest. The defence therefore contains both a subjective element – what the defendant believed was in the public interest at the time of publication – and an objective element – whether the belief was a reasonable one…*
>
> *Subsection 3 reflects the common law doctrine of "reportage", which describes the neutral reporting of attributed allegations (as opposed to the adoption of the allegations by the newspaper). In these circumstances a belief in the public interest in publication may be reasonable notwithstanding the fact that the publisher has not attempted to verify the truth of allegations, because the public interest lies in the reporting of the fact that the allegations have been made at all.*[20]

Section 5 created a new defence for the operators of websites where a defamation action is brought against them in respect of a statement posted on the website. Prior to the 2013 Act, a website operator hosting user-generated content could be sued in relation to defamatory content that is posted on the site. Regulation 19 of the Electronic

[18] Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, February 2012
[19] Explanatory Notes to the 2013 Act
[20] House of Commons Library, *The Defamation Act 2013*, January 2014

Commerce (EC Directive) Regulations 2002 (S.I. 2002/2012) and section 1 of the Defamation Act 1996 may have provided some protection, but there remained a potential chilling effect on free speech as non-defamatory material may have been removed for fear of being sued.[21]

Subsection (2) provides for the defence to apply if the website operator can show that they did not post the statement on the website. However, subsection (3):

> *provides for the defence to be defeated if the claimant can show that it was not possible for him or her to identify the person who posted the statement; that they gave the operator a notice of complaint in relation to the statement; and that the operator failed to respond to that notice in accordance with provision contained in regulations to be made by the Secretary of State.*[22]

In a January 2020 commentary on the provisions of the 2013 Act, one legal firm stated that:

> *We are not aware of any reported case in which a section 5 has been run at a hearing. Our own experience suggests that take up of the section 5 procedure has been very low. The procedure is complicated and onerous. It is probably unattractive to website operators who will often have no interest in the matter and/or be able rely on other substantive defences.*[23]

However, previous research identified potential problems with section 5:

> *Should an internet intermediary be sued in defamation, it can raise the defence of averring that the statement was not posted by itself but by another. However, the defence is defeated if the claimant shows that he could not identify the person who posted the statement, he gave a notice of complaint regarding the statement to the website operator, and the operator then failed to respond to such notice in accordance with the Defamation (Operators of Websites) Regulations 2013. The website operator now has three options in terms of the mechanism provided for in the Regulations: It can obtain the poster's consent to reveal their identity to the claimant, and if granted, must then give the poster's name and address to the claimant; if such permission is refused, it must inform the claimant of such refusal and also that the poster has refused to consent to the removal of the offending statement; or, finally, it could simply remove the statement complained of. Failure to do this would deprive the operator of the section 5 defence. It is no stretch of the imagination to assume that rather than assuming the potentially considerable burden of contacting posters, website operators may simply remove postings*

[21] Explanatory Memorandum to the Defamation (Operators of Websites) Regulations 2013
[22] Explanatory Memorandum to the Defamation Act 2013
[23] Brett Wilson LLP, Defamation Act 2013: A summary and overview six years on, January 2020: https://www.brettwilson.co.uk/blog/defamation-act-2013-a-summary-and-overview-six-years-on/

> *upon receipt of a notice of complaint, irrespective of whether they are in fact defamatory or not.*[24]

In its post-legislative memorandum on the Act, the Government stated:

> *In relation to section 5, it is understood anecdotally that the provisions have been little used, with website operators preferring to remove material or rely on other existing defences. However, the defence under section 5 was introduced because of concerns at that point that operators might not have adequate protection, and there is no obligation on operators to follow the process set out in the Regulations. As noted above, if the website operator chooses not to follow the process established under the Act, the defence under section 5 will not be available to the operator in the event that it is sued for defamation. However, this does not affect the availability of any other defences that may apply. The fact that website operators are choosing not to rely on the defence does not therefore appear to constitute a significant issue in practice.*[25]

Section 6 created a new defence of qualified privilege for peer-reviewed material in scientific or academic journals. There are two conditions attached to this: firstly, the statement must relate to an academic or medical matter and secondly, before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned.[26]

However, if the publication was found to be made with malice, then the defence falls.

Section 7 replaced and amended parts of the Defamation Act 1996 to extend the circumstances in which the defences of absolute and qualified privilege can be claimed. Subsection (1) extended the scope of the defence of absolute privilege so that it covers proceedings in any court established under the law of a country or territory outside the UK, and any international court or tribunal established by the Security Council of the United Nations or by an international agreement.[27]

Subsections (3) to (10) amended Part 2 of Schedule 1 of the 1996 Act to extend the circumstances in which qualified privilege can be claimed. Part 1 of Schedule 1 sets out categories of publication which attract qualified privilege without explanation or contradiction. These include fair and accurate reports of proceedings in public, anywhere in the world, of legislatures (both national and local), courts, public inquiries,

[24] Mariette Jones, *The Defamation Act 2013: a free speech retrospective*, accessed via the Middlesex University Research Repository, published 2019: https://eprints.mdx.ac.uk/27784/1/Mariette%20Jones%20A%20free%20speech%20retrospective%20on%20the%20UK%20Defamation%20Act%202013_v3.pdf

[25] Ministry of Justice, Post-Legislative Memorandum: *The Defamation Act 2013*, October 2019

[26] Explanatory Note to the 2013 Act

[27] As above

and international organisations or conferences, and documents, notices and other matter published by these bodies.[28]

Section 8 introduced a single publication rule. It "prevent(s) an action being brought in relation to publication of the same material by the same publisher after a one year limitation period from the date of the first publication of that material to the public or a section of the public".[29]

In its report on the draft bill, the Joint Committee recommended that the "single publication rule should protect anyone who republishes the same material in a similar manner after it has been in the public domain for more than one year". In response, the Government said that this would significantly widen the scope of the clause and did not believe that it would provide adequate protection for claimants:

> *For example, if the claimant were to bring an action in the one year period then they would be prevented from bringing any further action in relation to that material, irrespective of who might republish it. Whilst the claimant may have obtained a court injunction against the original publisher to prevent further publication of the defamatory material, any other publisher would still be free to republish it, and the claimant would have no recourse.*[30]

Section 9 addresses the issue of libel tourism and provides that:

> *a court does not have jurisdiction to hear and determine an action to which the section applies unless it is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.*[31]

The Explanatory Memorandum sets out an example of the issue section 9 is intended to address:

> *This would mean that, for example, if a statement was published 100,000 times in Australia and only 5,000 times in England that would be a good basis on which to conclude that the most appropriate jurisdiction in which to bring an action in respect of the statement was Australia rather than England.*[32]

The Explanatory Memorandum recognised that there may be other factors to take into consideration, for example the amount of damage caused to the claimant's reputation in a jurisdiction compared to elsewhere, the extent to which it was targeted at a

[28] Explanatory Note to the 2013 Act
[29] As above
[30] Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, February 2012
[31] Explanatory memorandum to the 2013 Act
[32] As above

readership in a particular jurisdiction and the likelihood of a claimant not receiving a fair hearing in a jurisdiction.

Section 10 replaced the common law defence of 'innocent publication', removing the jurisdiction of courts in England and Wales to hear defamation cases against secondary publishers, unless it is not reasonably practical to bring a case against the author, editor or publisher.

Previous research highlighted:

> *The significance of this change is that it protects secondary publishers such as wholesale and retail newspaper and magazine vendors and distributors, commercial printers, libraries and book distributors, and online publications who at common law, were deemed to be publishers and as such potentially liable*.[33]

The same research went on to note potential issues with section 10, for example in circumstances where it is difficult to locate the author, editor or publisher, or where they could not be subject to court proceedings due to bankruptcy or death. In such circumstances, the research suggested that the most likely defences would be: "the defence for operators of websites in section 5 of the 2013 Act; the defences for internet intermediaries in regulations 17-19 of the Electronic Commerce Regulations, and the statutory or common law defences of innocent dissemination".[34]

Section 11 removes the presumption on favour of trial by juries in defamation cases. It amended the Senior Courts Act 1981 and the County Courts Act 1984 to remove libel and slander from the list of proceedings where a right to jury trial exists. This resulted in defamation cases being tried without a jury unless a court orders otherwise.

In its report on the draft Defamation Bill, the Joint Committee supported the proposal as "the presumption in favour of jury trials works against our core principles of reducing costs by promoting early resolution and, to a lesser degree, of improving clarity".[35] But it recommended that "the circumstances in which a judge may order a trial by jury should be set out in the Bill, with judicial discretion to be applied on a case-by-case basis. These circumstances should generally be limited to cases involving senior figures in public life and ordinarily only where their public credibility is at stake".[36]

However, the Government responded that:

> *…a clear majority of responses to our consultation on this point, including from members of the senior judiciary, took the view that guidelines would not be necessary. Concerns were expressed that including guidelines in the Bill could*

[33] Mariette Jones, The Defamation Act 2013: a free speech retrospective, accessed via the Middlesex University Research Repository, published 2019

[34] As above

[35] House of Commons Library, *Defamation Bill*, May 2012

[36] Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, February 2012

> *be too prescriptive and could generate disputes. There would also be a risk that detailed provisions setting out when jury trial may be appropriate could inadvertently have the effect of leading to more cases being deemed suitable for a jury than at present, which would work against the Committee's view (which the Government shares) that jury trial should be exceptional.*[37]

Section 11 was engaged in 2014 when Tim Yeo, then Chair of the Energy and Climate Committee in the House of Commons, sued Times Newspapers Limited for articles published in *The Sunday Times* in June 2013 and online publication thereafter.

Times Newspapers asked that a jury be empanelled to hear the case. Mr. Justice Warby rejected this application, stating that "Neither party is a public authority. Mr Yeo, whilst holding an influential position, is not in government and exercises no state power".[38] Mr. Warby noted that "Mr Millar QC's (QC for Times Newspapers Limited) submissions do not identify any skills, knowledge, aptitudes or other attributes likely to be possessed by a jury which would make it better equipped than a judge to grapple with the issues that arise and may need to be tried."[39]

Section 12 extends the power of the courts to order that a summary of its judgement be published. This power already existed in a more limited form in section 8 of the Defamation Act 1996, whereby "the court has the power to order a summary of its judgment to be published in terms agreed by the parties or determined by the court".[40] This was in circumstances where the parties cannot agree a correction or an apology.

Section 12 would extend this to defamation proceedings more generally. In its report on the draft Bill the Joint Committee recommended:

> *The Bill should be amended, if necessary by a new clause, to provide the judge deciding a defamation case at final trial with the power to order the defendant to publish, with proportionate prominence, a reasonable summary of the court's judgment. In cases where media and newspaper editors are responsible for implementing such orders they should ensure that the summary is given proportionate prominence*.[41]

The Government agreed with the Committee's recommendation and the draft Bill was amended accordingly.

[37] Ministry of Justice, The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill, February 2012
[38] [2014] EWHC 2853 (QB): http://www.bailii.org/ew/cases/EWHC/QB/2014/2853.html
[39] As above
[40] House of Lords and House of Commons, Report of the Joint Committee on the Draft Defamation Bill, October 2011
[41] As above

3 Scotland

The Defamation and Malicious Publication (Scotland) Act received Royal Assent on 21 April 2021. The Act implements the substantive recommendations made in the Scottish Law Commission's *Report on Defamation*. In particular, it makes provisions in relation to:

- actionability of defamatory statements and restrictions on bringing proceedings;
- defences;
- absolute and qualified privilege;
- offers to make amends;
- jurisdiction; and
- the removal of the presumption that defamation proceedings are to be tried by jury.

The Act replaces some of the common law in this area, but does not replace all of it.

Background

The Scottish Law Commission had undertaken its work in light of the changes to defamation law in England & Wales as a result of the 2013 Defamation Act. In 2012, the Scottish Government decided not to bring a legislative consent motion to extend the provisions of the Westminster legislation to Scotland. It instead asked in its report on the LCM that the Scottish Law Commission should be asked for its views on defamation law in Scotland.

In March 2016 the Commission published a discussion paper which was followed by a seminar on reform of defamation law and verbal injury. The discussion paper noted the potential advantages of simply following the model adopted in England & Wales, but was not persuaded of this approach, stating that:

> *The issues and concerns that led to the Defamation Act 2013 may not apply (at least with the same force) in Scotland; for instance, there has been little evidence of libel tourism here, and the extent to which there is evidence that publication of information has been restricted is open to question.*[42]

The Commission's final report in 2017 considered not only what aspects of that Act might be suitable for Scottish law, but also wider reform of Scottish defamation law, particularly in the advent of the age of social media.

[42] Scottish Law Commission discussion paper on defamation, 2016: https://www.scotlawcom.gov.uk/files/5114/5820/6101/Discussion_Paper_on_Defamation_DP_No_161.pdf

The aim of the report was to:

> *…modernise and simplify Scots law in these areas so as to ensure that it strikes the correct balance between the fundamental values of freedom of expression on the one hand and protection of reputation on the other. Achieving the right balance between these two principles is a particularly sensitive issue in the age of the internet and social media.*[43]

The Commission also published a draft Bill to accompany its report, the Defamation and Malicious Publications (Scotland) Bill. The final report made a number of recommendations to amend the law on defamation. Subsequently, the Justice Committee in the Scottish Parliament held a short inquiry into the Commission's proposals. The Scottish Government subsequently published a consultation seeking further views on possible reform of the law.[44]

Justice Committee's Stage 1 report

In October 2020 the Justice Committee of the Scottish Parliament published its Stage 1 report on the Bill.

Addressing the balance between freedom of expression and the protection of reputation, the Committee noted that the age-old debate between free speech and protection of reputation had been upended by the advent of the internet, where anyone can create and disseminate information.

It reflected that a key issue that emerged during its evidence gathering process was "the challenges and the costs of taking a defamation action and the risk which a person may face when looking to defend their reputation of exposure to widespread publicity and comment".

There were different viewpoints on how real the so-called chilling effect was. The Committee heard from the National Union of Journalists (NUJ) who pointed out that "traditional media organisations are struggling to maintain their financial viability. With less money to invest in investigative journalism, the additional risk of court action may be sufficient to see a story dropped."[45] This is, as the Committee noted, the chilling effect. All of the media organisations who responded to the Committee's consultation welcomed the reforms in the Bill, although some suggested they did not go far enough.

This view was not shared by the Faculty of Advocates or the Law Society of Scotland. In its submission, the Faculty argued although the chilling effect was a "catchy

[43] Scottish Law Commission, *Report on Defamation*, 2017: https://www.scotlawcom.gov.uk/files/7315/1316/5353/Report_on_Defamation_Report_No_248.pdf

[44] Scottish Government consultation, Defamation in Scots Law, January 2019: https://www.gov.scot/publications/defamation-scots-law-consultation/pages/3/

[45] Scottish Parliament Justice Committee, *Defamation and Malicious Publication(Scotland) Bill: Stage 1 Report*, October 2020: https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2020/10/14/Defamation-and-Malicious-Publication--Scotland--Bill--Stage-1-Report/JS0520R17.pdf

phrase"[46], it should not be used to deny a private individual a remedy in circumstances where they have been defamed.

Key provisions of the Act

Section 1(4)(a) of the Bill places a definition of defamation on a statutory footing:

> *a statement about a person is defamatory if it causes harm to the person's reputation (that is, if it tends to lower the person's reputation in the estimation of ordinary persons)*

The Explanatory Memorandum explains that:

> *This follows closely the common law test adopted in Sim v Stretch(1) as regards the nature of a defamatory statement, thus leaving the additional elements (e.g. the onus of proof and presumptions as to falsity/malice) to be dealt with by the common law. This is a similar approach to that adopted at section 2 of the Irish Defamation Act 2009. A court, when interpreting the new statutory definition at subsection (4)(a), may refer to case law on the common law definition found in Sim v Stretch, and indeed any other relevant case, where it considers it appropriate to do so.*[47]

Section 1 also makes clear that defamation can only occur where a statement is communicated to a third party. Therefore, damage to reputation can only occur where someone else knows about the statement. This alters the current position whereby in Scotland "Defamation can arise where a damaging imputation is communicated only to the person who is the subject of it; in other words if it is seen, read or heard only by its subject and by no one else."[48]

In its Policy Memorandum for the Bill, the Scottish Government said that it was not aware "…of any other jurisdiction in which defamation is taken to arise as a matter of law without an allegedly defamatory imputation being communicated to a third party."[49] The Bill therefore "provide(d) that it should be competent to bring defamation proceedings in respect of a statement only where the statement has been communicated to a person other than its subject, with that person having seen or heard it and understood its main content or substance."[50]

A **serious harm test** is also introduced in Part 1. It follows the Defamation Act 2013 in setting a minimum threshold for harm below which a claim for defamation could not be

[46] Scottish Parliament Justice Committee, Defamation and Malicious Publication (Scotland) Bill: Stage 1 Report, October 2020
[47] Explanatory Notes to the Defamation and Malicious Publication (Scotland) Act 2021: https://www.legislation.gov.uk/asp/2021/10/notes/division/3
[48] Policy Memorandum to the Defamation and Malicious Publication (Scotland) Bill: https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/defamation-and-malicious-publication-scotland-bill/introduced/policy-memorandum-defamation-and-malicious-publication-scotland-bill.pdf
[49] As above
[50] Policy Memorandum to the Bill

pursued in the courts. The Scottish Law Commission felt that there was a lack of Scottish case law that would allow the courts to dispose of trivial claims. This was not a universally shared view, with the Faculty of Advocates unsure of the problem the introduction of such a test was supposed to address. Indeed, "Most legal stakeholders saw it as an unnecessary barrier. In their view, the Scottish courts did not have a problem with trivial claims. The test was therefore argued to be an English solution to an English problem."[51]

In its commentary, the Scottish Law Commission referenced the "English Court of Appeal case (Lachaux v AOL (UK) Ltd) which accepted that serious harm could be proved by inference from the nature of the words used."[52] However, a research paper from the Scottish Parliament highlighted the Supreme Court case of *Lachaux v Independent Print* which may have relevance to the Scottish Bill:

> *In its decision the Supreme Court departed from the Court of Appeal's reasoning on the meaning of "serious harm". It held that the 2013 Act created an additional test beyond the common law requirement that the words were capable of having a defamatory meaning. In essence, as well as showing that the words were capable of causing serious harm, someone bringing an action has to show that they did in fact cause harm (or were at least likely to). As a result of the Supreme Court decision, it is not clear whether the [Scottish Law Commission's] comments on the Lachaux case are still relevant.*[53]

The Explanatory Memorandum references the Supreme Court ruling, noting that:

> *The UK Supreme Court has recently ruled on the meaning of the equivalent provision in English law (section 1 of the Defamation Act 2013), holding in Lachaux v Independent Print Ltd and another [2019 UKSC 27] that there is a need to show evidence of actual harm caused to reputation, or evidence that there is a likelihood of future harm. It is anticipated that the Scottish courts will treat Lachaux as persuasive authority and follow a similar approach.*[54]

Therefore the Act "limits the circumstances in which an action for defamation can be brought against someone who is not the primary publisher of an allegedly defamatory statements"[55] and furthermore:

> *Subsection (1) lays down the general principle that, except as may be provided for in regulations made under section 4, no defamation proceedings may be brought against a person unless that person is the author, editor or*

[51] Scottish Parliament research briefing, Defamation and Malicious Publication(Scotland) Bill: consideration prior to Stage 3, February 2021: https://sp-bpr-en-prod-cdnep.azureedge.net/published/2021/2/23/77abf950-f489-4609-9a10-67a40f6eec69/SB%2021-13.pdf

[52] Scottish Parliament research briefing, Defamation and Malicious Publication(Scotland) Bill, March 2020: https://sp-bpr-en-prod-cdnep.azureedge.net/published/2020/3/11/Defamation-and-Malicious-Publication--Scotland--Bill/SB%2020-22.pdf

[53] As above

[54] Explanatory Note to the 2021 Act

[55] Explanatory Note to the Bill: https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/defamation-and-malicious-publication-scotland-bill/introduced/explanatory-notes-defamation-and-malicious-publication-scotland-bill.pdf

> *publisher of the statement which is complained about or is an employee or agent of that person and is responsible for the content of the statement or the decision to publish it*.[56]

Section 2 places the *Derbyshire* principle on a statutory footing. The *Derbyshire* principle prohibits public bodies from bringing defamation claims. This rule originated from a 1993 House of Lords (Law Lords) decision in a case between Derbyshire County Council and the Times Newspapers Ltd and Others.

It was the subject of some discussion during the Justice Committee's call for evidence, with some stakeholders raising the issue that some public services are outsourced to private companies. As initially drafted, the clause in the Bill would have exempted businesses and charities which only exercise public functions "from time to time" from the prohibition. Research from the Scottish Parliament stated that:

> *Stakeholders argued that this left the position in relation to outsourced public services unclear. Media stakeholders argued that what people could say about public services should not be controlled by how the service was delivered. However, some legal commentators noted that the proposal went beyond the current law and may deprive some organisations - such as universities or housing associations - of the right to defend their reputation.*[57]

In relation to the Defamation Act 2013, the UK Government found that:

> *little evidence has been provided to show that the current position is causing significant problems in practice, and we are concerned that codification could remove the flexibility that exists under the common law for the courts to develop the principle further in the light of individual cases. On balance we therefore believe that the courts should be allowed to continue to develop the law in this area without a statutory provision.*[58]

Section 3 of Act places restrictions on proceedings against secondary publishers. This means that:

> *no defamation proceedings may be brought against a person unless that person is the author, editor or publisher of the statement which is complained about or is an employee or agent of that person and is responsible for the content of the statement or the decision to publish it*.[59]

It reflects, to some extent, section 10 of the 2013 Act and section 1 of the 1996 Act. However, unlike section 10, there is no exception to allow persons other than the author, editor or publisher to be sued when it is not possible to bring proceedings

[56] Explanatory Note to the 2021 Act
[57] Scottish Parliament research paper, *Defamation and Malicious Publication(Scotland) Bill: consideration prior to Stage 3*, February 2021
[58] Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, February 2012
[59] Explanatory Note to the 2021 Act

against one of those parties. It removes the court's jurisdiction in relation to secondary publishers, other than in respect of the author, editor or publisher of a statement, or in certain other circumstances to be specified in regulations.

This is an important distinction from section 10 of the Defamation Act 2013, which provides that:

> *a court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of* ***unless it is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher***.[60] (emphasis added)

Section 3 also gives Scottish Ministers regulation making powers to specify categories of persons to be treated as authors, editors or publishers for the purposes of defamation proceedings who would not otherwise be classed as such, nor as employees or agents of such persons.

The Explanatory Memorandum states:

> *…any such regulations may be made only where Scottish Ministers consider it appropriate to take account of two different situations. The first situation reflects technological developments (including where certain technologies cease to be used) relating to the dissemination or processing of materials. The second reflects changes in how material is disseminated or processed as a result of such developments. Under subsections (7) to (8) any such regulations are to be the subject of consultation by the Scottish Ministers, and are to be subject to the affirmative procedure*.[61]

The Justice Committee heard evidence that the lack of a 'take-down' procedure (section 5 in the Defamation Act 2013) in the Bill tilted the balance too far away from private individuals seeking redress. In response to the committee's report, the Government explained that a person can use the Simple Procedure Rules in the Sheriff court to have the offending statement removed or to claim damages. This procedure is designed specifically for a lay-person, and parties need not instruct a solicitor.

Sections 5, **6 and 7** (defence of truth, defence of publication on a matter of public interest and defence of honest opinion) largely reflect the Defamation Act 2013.

Section 10 reflects section 6 of the 2013 Act "conferring qualified privilege on the publication of material in a scientific or academic journal (whether published in electronic form or otherwise), provided that certain conditions are met".[62]

[60] Explanatory Note to the 2021 Act
[61] As above
[62] Explanatory Note to the 2021 Act

Sections 13 to 18 replace sections 2 to 4 of the Defamation Act 1996 insofar as they relate to Scotland. According to the Explanatory Memorandum:

> *…the offer of amends procedure provides a route by which a person against whom proceedings for defamation are brought may seek to make amends as an alternative to defending the proceedings. The offer may relate to the statement in general (i.e. an "unqualified offer"), or only to a specific defamatory meaning conveyed by the statement (i.e. a "qualified offer"). In making an offer of amends, be it qualified or unqualified, the person making the offer is conceding, as appropriate, that the statement in general or the specific meaning to which the offer relates is defamatory*.[63]

Sections 21 to 27 (Part 2 of the Act) reform the Scottish law of verbal injury (which the Scottish Law Commission had recommended be renamed 'malicious publication').

4 Republic of Ireland

The Irish Constitution ensures "effective protection for the right to good name and reputation guaranteed by Article 40.3.2…while also ensuring due regard for the right to freedom of expression in a democratic society, contained at Article 40.6.1(i)."[64]

This section sets out the current laws on defamation and then provides an overview of the ongoing work to review and update those laws.

Defamation in the Republic of Ireland is currently legislated for in the Defamation Act 2009, which repealed the Defamation Act 1961. The Explanatory Memorandum accompanying the legislation stated:

> *The purpose of the act is to revise in part the law on defamation and to replace the Defamation Act 1961 with modern updated provisions taking into account the jurisprudence of our courts and the European Court of Human Rights.*

The 2009 Act replaced the traditional definition of defamation which was publication of a false statement which subjected a person to hatred, ridicule or contempt. It provided a statutory definition that a defamatory statement is one which tends to injure a person's reputation in the eyes of reasonable members of society. The law Reform Commission noted that:

> *The defamatory statement must also be untrue, since section 16 of the 2009 Act provides that truth is a defence to a defamation claim. Section 6(2) of the 2009 Act provides that defamation consists of the publication, by any means, of a defamatory statement concerning a person to one or more than one*

[63] Explanatory Note to the 2021 Act

[64] Review of the Defamation Act 2009, public consultation: http://www.justice.ie/en/JELR/Pages/Review_of_the_Defamation_Act_2009_Public_Consultation

person (other than the first-mentioned person). It has been pointed out that section 6(2) of the 2009 Act reflects well-established case law that no act of defamation has occurred until it is published to someone other than the allegedly defamed person. Liability for a defamatory statement does not attach to the person who wrote it, but rather to the person who made it public, though in practice they are often one and the same.[65]

The 2009 Act also "constituted a significant codification of many existing common law principles and rules on defamation".[66]

Key features of the Defamation Act 2009

- repealed the Defamation Act 1961
- abolished the separate torts of libel and slander – now collectively known as the tort of defamation
- the tort of defamation involves publication of a "defamatory statement"
- traditional defences to slander and libel are abolished (with some defences) and replaced with the defences of truth; absolute privilege; honest opinion; fair and reasonable publication on a matter of public interest
- offer of an apology will not amount to admission of liability
- new remedies including a Declatory Order (plaintiff receives an order from the Court that the statement was false, but foregoes right to bring any other proceedings); Correction Order (the defendant must publish a correction to the defamatory statement) and Prohibitory Order

Review of the 2009 Act

The Programme for Government, published in October 2020, committed to "Review and reform defamation laws, to ensure a balanced approach to the right to freedom of expression, the right to protection of good name and reputation, and the right of access to justice."[67]

Work to review the law on defamation had actually already commenced but was delayed to the need to focus on Covid-19 and Brexit. In response to a parliamentary

[65] Law Reform Commission, *Privilege for Reports of Court Proceedings under the Defamation Act 2009*, 2019: https://www.lawreform.ie/_fileupload/Reports/LRC%20121-2019%20Privilege%20for%20Reports%20of%20Court%20Proceedings%20under%20the%20Defamation%20Act%202009.pdf

[66] As above

[67] Programme for Government, 2020

question in January of this year, the Minister for Justice gave an update on the status of the review:

> *My Department has already completed extensive work on the defamation review, including holding a public consultation, publishing all submissions received, detailed consideration of the many issues raised, examining relevant reforms in other jurisdictions, organising a symposium on defamation law reform, and careful consideration of recent European Court of Human Rights (ECHR) case law…*
>
> *My Department is now finalising the report of the defamation review, with options for change to the law, and I expect to receive the report in the near future. I intend to publish it, subject to Government agreement, by the end of March. As a measure of the Government's commitment to this reform, I have already included the Defamation (Amendment) Bill, to implement the resulting legislative changes, in the Government's updated Legislation Programme, which was published on 13 January 2021*.[68]

In fact, initial work on reviewing the law had commenced in 2015, as stipulated in the Act. The aim of the review of the 2009 Act, which is required under section 5 of that legislation, is:

- to promote an exchange of views and experiences regarding the operation in practice of the changes made by the 2009 Act;
- to review recent reforms of defamation law in other relevant jurisdictions;
- to examine whether Irish defamation law, and in particular the Defamation Act 2009, remains appropriate and effective for securing its objectives: including in the light of any relevant developments since 2009;
- to explore and weigh the arguments (and evidence) for and against any proposed changes in Irish defamation law intended to better respond to its objectives; and
- to publish the outcomes of the review, with recommendations on appropriate follow-up measures.[69]

The review has been informed by a public consultation as well as a symposium which was held in November 2019 and hosted by the then Minister for Justice and Equality. The key themes which were considered had been informed by the public consultation and included:

- Avoid 'chilling' effects of high/unpredictable awards and legal costs on public interest media reporting;

[68] Q 27 Jan 2021
[69] Public consultation on the Review of the Defamation Act 2009

- Ensure effective and proportionate protection against unfair damage to a person's good name;
- Develop the use of alternative dispute resolution processes and solutions, and avoid defamation as a 'rich man's law';
- Tackle effectively the new and specific problems raised by online defamation.[70]

The Law Reform Commission in the Republic of Ireland has noted that:

> *The extent to which the law of defamation gives priority to the right to a good name or to the right to freedom of expression has varied over time. At one time, case law in Ireland gave significant weight to the right to a good name, and relatively little weight to freedom of expression. More recently, the courts have given more weight to freedom of expression, notably influenced by the case law of the European Court of Human Rights (the ECtHR) on Article 10 of the ECHR.*[71]

[70] Symposium on the reform of defamation law:http://www.justice.ie/en/JELR/Pages/Symposium_Reform_of_Defamation_Law
[71] Law Reform Commission, Privilege for Reports of Court Proceedings under the Defamation Act 2009, 2019:

5 Northern Ireland

This section provides background to the law of defamation in the context of Northern Ireland.

Defamation law in Northern Ireland

The civil law on defamation in Northern Ireland has developed through common law with some aspects codified in statute. It is essentially the same as the law in England & Wales prior to the implementation of the Defamation Act 2013. The Defamation Act 1952 did not extend to Northern Ireland although the Defamation Act (Northern Ireland) 1955 generally introduced the provisions of the 1952 Act into Northern Ireland law. In addition, the 1996 Act mostly applied to Northern Ireland.

Attempts to reform defamation law in Northern Ireland have gathered pace in recent years. The sponsor of the current bill had previously sought to introduce a defamation bill and had reached the consultation stage.[72] However, Mr. Nesbitt did not take forward his bill at that time as the then Minister for Finance and Personnel had asked the Northern Ireland Law Commission (NILC) to examine the matter. A 2014 study of the law of defamation and subsequent consultation by NILC was followed by a report by Dr. Andrew Scott of the London School of Economics on behalf of the Department of Finance. This built upon the work of the NILC (which had closed in 2015) with the aim "to draw on the consultation responses that it received, to assess the recent experience of the law of defamation in England and Wales under the Defamation Act 2013, and on these bases to set out recommendations for reform of the law of defamation in Northern Ireland."[73] Mr. Nesbitt's PMB was included as an appendix in the report by Dr. Scott. His Bill would essentially replicate and apply the Defamation Act 2013 in Northern Ireland, including sections 5 and 10.

The NILC consultation made the point that while the common law on defamation has essentially been consistent across the UK, Northern Ireland tended to lag when it came to the introduction of statutory reforms:

> *The Defamation Act 1952 was assimilated in Northern Ireland only through the Defamation Act (Northern Ireland) 1955. There was a much greater delay in the adoption of elements of the Defamation Act 1996 through a commencement order passed only in 2009 and effective in 2010.*[74]

[72] Committee for Finance and Personnel, Official Report, 26 March 2014: http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2013-2014/march-2014/defamation-act-2013-mr-mike-nesbitt-mla/

[73] Dr. Andrew Scott, *Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance*, 2016

[74] Northern Ireland Law Commission, Defamation Law in Northern Ireland consultation paper: http://www.nilawcommission.gov.uk/final_version_-_defamation_law_in_northern_ireland_consultation_paper_-_nilc_19__2014_.pdf

The NILC report placed the law of defamation in context and identified problems with the law as it stands. Its consultation identified "the over-complication of publication disputes as they move from the public sphere into the legal context and the attendant cost of (prospective) embroilment in legal proceedings as the root problem with defamation law."[75] This impacts both publishers who have to balance the decision to publish against the potential of expensive legal proceedings if somebody decides to sue them. Likewise, people who feel they have been defamed have to consider the potential cost of engaging in legal proceedings against the desire to defend their reputation.

The NILC stated that:

> *On the basis of research undertaken to date, the Northern Ireland Law Commission takes the view that these problems do apply – and with some force – in Northern Ireland. It is the view of the Northern Ireland Law Commission that there is good reason to believe that defamation law as it is currently structured does not best serve either the interests of the immediate parties to publication disputes, or the interests of the wider public in the circulation of accurate information on matters of importance.*[76]

The Scott Report built on the work of the NILC (which closed in 2015) and recommended the following:

1. that, to a significant extent, measures equivalent to the provisions of the Defamation Act 2013 should be introduced into Northern Irish law. Specifically, this includes strong recommendations that the following provisions should be emulated (with consequential changes reflecting the shift in jurisdiction):

Section 2: defence of truth

Section 4: defence of publication on a matter of public interest

Section 6: qualified privilege for peer-reviewed scientific or academic statements

Section 7: extension of existing qualified privileges

Section 8: single publication rule

Section 12: power of court to order publication of summary of judgment

Section 13: power of court to order take-down of statements

Section 14: updating of the law of slander

[75] Northern Ireland Law Commission consultation paper on review of defamation law
[76] As above

2. that the following provisions of the Defamation Act 2013 should be emulated (with consequential changes reflecting the shift in jurisdiction), although in each of these cases it is considered that the argument for introduction of the given provision is less compelling:

Provision	Extract from Scott Report
Section 1: serious harm test	Most contentious issue in NILC consultation. It seemed likely to require empirical proof that harm had been caused or was likely to be caused by the statement complained of, and that this may have the undesirable effect of increasing the complexity and cost of proceedings. Concern that mini-trials would take place on the issue of "serious harm" at a preliminary stage and that this would place a more onerous burden on plaintiffs irrespective of the merit of claims. Furthermore, given the diffuse and often intangible nature of harm to reputation, there was concern that it would be difficult in practice for plaintiffs to evidence the extent to which such harm had been caused. Evidence of whether Section 1 should be replicated in Northern Ireland law is somewhat mixed and any conclusion must be provisional. Whether section 1 offers a better regime than that that had developed under the common law is debateable. As noted, section 1 does not appear to have proved a panacea to the high cost of libel proceedings in England, although it may have had some influence over the apparent fall in the overall number of actions being brought.
Section 9: action against a person not domiciled in the UK or a Member State	A major motivating factor behind the political campaign to reform the law of defamation in England and Wales had been the perception that the law encouraged "libel tourists". NILC concluded that 'it has been sufficiently demonstrated that the use of threats to bring legal proceedings in England by corporations and others from other jurisdictions has been a fact of life for journalists, NGOs, media organisations and others'. Nevertheless, it acknowledged that 'very few such cases in fact ever reached the English courts'. The consultation paper also noted that it 'is difficult to identify many firm cases of "libel tourism" that have occurred in the Northern Irish courts', although it surmised that such cases may have occurred. A rule restricting the opportunity for libel tourism from outside the EU and other state signatories to the Lugano Convention was passed by the Westminster Parliament in section 9 of the Defamation Act 2013.135 The NILC consultation paper mooted whether an equivalent reform should be introduced into Northern Irish law. The unanimous view of all respondents who explicitly addressed this point was that such reform was desirable. The reform was variously described as 'important', and 'small but significant'.
Section 11: presumption in favour of trial by judge alone	NILC consultation paper noted the anomalous position that defamation trials, alone in civil law proceedings, currently involve a presumption in favour of trial by a judge with a jury. It noted a number of reasons why jury trials can be more cumbersome and expensive to pursue, and the impact that this has on decisions by litigants on whether to settle actions in advance of trial. The consultation paper also noted

	that there are powerful arguments of principle that push for retention of the current approach. A strong view among those respondents who replied specifically to this question was that the jury should be removed from defamation proceedings. It was generally thought that the continued role for the jury was a barrier to the efficient management of defamation cases, and that it negated opportunities for the early resolution of key facets of defamation proceedings. The historical and constitutional importance of the jury in the Northern Irish context should not lightly be undermined. Especially, where decisions to be taken by the court have a factual character, their legitimacy in the eyes of the wider public may be peculiarly dependent in some socio-political contexts on community involvement in the reaching of outcomes. While it is recommended that a measure equivalent to section 11 of the Defamation Act 2013 should be introduced into Northern Irish law, it is also suggested that the issue be revisited should any decision be taken to limit the task to be undertaken by the court through the adoption of the bipartite proposal.

3. that a new defence of honest opinion, similar to section 3 of the Defamation Act 2013, should be introduced by the Northern Ireland Assembly. It proposes, however, that - relative to the English variant - this defence should be augmented in three ways:

first, it should be possible for a publisher to rely on privileged statements that were published either before or "at the same time as" the opinion. This proposal corrects a drafting error in the 2013 Act. secondly, it should be possible for a publisher to rely not only on true underpinning facts or privileged statements as the basis for his or her opinion, but also on "facts" that he or she "reasonably believed to be true at the time the opinion was published". This expands the defence, especially so as to defend the position of social media commentators thirdly, it is recommended that it be made clear that the defence extends to cover "inferences of verifiable fact". This is intended to clarify an aspect of the defence that is agreed to be the current law by many legal commentators, but on which there remains a measure of uncertainty in English law.

The Scott Report noted that "A viewpoint expressed frequently to the NILC by those in favour of the introduction of reforms equivalent to those set out in the Defamation Act 2013 was that Northern Irish law should emulate the English legislation without any substantive change".[77]

The report cited responses to the NILC consultation and the reasons put forward for replicating the Defamation Act 2013 in Northern Ireland law, which included:

- the importance of the reforms to the promotion of free speech and investigative journalism;

[77] Dr. Andrew Scott, *Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance*, 2016

- that disparity with England and Wales would see publishers' costs of legal compliance escalate;
- the risk that the extent of publication relevant to Northern Ireland might reduce;
- that the benefit to Northern Irish publishers, legal practitioners and others of cognate common law authority could be lost 'creating uncertainty of principle and outcome'; and
- makes no sense for Northern Ireland to operate a system that is at odds to that in England and Wales.[78]

Nevertheless, the Scott Report identified a desire on the part of those who advocated wholesale replication of the 2013 Act to go beyond that legislation to address areas specific to Northern Ireland. The report quoted a submission to the NILC on behalf of the Media Lawyers Association, which stated that there are:

> *a number of important but subtle differences in the procedural and legal frameworks between the jurisdictions which combine to substantively prolong libel actions in Northern Ireland, deter their prompt and proportionate resolution and unnecessarily extend the costs involved... [which generate] an unduly tactical approach to litigation in this area which broadens and complicates the scope of litigation, rather than narrows the issues between the parties and ensures the prompt identification and resolution of key issues by the court*.[79]

To this end, the Scott Report recommended that:

> *…reforms directly equivalent to those set out in the 2013 Act should be legislated by the Northern Ireland Assembly. Where alternative reforms are recommended, this is done with a view to ensuring that in future Northern Ireland possesses a defamation law that is more easily understood and deployed by all those citizens who may find it necessary to bring or defend defamation proceedings*.[80]

The report highlighted two areas where Northern Ireland should not replicate the Defamation Act 2013. In relation to section 10 of the Defamation Act, it recommended that:

> *the jurisdictional exclusion relating to secondary publishers (intermediaries) found in section 10 of the Defamation Act 2013 should not be introduced in its current form. Rather, that exclusion should be extended so as to prevent any defamation claim being brought against a person other than the primary author, editor or publisher of a statement. This reform would absolve (online)*

[78] Dr. Andrew Scott, *Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance*, 2016
[79] As above
[80] As above

> *intermediaries from potential liability. This recommendation entails that no equivalent to the defence for website operators found in section 5 of the Defamation Act 2013 need be introduced into Northern Irish law, and that existing defences for intermediaries can be repealed. It is acknowledged that reputations are exceedingly vulnerable in the online environment. It is considered, however, that sufficient alternative avenues for the protection of reputations exist that would deliver prompt and efficacious solutions for plaintiffs*.

Consideration of the single meaning rule

An issue considered by the NILC consultation but not included in the Defamation Act 2013 was potential reform of the 'single meaning rule'. This rule holds that:

> *When a dispute is transposed from the public sphere to the courtroom, the "single meaning rule" dictates that each set of "words complained of" must be understood to hold one meaning only. Where language is ambiguous or uncertain, one interpretation only from the range of possibilities must be selected. This is thought to simplify the task confronting the court; to make it manageable*.[81]

This would seem sensible, but the difficulty of selecting a single meaning is complex and can lead to "cost generating game-playing". Therefore, "In accordance with the single meaning rule, the court is required to pretend that only one interpretation of each imputation involved will have been inferred by all such ordinary, reasonable people. Thereafter, this choice will form the basis of the disposal of (that element of) the case."

This has been described as a "legal abstraction from reality" and is often recognised by the courts as such. People interpret the same set of words differently. Hence the:

> *need to select one from among an array of possible meanings has resulted in complex rules and practice on the pleading of meanings. At present in both English and Northern Irish law, the plaintiff must specify in the statement of case the defamatory meaning that he or she believes the contested words hold. Plaintiffs tend to plead only a narrow range of meanings. On occasion, he or she may "hedge bets" by offering different arguments in the alternative. As the litigation develops, the court is not bound to the plaintiff's pleaded meaning, save that it will not find that the words bear a meaning more serious than that contended for.*[82]

The Scott Report recommended that the Northern Ireland Assembly legislate to introduce the bipartite scheme first proposed in the NILC consultation paper. This involves, first, abolition of the "single meaning rule", and secondly, the introduction of a

[81] Northern Ireland Law Commission consultation paper on review of defamation law
[82] As above

jurisdictional bar to claims in defamation based on meanings that had been corrected or retracted by the publisher promptly and prominently.

Northern Ireland (Executive Formation etc.) Act 2019

In the absence of a functioning Assembly and Executive, the Northern Ireland (Executive Formation etc.) Act 2019 required the Secretary of State to report on a range of matters relating to Northern Ireland.

Section 3 of the Act required the Secretary of State to report to the UK Parliament on progress on libel legislation, among other issues, in Northern Ireland and on any plans to align that law with the law in Great Britain.[83] The report was published in October 2019.

On the subject of defamation, the report restates that defamation is a devolved matter under the purview of the Department of Finance and sets out how the law in Northern Ireland contrasts with England & Wales since the introduction of the Defamation Act 2013:

> *i. Statements alleged to be defamatory are assumed to be both false and hurtful and there is no need for the plaintiff to prove this. (This contrasts with England and Wales where, on account of the 2013 Act, those bringing a defamation action are required to show serious reputational harm or financial loss).*
>
> *ii. Each publication of a libel is actionable. There is no single publication rule as in England and Wales.*
>
> *iii. To repeat a defamatory statement is equivalent to having made it. Unlike in England and Wales, there is no limitation of the circumstances in which an action can be brought against a person who is not the primary publisher.*
>
> *iv. The defences of absolute and qualified privilege have not been extended to cover fair reports of academic conferences or the contents of academic journals.*[84]

While acknowledging the potential for 'libel tourism', the report argued that this was not a significant issue:

> *There is little evidence of libel tourism in Northern Ireland. In 2010-2018, there were, on average, 35 Queen's Bench writs for defamation per annum ranging from 19 in 2017 to 54 in 2010. In the period 2014-2018, there were, on average, 30 Queen's Bench writs for defamation in Northern Ireland. As*

[83] Explanatory Note to the Northern Ireland (Executive Formation etc) Act 2019

[84] Report pursuant to section 3(17-20) of the Northern Ireland (Executive Formation etc) Act 2019, October 2019: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840990/EF_Report_-_21_Oct.pdf

Northern Ireland's current law provides that a claim can be summarily dismissed where no 'real or substantial' tort has occurred, libel tourism would not be straightforward.[85]

Competence of the Assembly to legislate on defamation

It was reported that a procedural issue relating to the competence of the Northern Ireland Assembly to legislate on the matter of defamation had delayed the introduction of the PMB. This was likely due to the fact that the bill would seek to legislate in areas related to online content, which is a reserved matter under the Northern Ireland Act 1998. The Bill's sponsor wrote to the Secretary of State for Northern Ireland seeking his consent to legislate on this matter. This consent was subsequently granted.[86]

[85] Report pursuant to section 3(17-20) of the Northern Ireland (Executive Formation etc) Act 2019, October 2019:

[86] See News Letter report: *Nine years after DUP secretly blocked libel reform, NIO clears way for bill to protect free speech,* 20th May 2021: https://www.newsletter.co.uk/news/politics/nine-years-after-dup-secretly-blocked-libel-reform-nio-clears-way-for-bill-to-protect-free-speech-3243327