



Department of

Finance

An Roinn

Airgeadais

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Review of Defamation Law in Northern Ireland

Engaging with Stakeholders

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Introduction

1. The Defamation Act (Northern Ireland) 2022 received Royal Assent on 6 June 2022. The principal changes arising from the Act are:
 - i. The removal of the presumption in favour of trial by jury in defamation cases.
 - ii. The replacement of the three common law defences (justification, fair comment and the ‘Reynolds defence’) with equivalent statutory defences (truth, honest opinion and publication in the public interest).
2. The Department of Finance (DOF) has policy responsibility for the law on defamation. Section 11 of the 2022 Act commits the Department to review defamation law in this jurisdiction and elsewhere and report its findings and any policy recommendations to the Northern Ireland Assembly by June 2024 (i.e. two years after Royal Assent). Undertaking this Review is compliant with The Northern Ireland (Executive Formation etc) Act 2022, Section 3(1).
3. Work on this review has been ongoing for several months and has included: analysis of commentary on The Defamation Act (Northern Ireland) 2022; the wider, global debate on defamation law; and relevant legislative initiatives in other jurisdictions, including developments in London (the Ministry of Justice’s *Call for Evidence on SLAPPs*, 2022) and Dublin (the Department of Justice’s *Review of the Defamation Act 2009*, 2022).
4. We now wish to engage, in a targeted manner, with local stakeholders to obtain their opinion on the operation of the 2022 Act and on areas where further policy review may be required. The present document has been prepared to guide and structure your responses via questions (**listed at Annex A below**) regarding the following areas:

- i. The Operation of the Defamation Act (NI) 2022
 - ii. Online Defamation
 - iii. Libel Tourism
 - iv. Strategic Lawsuits Against Public Participation (SLAPPs)
 - v. Access to Justice
 - vi. Alternative Dispute Resolution (ADR)
5. This list, while inclusive of the main issues in defamation law we have to date encountered in our review, is not intended to be exhaustive. We would therefore welcome any views you might have on aspects of defamation law other than those we have listed.
6. Your opinions regarding the operation of The Defamation Act (Northern Ireland) 2022 are particularly important. While the Department is conscious that little more than a year has elapsed since the Act came into force and that it therefore may be difficult to assess how it has impacted on existing law and practice, any insights that can be offered on this aspect are nonetheless welcome. In addition, your thoughts and suggestions on the future of defamation law in this jurisdiction are also valuable to us and we look forward to receiving them.

How to Respond

7. We would encourage you to respond using the on-line facility on [Citizen Space](#), accessible via NI Direct.
8. However, if you prefer to send a written response, this should be emailed to defamationreview@finance-ni.gov.uk or posted to:

Review of Defamation Law
Departmental Solicitor's Office—Civil Law Reform
2nd Floor Lanyon Plaza
7 Lanyon Place
BELFAST
BT1 3LP

9. If you choose to respond conventionally rather than via Citizen Space we would be grateful if you could provide: your name; the capacity in which you are responding (e.g. as a member of the public, elected representative, or on behalf of a group or organisation); and contact details (e.g. an email address).
10. We request that you respond by **26 January 2024**. Responses received after this date will only be considered in exceptional circumstances and with prior agreement from the Department.
11. We ask you to exercise care when responding and, naturally, to refrain from the inclusion of any potentially defamatory material as it is our intention to publish responses on the Department's website. We will not publish the names or contact details of respondents answering in an individual capacity but will include the names of any organisations responding.

Next Steps in the Review of the Defamation Act (Northern Ireland) 2022

12. Following the closing date, all responses will be analysed and will inform the Department's review. The Department will, as required under Section 11 of the 2022 Act, present a report of its review to the Northern Ireland Assembly by June 2024.
13. All personal data will be handled in accordance with UK data protection legislation.

Confidentiality and Data Management

14. Information provided, including personal data (see Annex B), will be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA) and the UK General Data Protection Regulation (GDPR). If we receive a request for disclosure of confidential information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.

15. The Department of Finance will process your personal data in accordance with the law and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties. A full privacy notice is included at Annex B.

Review of The Defamation Act (Northern Ireland) 2022

Stakeholder Questions

The following questions are presented to guide and structure your response but are not intended to be exhaustive or prescriptive.

Questions 1-2 The Defamation Act (Northern Ireland) 2022

The Department appreciates that the Act is relatively new and that it could be too soon to offer much in the way of informed comment on how it has been operating. Nonetheless, we are keen to get a sense of how people view the Act as working, what they consider the likely impact of the reforms it has introduced, and any views as to where the Act might be improved. The Department is conscious that the Act was considered by the Committee for Finance in some detail, and then by the Assembly in plenary, and that the Act represented the considered view of the Assembly at that time. Nevertheless, the Department can, and if the evidence points to it, will be open to further refinement of policy in this area subject to the views of Ministers and the Executive and within the constraints of available resources.

While the 2022 Act's principal innovations (e.g. regarding jury trials) were generally welcomed, academic and other commentators have, since the Act was brought into force, voiced a number of concerns regarding perceived remaining gaps in the legislation. These have included the following:

- i. The Act does not specifically address online defamation and the particular challenges it has created.
- ii. The Act does not replicate the serious harm test, a key innovation of the Defamation Act 2013 on which it is based. The serious harm test was intended to deter trivial or vexatious defamation actions from reaching the courts by requiring that claimants show that the allegedly defamatory statement either caused them, or had the potential to cause them, serious harm. Arguably, the absence of a serious harm test in the 2022 Act could

mean that the threshold for proving defamation in Northern Ireland remains lower than in England and Wales, thereby creating an opening for libel tourism by incentivising claimants to bring a case to a Northern Ireland court rather than a court in England and Wales. However, the Department is conscious that this issue has been recently considered by the Assembly in the context of the debates on the Defamation Bill, as it then was, and the Assembly chose not to replicate those provisions for this jurisdiction.

- iii. The Act does not address Strategic Lawsuits Against Public Participation (SLAPPs), actions allegedly without merit and taken solely in order to deter publication. SLAPPs as a concept is not restricted solely to defamation law and practice and may involve other aspects of the law outside the Department's remit, but nevertheless this does form part of the debate on defamation law generally.

- 1. How do you think the 2022 Act is currently performing and how do you think the changes it has introduced might work out in the coming years? In particular, what is your view of the actual and potential impact of: (i) the ending of the presumption in favour of trial by jury; (ii) the three statutory defences?**

- 2. Are there any further policy developments that the Department should consider that would improve upon the provisions in the Act?**

Questions 3-9 Online Defamation

Online publication is diverse. It ranges from the online versions of conventional print periodicals written by professional journalists and overseen by editors to short comments posted by specialist and non-specialist readers as part of an ongoing online discussion. Online publication or broadcasting that is similar to the conventional version should present few problems in terms of defamation law since authors, editors and publishers can usually be readily identified and there is clear ownership and accountability for what is published.

Statements posted online by specialists and non-specialists as part of an online discussion are more problematic. Where such statements are alleged to be defamatory, determining who is the author, editor and/or publisher is not always straightforward. Social media corporations such as X (previously Twitter) and Facebook, for example, have long argued that they cannot be held liable for any defamatory content that features in the discussions and commentary they host any more than BT can be held liable for a defamatory phone call or Vodafone for a defamatory text. Moreover, as with BT, Vodafone etc, the volume of online postings hosted by social media corporations is allegedly too great to monitor. The same might be said for internet operators such as online news services that enable users to comment on and debate the current affairs items they feature, or websites that allow users to comment critically on, among other things, films, books, live or recorded performances, goods and services. Hosts can remove offending statements after these have been posted and can often identify the author. But their ability to prevent a comment from being published is arguably limited or non-existent.

In researching this area, the Department found little enthusiasm for treating website operators as analogous to authors, editors and publishers. At the same time, operators who host material are generally seen as having some responsibility for the material whose publication they facilitate particularly if they also moderate what is posted online.

If website operators and similar are assumed to be hosts with limited responsibility for the statements they enable, then primary responsibility for the statements in question rests with the people who create or post the online content. An individual who posts a comment online in effect combines the roles of author, editor and publisher. If the creators of online statements can be clearly identified, then making a claim in respect of an online statement considered defamatory is usually straightforward. However, many online statements are made anonymously or pseudonymously. Also, a particular comment might be seen and endorsed by many others, some may share it with a new readership, and any particular online statement might be seen, endorsed and shared across many jurisdictions. It could end up with a readership larger than that of most conventional publications.

A further difficulty is that the act of endorsing an online comment and/or sharing it can increase its impact, sometimes considerably so. If a celebrity, a politician, an expert, or a well-respected public figure endorses a statement originally made by someone with little or no profile or reputation, that act of endorsement could give the statement authority, respectability and credibility it would not otherwise have had thereby increasing its readership and general acceptance. And if the influential person who endorsed it also shares it, the reach and impact of the statement are increased further. The Defamation and Malicious Publications (Scotland) Act 2021 acknowledges this possibility and allows that people not involved in the creation of a defamatory statement might yet contribute to the harm caused by indicating their approval and/or forwarding it to other readers.

Finally, online statements are easily replicable, stored and sent from person to person and place to place. All of which creates additional challenges for defamation law.

Remedies frequently sought by claimants with regard to online defamation include:

- i. Takedown—the removal of defamatory content from a website (e.g. following a takedown order issued by a court).
- ii. A ‘Norwich Pharmacal’ order whereby anonymous/pseudonymous posters must be identified by the relevant online service provider, if that is possible, so that the claimant can bring a case against the person who originally posted the comment.

The Defamation Act (Northern Ireland) 2022 makes no particular reference to online publication. This is in contrast to the Defamation Act 2013. Under Section 5 of the 2013 Act, it is a defence for a website operator to show that they were not the author of the defamatory statement while Section 10 states that a court does not have jurisdiction to hear a defamation case brought against someone who was not the author, editor or publisher of the statement in question. Finally, under the Single Publication Rule (Section 8 of the 2013 Act), a defamation claim can be made against the first publication of a statement only, not subsequent republications of the same material. This has clear implications for online publication where the same material can be reproduced online across numerous websites. The Assembly considered each of those provisions—which

were included in the original draft of the Private Members Bill brought forward by Mike Nesbitt MLA—but decided against their inclusion in the Act.

Although Sections 5, 8 and 10 of the 2013 Act are not replicated in the 2022 Act, this does not mean that defamation law in Northern Ireland cannot address online defamation. An action can be taken in respect of online publication in the same way that an action can be taken against print or broadcast defamation (allowing for the particular complications arising with online defamation noted earlier) and there have been successful actions in Northern Ireland arising from online defamation. Similarly, those who host and facilitate online discussion can avail of the existing defences.

- 3. Do we need further policy development regarding online defamation or is existing defamation law sufficient?**
- 4. Should policy be considered: (i) making it easier to obtain a takedown order in respect of defamatory online comment and (ii) making takedown orders more effective?**
- 5. Should website operators, hosts and similar be required to name people who post defamatory comment anonymously/pseudonymously on the services they provide?**
- 6. Is it reasonable to consider the online version of a newspaper or magazine, the online website of a broadcast news service, and online-only publications equivalent to conventional print and broadcast media? Should they be treated as equivalent for the purposes of defamation law?**
- 7. Do you agree that social media hosts and those who host and facilitate online comments are not equivalent to conventional print publishers or conventional broadcasters?**
- 8. Do you agree that, aside from online statements in online publications and broadcasts, the person who posted a statement online is usually responsible for that statement? Are they solely responsible?**
- 9. What is your view regarding people who endorse and/or share a defamatory online comment in a way that could make it more likely to be read and/or taken seriously. Have they contributed to the harm caused by the statement and, if so, would it be legitimate to take a defamation case against them?**

Question 10 Libel Tourism

Libel tourism involves claimants bringing a claim in a particular jurisdiction, not because they believe that that jurisdiction is the most appropriate place for their case to be heard, but because they believe that the defamation law there gives them the best chance of a favourable outcome. There were concerns, after the Defamation Act 2013 entered into law in England and Wales, that Northern Ireland would become a centre for libel tourism since claimants in Northern Ireland would not have to show serious harm and would still benefit from the presumption in favour of a jury.

However, discussions during the passing of the 2022 Act in the Assembly suggested no evidence of any increase in defamation actions being brought in the Northern Ireland jurisdiction since 2013. As the 2022 Act ended the presumption in favour of jury trials in defamation cases, any risk can be assumed to be further minimised.

It was noted during the debates on what was then the Defamation Bill that all defamation claims brought in Northern Ireland are currently assessed to establish if Northern Ireland is, indeed, the most appropriate jurisdiction in which to hear them. In addition, provision is made in the Act, at Section 6 (action against a person not domiciled in the UK), that should also minimise any additional perceived risks of libel tourism.

10. Do you believe that libel tourism still has the potential to become a problem in Northern Ireland or are existing protections, including Section 6 of the 2022 Act, adequate?

Questions 11-14 Strategic Lawsuits Against Public Participation (SLAPPs)

Defamation law is said to have a chilling effect when people are reluctant to publish certain statements, including statements that are unambiguously true, for fear of prolonged, expensive and stressful legal action that may leave them at a financial loss. SLAPPs are actions, including defamation actions, taken primarily in order to embroil the defendant in a costly and prolonged legal process with a view to deterring them from researching or reporting on a matter of public interest. They have been seen as one of the reasons for the chilling effect.

Some commentators have argued that no new legislation is required to address SLAPPs, that SLAPPs can be dealt with using existing procedures to screen out baseless defamation cases. But many disagree. In developing anti-SLAPP legislation, the principal challenge remains determining whether alleged SLAPP actions are indeed illegitimate attempts to suppress free expression and journalistic enquiry, and how best to prevent this.

Both the Ministry of Justice (MOJ) in London and the Department of Justice (DOJ) in Dublin, in their recent reviews¹, are satisfied that SLAPPs exist as a distinct and dubious form of litigation, that they constitute a threat to expression of opinion on matters of public interest, and that existing controls are insufficient to address them. Both London and Dublin are therefore proposing to introduce an early dismissal process along with measures to protect defendant costs. There are aspects of the work conducted in both jurisdictions that transgress into areas other than defamation law, but nonetheless this issue forms an important part of ongoing policy considerations and it was raised during discourse on the Defamation Act 2022 during and after its passage in the Assembly.

The Ontario Protection of Public Participation Act 2015 has been cited as an example of effective legislation to counter SLAPPs and noted as such by both MOJ in London and DOJ in Dublin. Under the Ontario Act, a defendant can make an anti-SLAPP application at any time during a defamation case and, if successful, can put the case on hold. If the defendant can then establish that the action is indeed a SLAPP, there is a statutory presumption that the claimant should pay the defendant's costs and may also be liable to make an award to the defendant. In contrast, the defendant generally does not have to pay the claimant's costs if the action is not considered a SLAPP, again a statutory presumption.

The Ontario Protection of Public Participation Act 2015 sets out three tests to determine whether a defamation action should continue:

- i. Public Interest: If the defendant can show that the statement was on a matter of public interest, the case must end unless the claimant can meet two further tests.

¹ Call for Evidence on SLAPPs, DOJ, 2022; Review of the Defamation Act 2009, MOJ, 2022).

- ii. Merits Test: This is essentially a serious harm test—the claimant must demonstrate that the statement will cause them serious harm.
- iii. Balancing Test: The claimant must show that the serious harm caused by the statement outweighs the public interest in the original expression.

11. Do you consider that SLAPPs are a distinct development relevant to defamation law?

12. Are existing procedures for screening out defamation actions that lack merit sufficient to deal with SLAPPs or do we need new legislation?

13. What are your thoughts on the Ontario Protection of Public Participation Act 2015 described above? Would you welcome a similar initiative in Northern Ireland?

14. To what extent would anti-SLAPP legislation reduce the alleged chilling effect of defamation law?

Question 15-16 Access to Justice

Defamation actions can be prolonged and the final amount awarded often difficult to forecast. As a result, the cost of taking an action and the cost of defending it are important considerations for the parties in a prospective defamation action. Cost is probably the main factor limiting access to justice, whether to protect a reputation or defend freedom of expression.

Proposals to address problems of access to justice arising from the cost of defamation claims include making defamation actions eligible for legal aid and encouraging or incentivising the parties to a defamation action to seek options costing less than a full legal process. While aspects of reform in this area sit outside the remit of the Department of Finance, nonetheless we are keen to hear views on this issue.

15. Do you agree that cost is an important factor limiting access to justice in defamation cases?

16. Have you any suggestions as to how the cost of defamation action might be made more manageable?

Questions 17-18 Alternative Dispute Resolution (ADR)

Options for resolving a defamation case out of court include mediation or putting the matter to an independent tribunal such as a press or broadcasting complaints body. Potential settlements include takedown, retraction and/or apology. Imposing a legal obligation on the parties to a defamation case to engage in an ADR process before conventional litigation has been suggested as a possible reform to defamation law.

17. What are your thoughts on the use of ADR in defamation cases as an alternative to a full legal process?

18. Should the parties in a defamation action be obliged to pursue ADR before conventional litigation?

This concludes the questions we have prepared on what we regard as the main current issues in defamation law. As noted, these questions are provided in order to guide and structure responses. **We would welcome any additional comments you might have regarding defamation law.**

Annex B

Personal Data

The following is to explain your rights and give you the information you are entitled to under UK data protection legislation.

Note that this section only refers to your personal data (your name address and anything that could be used to identify you personally), not the content of your response to the consultation.

1. The identity of the data controller and contact details of our Data Protection Officer

The Department of Finance (DoF) is the data controller. The Data Protection Officer can be contacted as follows:

**Data Protection Officer
Department of Finance
Room 20, Dundonald House
Upper Newtownards Road
Belfast
BT4 3SB**

Email: dataprotectionofficer@finance-ni.gov.uk

2. Why we are collecting your personal data

Your personal data is being collected as an essential part of the consultation process, so that we can contact you regarding your response and for statistical purposes. We may also use it to contact you about related matters.

3. Our legal basis for processing your personal data

The UK GDPR states that, as a government department, DoF may process personal data as necessary for the effective performance of a task carried out in the public interest. i.e. a consultation.

4. For how long we will keep your personal data, or criteria used to determine the retention period.

Your personal data will be held for two years from the closure of the consultation.

5. Your rights, e.g. access, rectification, erasure

The data we are collecting is your personal data, and you have the right:

- a) to see what data we have about you
- b) to ask us to stop using your data, but keep it on record
- c) to ask to have all or some of your data deleted or corrected
- d) to lodge a complaint with the independent Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law. **You can contact the ICO at <https://ico.org.uk/>, or telephone 0303 123 1113.**



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