Department of Finance
An Roinn Airgeadais
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Review of the Defamation Act (NI) 2022

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Department of Finance

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EXECUTIVE SUMMARY

1. This report has been produced by the Department of Finance (DOF) in compliance with Section 11 of the Defamation Act (NI) 2022. Section 11 commits the Department to review the operation of the 2022 Act and all relevant developments pertaining to defamation law as it considers appropriate, and to provide a report on its findings along with recommendations to the Assembly by June 2024.

2. Work on the Review took place between March 2023 and May 2024. It comprised: desk research; liaison with relevant policy officials in Dublin and London; and engagement with stakeholders (via a formal stakeholder engagement consultation) including lawyers and journalists and their respective representative bodies. Details of this exercise can be access at the following link: https://www.finance-ni.gov.uk/review-defamation-law-northern-ireland

3. The present Report was finalised in May 2024 for consideration by the Minister of Finance, Dr Caoimhe Archibald MLA, who has approved it to be laid before the Assembly in compliance with Section 11.

4. The Defamation Act (NI) 2022 originated in a Private Member's Bill (PMB) introduced by Mike Nesbitt MLA. Its principal change is to remove the presumption in favour of trial by jury in defamation cases and to codify the three common law defences with equivalent statutory defences, namely: truth, honest opinion, and publication in the public interest.

The Defamation Act (NI) 2022 to date

5. Almost all stakeholders and commentators consider it too soon to say what impact the 2022 Act has had to date or what its long-term impact might be. It has been in place just two years in a jurisdiction in which defamation claims are relatively rare with the result that the evidence base is inevitably limited.

6. That said, certain features of the Act have been broadly welcomed, notably the ending of the presumption in favour of jury trials. Most commentators and stakeholders, for example, thought that judge-only cases would progress more quickly than jury trials and be less costly and more predictable in terms of outcome. The new statutory defences were also generally welcomed.

7. Criticism of the 2022 Act focused mainly on those aspects of the PMB that had failed to secure sufficient Assembly support during the Bill's progress. Notable here was the Serious Harm Test which was intended to deter actions where the allegedly defamatory statement is likely to have little impact on the claimant's reputation. The Test has been seen as supportive of freedom of expression because it filters out trivial claims that might nonetheless prove prolonged and costly if they reach court and require a full hearing. It was a headline innovation of the Defamation Act 2013, an Act of the Westminster Parliament that applies in England and Wales only and on which the original PMB was largely based.

8. The 2022 Act has also been criticised for a perceived failure to address, adequately, current issues in defamation law and policy including online defamation, Access to Justice, and Strategic Litigation Against Public Participation (SLAPPs), all of which are discussed below.

Current Issues in Defamation Law

9. The Review identified the following as the principal current issues in defamation law and policy.

    i. Online Defamation
    ii. SLAPPs
    iii. Libel Tourism
    iv. Access to Justice
    v. Alternative Dispute Resolution (ADR)

10. Online Defamation. The Review found little disagreement that people who post defamatory material online should be held responsible for it. Debate centred on the degree, if any, to which the relevant online host or platform should be considered responsible. A common view was that hosts might become responsible if they did not act promptly to investigate or take down allegedly defamatory material or to reveal the identity of people posting defamatory material anonymously or pseudonymously. There was some criticism that hosts did not always provide user-friendly complaints, investigation, and take-down procedures and that the cost and the time required to secure a court order to take down content or reveal the identity of the person who posted it often deterred complainants.

11. The practical challenges presented by online defamation were widely recognised. These include the durability of online content and the speed with which it can travel between jurisdictions. A further complication is that a statement published online can be liked or reposted in ways that greatly enhance its impact (e.g. a reposting reaching many more readers than the original post), but apportioning responsibility or intention might not be straightforward.

12. Proposed and actual interventions regarding online defamation have included:

    i. A 'single publication rule' per Section 8 of the Defamation Act 2013. Under Section 8, a defamation claim can be made against the first publication of a statement only, not subsequent publications, thereby protecting online content from multiple actions every time it is accessed. However, such a provision was rejected by the Assembly in 2022.
    ii. Online hosts and platforms should improve their arrangements for the reporting and investigation of allegedly defamatory content and for identifying those who posted it.
    iii. Courts should be empowered to order online providers to takedown defamatory content and identify those who posted it.

13. SLAPPs. SLAPPs are legal actions relevant to defamation and several other areas of law that are not the responsibility of DOF, including privacy, data protection and environmental protection. They are actions intended to deter or chill critical comment by embroiling defendants in lengthy and costly litigation. Many who contributed to the Review regard SLAPPs as the most pressing of the current issues relevant to defamation law and the Review coincided with the Irish Government's review of defamation law culminating in its General Scheme for Defamation (Amendment) Act 2023 in which SLAPPs featured prominently and the Call for Evidence on SLAPPs undertaken by the Ministry of Justice (MOJ) in London. The MOJ initiative was followed by amendments to the Economic Crime and Transparency Act and, in February 2024, the Strategic Litigation Against Public Participation Bill, a PMB which has the support of the Westminster Government and is currently under consideration in England and Wales. Separately, EU Directive 2024/1069 aims to address SLAPPs across EU member states where there is a cross-border dimension.

14. The principal development in this jurisdiction relevant to SLAPPs was the judgment in the case of *Kelly v O'Doherty* in January 2024 in which the claim was struck out on the grounds, among other things, that it bore 'the hallmarks of a SLAPP…'

15. Some stakeholders who participated in the Review suggested that this was evidence that no bespoke anti-SLAPP legislation was required here since SLAPPs were uncommon and existing protections adequate to deal with them. Others, however, advocate a bespoke approach to the phenomenon.

16. The principal intervention advocated in respect of SLAPPs in general (i.e. not necessarily in respect of their relevance to defamation law) is an early dismissal mechanism whereby a defendant can have a claim held until it has been assessed as a possible SLAPP. If it is considered to be a SLAPP it is then struck and a cost/penalty imposed on the claimant. To introduce such a procedure to this jurisdiction would entail amending the ways in which the Courts currently operate. It is therefore something that would need to be discussed and undertaken in partnership with the Department of Justice (DOJ).

17. Libel Tourism. During the progress of the 2022 Act through the Assembly all evidence indicated that libel tourism—claimants taking their claim in this jurisdiction solely or primarily because they believed that they would get the best outcome here—was not a problem in this jurisdiction. This was acknowledged at the time and most who participated in the Review continue to share this assessment. There was some concern that, if anti-SLAPPs mechanisms were put in place in England and Wales, in Scotland and in the South, but not in this jurisdiction, libel tourism could become a problem here.

18. Access to Justice. The cost of defamation actions was generally seen as the principal factor restricting Access to Justice. It was alleged that cost could deter claimants from bringing a claim and likewise deter defendants from defending.

19. Suggested remedies included changing the rules governing legal aid to make it available in defamation cases or permitting legal professionals to operate on a ‘no win, no fee’ basis.

20. Alternative Dispute Resolution (ADR). ADR relates to the issues of Access to Justice and cost noted above since it is a potential means by which a defamation claim might be addressed and redressed without recourse to full-scale and expensive litigation. Participants in the Review and other commentators were generally of the opinion that ADR should be encouraged and promoted but not made obligatory.

Next Steps

21. It is the view of the Department that it is too soon, just two years after the 2022 Act, to bring forward further legislative reform in this area. The exception is potentially in relation to SLAPPs which, as noted, go wider than defamation law and where some legislation might be appropriately considered in the shorter term. The Department will therefore continue to monitor developments in Dublin and London and will work with other colleagues within Government to see how this important issue can be addressed. In parallel it will monitor the progress and performance of the 2022 Act and of defamation law in general. However,

all such work will need to be considered in the current context—a shortened mandate and, in DOF and generally, competing priorities and limited resources. It is also important to note that defamation law is an area which the Assembly has, very recently, in the context of the 2022 Act's passage, had the opportunity to consider in detail.

MAIN REPORT

Introduction

1. Section 11 of the Defamation Act (NI) 2022 (outlined below) requires that the Department of Finance carry out a review of defamation law in this jurisdiction and elsewhere and formally report on its findings to the Assembly by June 2024 (i.e. two years after Royal Assent):

Review of Defamation Law

11—(1)The Department must keep under review all relevant developments pertaining to the law of defamation as it considers appropriate.

(2) The Department must prepare a report and recommendations on

a. the findings of the review under subsection (1), and

b. the operation of this Act.

(3) The Department must lay the report and recommendations before the Assembly, and publish the report and recommendations, before the end of the period of 2 years beginning with the day on which this Act receives Royal Assent.

2. Work on the Review began in 2023 and included desk research, liaison with the relevant government departments in London and Dublin, and stakeholder engagement. This included a formal targeted consultation conducted between 13 November 2023 and 26 January 2024). The present report summarises the findings of this work and sets out some recommendations for future policy in this area. It has been considered by the Minister of Finance, Dr Caoimhe Archibald MLA, who has agreed that it be laid before the Assembly in compliance with Section 11.

3. The Defamation Act (NI) 2022 derives from a Private Member's Bill (PMB) introduced to the Assembly in June 2021 by Mike Nesbitt MLA. In its original form, the PMB largely replicated the Defamation Act 2013, which applies in England and Wales but which was not extended to this jurisdiction. Following consideration by the Assembly, an amended version of the PMB received Royal Assent on 6 June 2022.

4. The principal change arising from the 2022 Act is that, like the Defamation Act 2013, it removes the presumption in favour of trial by jury in defamation cases. In addition, the 2022 Act, again in common with the 2013 Act, replaces 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).

5. Notable differences between the Defamation Act (NI) 2022 and the Defamation Act 2013 is that the 2022 Act does not replicate the 2013 Act's Serious Harm Test, which was intended to deter frivolous defamation claims, or its provisions relating to online defamation including the Single Publication Rule whereby a defamation claim can be made against first publication only.

Overview of Report

6. The present Report will focus on issues that were discussed during the Act's progress from PMB to Royal Assent and/or the Department's stakeholder engagement exercise, or that have featured prominently in the general debate on defamation law. These include: online defamation; libel tourism; strategic lawsuits against public participation (SLAPPs); Access to Justice; alternative dispute resolution (ADR); and the Serious Harm Test. These are defined briefly below but will be considered in greater detail later in this report.

   i. Online Defamation—Defamatory comments published online whether in the online version of a print publication, an online-only publication, a posting on a social media platform, or a posting on a website such as the homepage for an online publication that invites reader comments or on a website that solicits critical comment on, for example, the hospitality or entertainment sectors.

   ii. Libel tourism—Claimants taking their case to a particular jurisdiction, not because it is the most appropriate place for their claim to be heard, but

because they believe that that jurisdiction will give them the most favourable settlement. As the Defamation Act 2013 was not extended to this jurisdiction, there was, at the time, some concern that libel tourism would become a problem here. The 2013 Act was intended, via innovations such as the Serious Harm Test, to make it more challenging to bring a defamation action. Consequently, some believed that claimants who might previously have brought their claims to London would now bring them to Belfast where the pre-2013 defamation regime continued. However, as will be discussed later in the present Report, all evidence to date suggests that such concerns were unfounded.

iii. Strategic Lawsuits Against Public Participation (SLAPP)—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.

iv. Access to Justice—Defamation cases can be complex, prolonged and expensive, even before any final award is made. Consequently, some potential claimants cannot afford to bring a defamation claim and therefore challenge an alleged reputational harm. Similarly, some cannot afford to defend a defamation action with the result that they cannot exercise their right to freedom of expression.

v. Alternative Dispute Resolution (ADR)—ADR is the resolution of defamation cases out of court through, for example, mediation or independent assessment. It is a generally low-cost option relative to full legal action and is therefore a potential means by which parties with limited resources might access justice.

vi. Serious Harm Test—The Serious Harm Test is a feature of the 2013 Act. It aims to deter trivial or vexatious defamation actions from reaching the courts by requiring that claimants show that the allegedly defamatory statement caused them, or had the potential to cause them, serious

harm. The test was not replicated in the 2022 Act in part because of the perceived challenge and complexity of demonstrating actual or potential serious harm pre-trial. Commentators on defamation law differ on the merits of the test as did the stakeholders with whom the Department engaged, but some were supportive.

Principal Sources

7. The following are the principal information sources that have been used in developing the present report.

   i. Initial specialist reactions to the Defamation Act (NI) 2022.

   ii. Stakeholder engagement—the Department invited stakeholders to submit their opinions on the 2022 Act and the future of defamation policy. Contributions were invited between 13 November 2023 to 26 January 2024. In addition to advising of the engagement exercise via a press release and the DOF website (which included a portal for online participation) key stakeholders were approached directly for comment. These included: those had given evidence during the passage of the PMB (e.g. Index on Censorship, the NI Human Rights Commission, and the Publishers' Association); the legal studies departments at Queen's and Ulster University; and the main representative bodies of the legal profession. Fourteen submissions were received. In addition, DOF officials held an online meeting with Mike Nesbitt MLA on 13 December 2013.

   iii. The decision in the High Court in Belfast on 8 January 2024 in the case of *Kelly v O'Doherty*[1] which is relevant to SLAPPs.

   iv. The draft General Scheme for a Defamation (Amendment) Bill published by the Department of Justice (DOJ), Dublin, in 2023 and the DOJ's

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earlier Review of the Defamation Act 2009 (published 2022), which informed the draft General Scheme. The Review of the Defamation Act 2009 considered how best to achieve balance between three rights—freedom of expression, reputation, and Access to Justice —and consisted of:

- A public consultation in 2016-2017 resulting in 41 submissions.
- A symposium of experts on defamation law and key stakeholders (held November 2019).
- A review of relevant ECHR case law.
- A review of actual and proposed reforms in other common law jurisdictions including the Defamation Act 2013 in England and Wales and initiatives to reform defamation law in this jurisdiction beginning 2014 and culminating in the 2022 Act.
- A review of relevant judgments by Irish superior courts.
- A review of EU law in areas such as online defamation and libel tourism.
- A review of relevant parallel reform initiatives in Ireland (e.g. of civil procedures).

v. Developments in England and Wales, notably the responses to the Call for Evidence on SLAPPs, a consultation undertaken by the Ministry of Justice (MOJ) in London. This was an initiative of the Deputy Prime Minister, Lord Chancellor and Secretary of State for Justice, the Rt Hon Dominic Raab. Respondents were asked to provide evidence of SLAPPs and to propose legislative, procedural and other reforms that might address the issue. Those who took part included lawyers, academics and stakeholder groups. The Call for Evidence was launched in March 2022 and reported in July 2022. In June 2023, and following on from the Call, amendments were tabled to the Economic Crime and Corporate Transparency Bill with the aim of addressing SLAPPs where these relate to economic crime. These measures will apply in England and Wales only. In 2024, a Private Member's Bill, the Strategic Litigation Against

Public Participation Bill, was introduced into the House of Commons by Wayne David MP and is currently (May 2024) at Committee stage.

vi. Developments in Scotland, principally the Defamation and Malicious Publications (Scotland) Act 2021.

8. The present Report is in five sections:

i. The operation of the Defamation Act (NI) 2022
ii. Current issues in defamation law.
iii. Stakeholder opinions
iv. Developments in this and other jurisdictions.
v. Conclusions and recommendations.

The Operation of the Defamation Act (NI) 2022

9. It is generally considered to be too soon to offer much informed comment on the operation of the 2022 Act. The Act had been in place for less than two years when this report was being finalised and, at any rate, the number of defamation cases in this jurisdiction is typically relatively small. In the period 2010 to 2021, the number of defamation cases received in the High Court ranged from 12 to 54 with the annual average around 30. In the period since the Defamation Act (NI) 2022 received Royal Assent (July 2022 to April 2024), 20 writs for defamation were received. In addition, there were 13 disposals, eight of which were discontinued and five cases with court disposals.

10. The Defamation Act (NI) 2022 does not replicate the sections of the Defamation Act 2013 relating to website operators. This has prompted criticism from commentators that the Act does not adequately address the continuing challenges presented by online publication. Nor has the 2022 Act replicated the single publication rule. Under the single publication rule, the limitation period for a defamation action begins with the first publication of a statement and does not recommence each time the same statement is

published. This is particularly relevant to online publication where material could otherwise be deemed to have been published every time it was accessed. It has been suggested that, in the absence of the single publication rule in this jurisdiction, there could be a cause of action every time a defamatory statement is accessed or downloaded.

11. Several commentators have noted that, although the Defamation Act (NI) 2022 does not replicate those sections of the 2013 Act relating to online defamation, this does not mean that defamatory statements published online are unactionable. Claims are taken against online statements in this jurisdiction just as they are in respect of conventional published or broadcast statements.

12. The Department, during the debates on the PMB, noted the particular and complex challenges presented by online defamation (challenges discussed in detail later in this Report) and the Finance Committee's concern, at the Committee stage of the PMB, that the sections of the 2013 Act relating to online defamation were more favourable to the freedom of expression rights of online publishers than to the reputational rights of those allegedly defamed.

Serious Harm Test

13. As noted, the 2022 Act does not replicate the Serious Harm Test, which was a distinctive feature of the Defamation Act 2013. The test is intended to deter trivial or vexatious defamation actions from reaching the courts by requiring that claimants show that the allegedly defamatory statement caused them, or had the potential to cause them, serious harm. It was not replicated in the Defamation Act (NI) 2022 in part because of the perceived challenge and complexity of demonstrating actual or potential serious harm pre-trial. Some, however, have suggested that, while this was an issue in the years immediately after the 2013 Act came into effect, it is less problematic today because the courts have had time to establish a working definition of what serious harm might involve. Concern has also been expressed that the

absence of a Serious Harm Test in the 2022 Act could mean that the threshold for proving defamation in this jurisdiction remains lower than in England and Wales, thereby creating an opening for libel tourism by incentivising claimants to bring a case to a court here rather than a court in England and Wales. However, it must be recognised, that the Assembly debated this issue fully, both at Committee and plenary, and it was the will of the Assembly, two years ago, not to legislate in this way.

Serious Harm Test and Anti-SLAPP Legislation

14. Some have also suggested that the absence of a Serious Harm Test in this jurisdiction could potentially prove problematic for any future legislation relating to SLAPPs. As mentioned in the Overview section above, a SLAPP action, in the context of defamation law, is a groundless or largely groundless claim taken primarily in order to harass and deter a defendant who has been commenting on a matter of public interest. Anti-SLAPP legislation, which will be discussed in greater detail below, typically includes measures for the early dismissal of SLAPP actions if these can be shown to be such. It has been suggested that it might be difficult to make a case for the early dismissal of SLAPPs in a legal environment where the Serious Harm Test has already been rejected since anti-SLAPP legislation, where it relates to defamation law, applies what is essentially a Serious Harm Test.

15. In the absence of a Serious Harm Test the threshold for a defamation action in this jurisdiction is the common law concept of de minimis, where the damage caused in a case is minimal, and the costs of pursuing any action would be disproportionate to the harm caused, and to the detriment of the wider public in terms of court resources.. Some commentators have speculated that, if anti-SLAPP provisions were to be introduced in this jurisdiction, this could create two distinct defamation thresholds. For private claims, the lesser, de minimis threshold, would continue to apply but for public interest claims there could be a more challenging threshold.

The Chilling Effect

16. A similar argument has been made regarding the chilling effect of defamation legislation. (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 legal action). If a government introduces anti-SLAPP legislation, it is, in effect, accepting that there is a chilling effect for certain public interest statements. However, in a jurisdiction where defamation law creates a chilling effect for public interest statements, it is also likely to create one for private statements with no public interest aspect. While anti-SLAPP legislation addresses a presumed chilling effect regarding public interest statements, it does not do so for any similar chilling effect affecting private statements.

Positive Commentary on the Defamation Act (NI) 2022—Jury Trials

17. Certain features of the 2022 Act were generally welcomed by commentators, notably the ending of the presumption in favour of jury trials. Several were of the view, for example, that this would increase the number of 'meanings applications'—defendants requesting that an action be dismissed on the grounds that the statement in question did not have the defamatory meaning attributed to it by the claimant. It is too early to say whether that expectation will be borne out.

Positive Commentary on the Defamation Act (NI) 2022—The New, Statutory Defences

18. The new, statutory defences of truth, honest opinion and public interest were generally welcomed by commentators when the 2022 Act received Royal Assent.

Current Issues in Defamation Law

Online Publication

19. Online publication is diverse. It ranges from the online versions of conventional print periodicals written by professional journalists and overseen by editors, to brief comments posted by everyday readers as part of an ongoing online discussion. Where online content is alleged to be defamatory, determining responsibility is not always straightforward. Social media corporations such as 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 and facilitate as the volume of postings is simply 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 news stories they feature, or websites that allow users to comment critically on, among other things, films, books, concerts, goods and services.

20. If website operators and similar are assumed to be hosts with either no responsibility or limited responsibility for the statements they enable, then responsibility for online statements rests with the people who create and/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 and some may share it with a new readership and any particular online statement might be seen, endorsed and shared across many jurisdictions. Finally, online statements are easily replicable, easily stored and easily sent from person to person and place to place, all of which creates challenges for defamation law.

21. Takedown—the removal of defamatory content from a website (e.g. via a takedown order issued by a court)—is one of the remedies most often sought by claimants with regard to online defamation. Another common remedy is 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.

22. The EU's E-Commerce Directive 2000 was an early attempt to address the issues raised by online publication. The Directive distinguishes three broad categories of online service provider—those who host content; those who cache content; and those who act as a conduit for content. The Directive views all three categories of provider as being, to varying degrees, passive and unaware with regard to the content they handle and/or enable, with those who host content being considered in general both the least passive and the most aware regarding content. As a result, the duty (and liability) of hosts in respect of content is correspondingly greatest. The Directive states that the hosts of website content should operate a notice and takedown service whereby they undertake to remove any content that is the subject of legitimate complaint.

23. The Defamation Act (NI) 2022 makes no particular reference to online publication. As noted, this is in contrast with the Defamation Act 2013. The 2013 Act aims to address defamatory material published online through Section 5 (Operators of Websites), Section 8 (Single Publication Rule) and Section 10 (Action against a person who was not the author, editor or publisher of the statement). Under Section 5, 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.

24. None of these sections is replicated in the Defamation Act (NI) 2022 although all three were included in the original Defamation Bill. All were criticised at the Committee stage where, among other things, they were viewed as providing disproportionate protection to website operators and offering no particular improvement on the current situation for prospective claimants.

25. 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 this jurisdiction 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 such as establishing the identity of the author) and there have been successful prosecutions here arising from online defamation.

Libel Tourism

26. 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 had entered into law in England and Wales, that this jurisdiction would become a centre for libel tourism since claimants here 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 this jurisdiction since 2013.

27. It was further noted during the debates on the Defamation Bill that all defamation claims brought in this jurisdiction are currently assessed to establish if this is, indeed, the most appropriate jurisdiction in which to hear them. Additionally, Section 6 of the 2022 Act makes further provision against

libel tourism, requiring, inter alia, that a court must be satisfied that this jurisdiction is the most appropriate place to bring the action in question.

Strategic Lawsuits Against Public Participation (SLAPPs)

28. As noted previously, SLAPPs include defamation actions launched solely to prevent particular public interest statements from being published.

29. During the progress of the Defamation Bill through the Assembly in 2022, our advice was that the wider discussion on SLAPPs remained ongoing and touched on issues beyond defamation law such as privacy, trademark and copyright law and planning regulations. It was noted, also, that the Westminster Ministry of Justice's Call for Evidence on SLAPPs was at an advanced stage and that the Dublin Department of Justice's review of defamation law in the Republic, including SLAPPs, had lately reported. In view of this, it was judged that SLAPPs should be given closer scrutiny at a later date. To this end, the present Report notes the main findings and conclusions of the Westminster and Dublin reviews and other relevant developments.

30. SLAPPs were first identified as an issue in North America in the 1990s where there have since been attempts to introduce anti-SLAPP legislation. More recently, there has been considerable lobbying in the European Union for anti-SLAPP legislation following lawsuits against NGOs and investigative journalists. In developing anti-SLAPP legislation, the principal challenge remains determining whether alleged SLAPP actions, including defamation actions, are indeed illegitimate attempts to suppress free expression and journalistic enquiry, and how to prevent this.

31. The Ontario Protection of Public Participation Act 2015 has been cited by, for example, the Dublin DOJ's review of Irish defamation law, as an example of effective anti-SLAPP legislation. 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 ultimately not deemed to be a SLAPP, again a statutory presumption.

32. 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.
    ii. Merits Test: This is essentially a Serious Harm Test requiring the claimant to demonstrate that the statement will cause 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.

Access to Justice

33. Based on commentary during the progress of the 2022 Act and opinions expressed during our more recent stakeholder engagement, the principal factor limiting Access to Justice is generally held to be cost—the cost of taking an action and the cost of defending. (Defamation actions can be prolonged and the final amount awarded often difficult to forecast). Cost can therefore affect both the protection of reputation and freedom of expression and may contribute to a wider chilling effect.

34. Proposals to address problems of Access to Justice arising from the cost of defamation claims include encouraging or incentivising the parties to a defamation action to seek lower cost options than a full legal process or making defamation actions eligible for legal aid. Legal aid, however, falls outside the competence of DOF and any discussion of changing eligibility would be a matter for DOJ.

Alternative Dispute Resolution (ADR)

35. 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.

Stakeholder Opinions

36. The background to our 2023 -24 stakeholder engagement exercise has been noted earlier in the present report. Most stakeholders agreed that it was too soon to form an opinion of the Act's performance or to consider amendments. One participant, for example, observed that it taken around seven years to form an opinion of the impact of the 2013 Act and that was despite the much larger volume of defamation actions in the London Courts. This view, that it was too soon to comment with much authority on the 2022 Act and its likely impact, was one of the few points of relative agreement among the stakeholders who participated in the exercise. Stakeholders otherwise tended to divide into two broad groups with opposing views on whether and to what extent changes was needed.

37. In general, media and journalistic commentators tended to report that the Act did not go far enough and was merely a small step in the right direction. In contrast practising lawyers, especially those who tended to represent claimant interests, were typically critical of the Act. Opinions were similarly divided on the current key issues in defamation law and on the various proposals for change.

38. The paragraphs below summarise stakeholder responses regarding the 2022 Act and on the current issues in defamation law and policy.

Stakeholder Views on the 2022 Act

39. A number of stakeholders regretted the absence of a Serious Harm Test. They regarded this test as a means of filtering out, at an early stage, actions that lacked merit but that could embroil a defendant in prolonged and expensive litigation. To some, particularly media and journalistic stakeholders, it was an important means of protecting freedom of expression.

40. Some, however, were unconvinced of the need for a Serious Harm Test. They responded that there were already sufficient means available to prevent a defamation claim that lacked merit from progressing. The main effect of a Serious Harm Test, they suggested, would be to add to the costs of litigation and further restrict Access to Justice. The difference of opinion on this issue reflected similar opposite views expressed during the passage of the Act in 2022.

41. The ending of the presumption in favour of jury trials was largely welcomed. The general view was that it was likely to make defamation cases progress faster and more economically. Most considered judges better placed than juries to decide, not just on points of law, but possibly on facts as well. Juries were, in contrast, criticised for a perceived unpredictability as well as for the amounts they sometimes awarded against unsuccessful defendants. A further criticism was that juries sometimes took excessive time to reach a decision, often because the complexities of the case had to be explained to them. The time a jury might need further added to the unpredictability of how much a defamation action might cost the parties involved.

42. While no stakeholders saw the presumption in favour of jury trials as a good thing or regretted its end, one did comment that the effect of the ending of the presumption was likely to be minimal. This contrasts with views espoused by others during consideration of the 2022 PMB.

43. Stakeholders also generally welcomed the new, statutory defences. However, one respondent voiced concern that this change could lead to a marked increase in litigation and cost by encouraging more Interlocutory Applications seeking pre-trial determination of these issues. This, it was suggested, could have Access to Justice implications by increasing costs.

Online Defamation

44. The question of online defamation attracted significant stakeholder comment. The main issues here included attributing and apportioning responsibility for what is posed online and how best to address these via legislation and policy.

Responsibility for online material

45. Stakeholders generally agreed that online periodicals or the online versions of conventional print publications should, for the purposes of defamation law, be treated in the same way as conventional print publications. However, there was less consensus with regard to people who post comments online in the form of a blog or similar or who post as part of an online discussion or debate. Opinions also differed regarding how responsible we should hold service providers and the platforms that host and facilitate individual postings.

46. Regarding individual online 'posters', most thought that these were generally responsible for anything they published online. One respondent thought that posting allowed ordinary people an opportunity to have their say, including on matters of public interest, outside of conventional journalism and broadcasting where access is more restricted. They recognised that this had positive and negative consequences but it was also the case that postings by non-specialists typically had a strong 'fade factor'—quickly lost in the general free-for-all of online comment. Some noted that Section 10 of the 2013 Act provides that a court cannot hear a defamation claim against a person who is not the author, editor or publisher of the statement unless the

court is satisfied that it is not practicable to bring such proceedings against that person. These respondents regretted that Section 10 had not been replicated in the 2022 Act and proposed that it be included now.

47. Opinions differed regarding whether those who liked or reposted material posted by others could be held to have any responsibility for it. Some thought that, in principle, there were situations where a person who liked or, more significantly, reposted a defamatory statement could contribute to the reputational harm it caused. Inevitably, others disagreed and argued that to like or even repost a statement did not amount to the same level of responsibility as making it. Some thought that if an action were brought against a person who liked or reposted a statement, the reason for their liking or reposting it might become relevant to the final judgment. This could lead to prolonged debates about intention. It was also suggested that, where a defamatory statement had been liked or reposted many times, there would be a cumulative effect on the reputation that had been adversely affected with the result that establishing the particular impact of any given like or repost might not be easy. Some stakeholders commented that the law already provided scope for bringing an action against someone who had republished a defamatory statement.

48. Regarding online hosts and service providers, a common view was that these were similar to telecommunications providers and should not therefore be held responsible for the communications they facilitate. However, several stakeholders thought that these might not be automatically liable for what is posted on their services, but that they could become so if they failed to act when alerted of potentially defamatory content.

49. One stakeholder thought that online hosts and providers could, in some circumstances at least, be treated in a manner akin to conventional publishers and broadcasters. Such providers receive advertising revenue and sometimes run content that is and that can be disseminated across a wide, global readership. In some cases, their output rivals the material put into circulation by conventional outlets and may compete with it. However,

if that online content turns out to be defamatory, the provider, who has enabled it and been enriched by it, is not normally liable for it in the way that a conventional publisher would be.

50. In short, an online provider can run content that is frequently similar to the content run by conventional publishers, and cut into their readership and their advertising revenue, and yet not be liable to the same extent for any defamatory content they happen to put into circulation.

51. On the other hand, some respondents gave reasons not to treat online providers as conventional publishers. It could, for example, open them to claims regarding content over which they had no or little control and no or little knowledge and, over time, limit the freedom of expression of people who wish to post comments online. Some also queried if online providers could avail of the same defences as conventional publishers. Finally, it was noted that, if this jurisdiction were to treat online providers as equivalent to traditional publishers, it could result in our being 'geo-blocked'—excluded from online material that is available elsewhere.

Reporting Procedures and Takedown Orders

52. A common complaint among stakeholders was that it was not always easy to alert online providers to defamatory content or get them to act on it. The process for registering a complaint regarding a particular posting is often automated—the person bringing the complaint does not engage with an actual person—and it can therefore take time for a provider or host to act. Several advocated that online hosts and providers be required to operate a more streamlined and timely complaints and takedown procedure perhaps with a statutory cut-off date after which they become liable if they have failed to act.

53. Some stakeholders expressed concern regarding formal processes whereby hosts are required to intervene against allegedly defamatory statements. They thought that this could result in true statements, possibly in the public

interest, being removed without any assessment of their validity. This, it was suggested, could work against freedom of speech.

54. Some were critical of the process for obtaining a takedown order and suggested that this should be made easier and the orders themselves made more effective. Moreover, a takedown order in one jurisdiction will not prevent the same content being available in other jurisdictions.

Anonymity and Pseudonymity

55. While some stakeholders agreed that anonymous and pseudonymous posters of defamatory material should be named by the relevant host or online provider, others, considered this impractical on grounds of cost. A person may have to litigate to oblige a provider to identify a poster which would take time and therefore prove expensive. Some suggested that the cost of establishing the identity of a person who had posted defamatory content was a good argument for creating a statutory obligation on online providers to name those who posted on their sites. However, such an obligation, it was suggested, might run up against practical problems—it is not always easy to identify anonymous and pseudonymous posters—and some were critical on grounds of principle. Furthermore, some stakeholders alleged that anonymity and pseudonymity were sometimes the only way in which certain people could post online and were therefore essential to freedom of expression.

Libel tourism

56. The predominant view among stakeholders was that libel tourism was not a problem in this jurisdiction and that the Pre-Action Protocol (which requires that a letter of claim sets out a basis for the claim) and Section 6 of the 2022 Act provided effective barriers to it. Some, however, thought that there remained potential for this jurisdiction to become a centre for libel tourism, notably if we did not introduce anti-SLAPP measures in step with the other jurisdictions on these islands. While most stakeholders concurred that there

was no evidence at present of libel tourism, some thought that this was a situation that should be formally monitored and reported.

Strategic Lawsuits Against Public Participation (SLAPPs)

57. Most respondents considered SLAPPs to be a distinctive development relevant to defamation law (one respondent likened SLAPPs to a 'gagging order' that had created a chilling effect throughout the media). Not all, however, thought that new legislation was needed, particularly since, in their opinion, SLAPPs were uncommon in this jurisdiction. They suggested that existing provisions such as the Pre-Action Protocol and the new, statutory public interest defence might be sufficient. There was also concern that new anti-SLAPPs legislation also add to the complexity and cost of defamation law.

58. However, most respondents were of the view that existing protections were inadequate and that new legislation was required. One respondent noted that the threshold for dismissal in this jurisdiction is high, which works against early dismissal. Also, the complexity of the relevant law often makes it difficult to demonstrate at an early stage that any particular claim has little realistic chance of success at court.

59. Early dismissal legislation was seen by some as a powerful disincentive to claims that lacked merit and, therefore, a means of strengthening the willingness of publishers and journalists to challenge such claims without risking prolonged and costly legal action. Some considered the Ontario procedures to be a good model (possibly aligned with the EU's anti-SLAPPs Directive[2]) although others criticised these as too heavily skewed in favour of the defendant. Criticisms of the Ontario arrangements included that the

[2] Directive (EU) 2024/1069 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation')

public interest can only be defined case by case, that it appeared more difficult for the claimant to keep a legitimate claim in play than for a defendant to dismiss it, and that Ontario anti-SLAPPs/early dismissal arrangement seemed an overreaction to the problem, 'a sledgehammer to a nut.' A Serious Harm Test was viewed by some as preferable to an Ontario-type system on the grounds that it struck a better balance of rights. Others, however, noted that the test had not deterred SLAPP actions in England and Wales, where anti-SLAPP legislation is currently in development.

Access to Justice

60. Costs were widely seen as a key problem in defamation law. A frequently expressed view was that a well-resourced claimant can silence less affluent critics and, somewhat less commonly, a well-resourced defendant can defame a less affluent party with impunity. The deterrent effect of costs was generally seen as affecting defendants more than claimants—the prospects of losing and thereby incurring high costs were regarded as likely to dissuade people from defending even a weak claim, thereby contributing to the chill factor. Moreover, as noted, the high costs of defending an action are, of course, the principal factor in SLAPPs as these relate to defamation law.

61. Suggestions for addressing costs included making legal aid available in defamation cases and permitting legal representation to be made available on a 'no win, no fee' basis.

62. Only one respondent considered the legal system to be already cost-effective. They noted several factors it thought had enabled costs to be controlled such as the Taxing Master, who intervenes against excessive fees, the Pre-Action Protocol, and case management.

Alternative Dispute Resolution (ADR)

63. Respondents were generally supportive of ADR but most thought that it should not be made obligatory. Instead, courts and lawyers should be

required to encourage it and parties advised to consider it rather as at least a preliminary to formal defamation action.

Other

64. Finally, one stakeholder noted the Derbyshire Principle (from *Derbyshire County Council v Times Newspapers*, 1992) which prevents a public body from bringing a defamation action. The respondent proposed that this principle be incorporated into statute law and extended to cover private bodies that deliver public services. They suggested that such codification would clarify the principle and that extending it to private providers would create a level playing field. Currently, criticism of a service delivered by a local authority is not actionable but criticism of the equivalent service being delivered by a private contractor on behalf of a local authority is. This includes criticism by a watchdog body.

Developments in this Jurisdiction

65. The sections below look at recent, relevant developments in this jurisdiction, in the south of Ireland, England and Wales, and Scotland.

Kelly v O'Doherty

66. The judgment in the case *Kelly v O'Doherty* was given on 8 January 2024. The background is that the defendant, a journalist, made allegedly defamatory comments regarding the claimant in radio interviews in the summer of 2019. The writ followed a year later and a statement of claim in May 2022. In September 2022, the defendant sought to have the claim struck out under Order 18 Rule 19 of the Rules of the Court of Judicature on the basis that it was vexatious (Rule 19 (1)(b)) and an abuse of process (Rule 19(1)(d)).

67. The defendant also sought to have the claim struck out under section 8 of the Defamation Act 1996 and the principles in the *Jameel* case. Section 8 of the Defamation Act 1996 permits a court to dispose of a claim summarily if it has no realistic prospect of success or there is no defence to the claim that has any realistic prospect of success. The seriousness of the alleged wrong is one of several factors that will influence the court in its decision to dismiss a claim. *Jameel* (2005) establishes a minimum test of serious as does *Lachaux* (2019). In *Jameel (Yousef) v Dow Jones and Co Inc* [2005 QB 946] a statement published online alleged that Jameel had funded terrorism. However, as only five people in England and Wales had seen the statement the claim that Jameel had suffered reputational damage in that jurisdiction was ultimately dismissed.

68. Finally, the defendant alleged that the claim was a SLAPP and that it had been brought principally to silence his criticism of the claimant.

69. The claim was struck out. In giving his judgment, the Master commented that the action did '*bear the hallmarks of a SLAPP…initiated not for the purposes of vindicating a reputation injured by defamatory statements, but rather for the purposes of stifling the voices of…troublesome critics*.' He also noted that the Solicitors' Regulation Authority in England and Wales has issued guidance for the identification of SLAPPs, one indicator being '*that the client asks that the claim is targeted only against individuals where other corporate defendants are more appropriate. Freelance journalists are particularly vulnerable without the support of a media outlet behind them*.'

70. The Master went on to comment: '*It may well be that the statutory requirement of a review of defamation law in Northern Ireland which is required under section 11 of the Defamation Act (Northern Ireland) 2022 will make proposals for this jurisdiction in respect of either the "serious damage" to reputation threshold which now applies in England and Wales but not here (and which would provide some protection against SLAPPs) or proposals to introduce fully-fledged anti-SLAPP provisions*.'

71. While some stakeholders have cited this case as evidence that the system as it stands can address the problem of SLAPPs, this is arguably challengeable. The original writ in *O'Doherty* was made in 2020 and the judgment given more than two years later. It took more than two years for the claim to be struck out under current arrangements and identified as, in effect, a SLAPP. Doing so obliged the defendant to obtain considerable legal advice, at significant cost, and at risk of the eventual decision going against him. The rationale for anti-SLAPPs legislation is that it enables SLAPPs to be identified and dealt with promptly and at low cost.

Developments in Other Jurisdictions

European Union—EU Directive 2024/1069 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation').

72. This Directive was agreed by EU co-legislators as the present report was in preparation and its content and implications are therefore still under consideration.

73. The Directive aims to provide '*safeguards against manifestly unfounded claims or abusive court proceedings in civil matters with cross-border implications*' where these proceedings have been brought against people on account of their having engaged in public participation.

74. The Directive requires that, by May 2026, all EU member states will have put in place early dismissal and cost protection arrangements that can be accessed by parties who believe that a SLAPP action has been initiated against them.

Developments in the South—The General Scheme for Defamation (Amendment) Act 2023

75. DOJ in Dublin issued its General Scheme for Defamation (Amendment) Act 2023 in April 2023. This sets out the Dublin Government's intentions for the reform of the Defamation Act 2009 based on its review of the 2009 Act which reported in 2022. Among its proposals is the abolition of the presumption in favour of jury trials in defamation cases. The Department has started an examination of these developments and has noted some of the following general themes.

Online Publication

76. The main provisions regarding online publication are intended to give some protection to website operators, making a distinction between their role as hosts and facilitators of comment and the roles of author, editor and publisher. It is proposed that defamation claims will be brought against those who made the defamatory statements—i.e. the person or people who authored, edited or published them—rather than those who hosted and facilitated them. Nor is someone likely to be deemed responsible for an online statement if they simply react to a statement posted by another or forward it on. Website operators will, however, be obliged to work with claimants in order to identify anonymous and pseudonymous posters and to take down defamatory content.

77. A further provision set out in the scheme is that a website operator will not be held responsible for defamatory postings if they have taken reasonable steps to prevent such postings and that publication happened despite the steps they took. This does not apply if the claimant cannot identify the person who posted the statement or if the claimant has sent the operator a letter of complaint that has not been actioned by the operator.

78. The scheme also includes provision for a person who believes that a particular anonymous or pseudonymous online statement is defamatory to write to the website operator/intermediary service provider requesting that

they identify the statement's creator. In such circumstances, the provider must liaise then with the person responsible for the statement and, if that person does not engage, the provider must restrict access to the statement.

79. The definition of a periodical will be amended to include online-only publications that meet certain criteria. These latter include that the publisher is based in the state and that the publication is aimed primarily at people resident in the state.

80. Courts can issue 'Norwich Pharmacal Orders' to website operators requiring them to identify anonymous publishers.

81. A court may order a website operator to take down a defamatory statement published online. Also, during proceedings, an operator may be required to suspend access to a statement at the claimant's request. In this case, the operator will need to display prominently notice of the suspension and the reason for it.

Libel Tourism

82. The General Scheme has proposed that a court must be satisfied that, of all the places an action might be brought in respect of a particular statement, the state is the most appropriate such place. This is similar to provision already set out in Section 6 of the Defamation Act (NI) 2022.

SLAPPs

83. The General Scheme includes proposals to introduce a new section into the 2009 Act to address SLAPPs. The principal innovation here is an early dismissal mechanism. In making this application, the defendant will need to show that the action in question has at least one of the features of concern set out below. The court will then decide whether the action is, indeed, a SLAPP and should therefore be dismissed. If the court so decides, it is for the claimant in the original defamation action to contest the decision and show otherwise. While an application for early dismissal is being considered, the original claim is stayed.

84. The following are considered features of concern in relation to proceedings against public participation:

i. Disproportionate, excessive or unreasonable claims.
ii. Intimidation, harassment or threats made by the claimant against the defendant or associated parties, including prior to the institution of the proceedings.
iii. Multiple proceedings initiated by the claimant or associated parties, against the defendant or associated parties, in relation to similar matters.
iv. The conduct of the litigation by the claimant in a manner which is disproportionate, excessive or unreasonable, including the use of aggressive, unreasonably frequent, or intrusive pre-action communication.
v. The conduct of the litigation by the claimant in a manner which is likely to generate disproportionate, excessive or unreasonable costs or delays to the defendant, especially where the balance of financial resources between the parties is significantly in favour of the claimant. Examples include the choice of jurisdiction and the use of requests for disclosure or discovery.
vi. The seeking by the claimant of remedies that are disproportionate, excessive or unreasonable.

85. The proposals suggest that a court will not dismiss an action if the claimant's case is likely to succeed at full hearing or if there is a greater public interest in allowing the case to proceed to full hearing than in dismissing it.

86. The presumption is that, in an early dismissal order, the applicant (the defendant in the original defamation case) is entitled to their costs whereas the claimant is not. In addition, the defendant in a defamation case that shows features of concern can apply to the court to require the claimant to provide security of costs. Where a court determines that an action is a SLAPP, it may award damages to the defendant.

87. A court may authorise a relevant NGO to appear before it in an application for early dismissal as *amicus curiae* ('a friend of the court'—assisting the court by providing relevant information and advice).

Access to Justice

88. The Review of the Defamation Act 2009, which informed the General Scheme, recommends that the current exclusion of defamation from the Civil Legal Aid Act 1995 be removed. It suggested that this be considered in the context of the Dublin Government's planned review of civil legal aid in general.

89. The General Scheme makes no proposals regarding the inclusion of defamation actions within the scope of current legal aid legislation.

Alternative Dispute Resolution etc

90. Solicitors will be obliged to advise clients of the complaint and redress arrangements offered by the Press Council and an Coimisiún na Meán and parties to a defamation case will also be obliged to consider mediation.

91. Where a claimant makes an offer of terms of settlement to the defendant, the defendant may respond either with an offer of settlement or to decline any settlement. The case will then proceed during which time the judge will have no knowledge of the offer. However, the terms of the offer and the conduct of the parties in making it will be considered by the court when making its decision as to the payment of costs.

92. Where there is an offer to make amends through correction and/or apology (a voluntary offer rather than a correction order issued by a court), the correction/apology will be published with equal prominence to the original, defamatory statement. It will be a defence in a defamation case to say that an offer to make amends was made and rejected unless it can be shown that

the defendant knew at the time that the statement was false and defamatory to the claimant.

93. Where a defendant has offered to make amends and the offer has been accepted but the amount of damages cannot be agreed, the defendant can lodge money with the court. The court, when deciding on damages, will take account of this amount and the reasonableness of the behaviour of both parties.

94. Under the 2009 Act, a court can currently make a variety of orders that allow for redress other than damages where a defendant has no defence—declaratory, correction, prohibition (prohibiting the publication of a defamatory statement), and summary relief (summary disposal of action). The General Scheme amends the no defence provision to no defence *that is likely to succeed*. The 'that is likely to succeed' clarification is intended to make the orders option more attractive to claimants. Where a correction order is issued, the correction must have equal prominence to the original defamatory statement.

95. When awarding costs, it is proposed that a court will take account of any unreasonable failure of the parties to use ADR.

Procedure

96. The General Scheme makes a number of recommendations to amend court procedure in defamation cases, including the abolition of juries in High Court defamation actions.

97. The General Scheme notes that the number of defamation cases disposed of is much smaller than the number of cases initiated. This is because many cases never come to court. Cases that have been initiated but do not then proceed can cause defendants stress and can also result in costs being incurred. Therefore, the General Scheme proposes that, in defamation proceedings, where no step has been taken by the claimant two years after

the case was initiated, the court can discontinue the proceedings or set out a timeframe in which the claimant must take action to enable the case to proceed.

Serious Harm Test

98. The General Scheme proposes that a Serious Harm Test be introduced into Irish defamation law in the following situations.

    i. Following a recommendation of the Report of the Review of the Defamation Act 2009, the General Scheme proposes enabling corporate bodies to bring defamation claims in much the same way as individuals. Currently, corporate bodies cannot bring defamation claims under Irish defamation law. The General Scheme suggests that a corporate body should be permitted to bring a defamation case but only in respect of serious reputational harm. Where the corporate body is commercial, harm will be considered serious only if it has caused, or is likely to cause, serious financial loss. The possible exemption of microbusinesses from this test has been considered and is subject to further consultation.
    ii. A Serious Harm Test is also advocated in cases of 'transient retail defamation' where a customer is suspected of non-payment or fraudulent payment and is, for example, asked to produce a receipt or is refused service. In such cases, a person it is proposed that a person could bring a defamation case only if they can show that the incident resulted in serious harm.

99. The introduction into Irish defamation law of a wider Serious Harm Test along the lines of the Defamation Act 2013 was discussed in the Report of the Review of the Defamation Act 2009. The Report noted that, while there is no Serious Harm Test in Irish defamation law, the level of harm a particular statement caused or is likely to cause is nonetheless relevant during the defamation action because it will have a bearing on issues such as the level of redress. In addition, the Defamation Act 2009 requires that account be taken of factors such as the extent to which the statement has been

circulated, the enduring nature of the means of circulation, and the importance of the claimant's reputation in the eyes of particular recipients of the statement. Based on these, a judge may strike out a case that appears frivolous, vexatious or has no reasonable cause of action.

100. Irish courts have not, however, followed the judgment of the English Court of Appeal in the case of *Jameel v Dow Jones* noted earlier in the present report.

101. The Irish Court of Appeal declined to apply the *Jameel* approach in *Gilchrist and Rogers v Sunday Newspapers*. The Court noted that the Irish Constitution confers a right of access to the courts although this is limited by the right of the courts to strike out a case where that case is frivolous, vexatious, bound to fail, etc. The Court of Appeal did not consider that the conditions for strike out had been met. Also, in *Jameel*, there had been consideration of the benefit to the claimant in proceeding and whether that benefit could be considered proportionate. (The English Court of Appeal thought not). The Irish Court of Appeal thought it inappropriate that what amounted to a cost benefit analysis be carried out on defamation cases—the likely benefit to the claimant on the one hand and the costs and use of court time on the other. The Review Report notes the view of Maher J that the *Jameel* judgement and the subsequent Serious Harm Test has led to a divergence between English and Irish defamation law. In Irish law, publication to one person may suffice for an action to proceed whereas publication to a single person might, in English law, justify the action being rejected via the Serious Harm Test.

102. Some submissions received by the Review proposed that a Serious Harm Test might be unconstitutional, affecting a citizen's right of access to the courts. A possible compromise might be that a financial limit be placed on certain types of defamation claim (e.g. where publication is limited), limiting both the potential award and the likely cost to the defendant.

103. The Review Report notes that, in Ontario, a general Serious Harm Test was rejected on the grounds that the presumption of harm is at the centre of defamation law and because such a test would add to the costs of a defamation action. However, what amounted to a Serious Harm Test was introduced with regard to SLAPP actions.

104. The Review received several submissions advocating the introduction of a Serious Harm Test. These rehearse arguments familiar from discussions on the 2013 and 2022 Acts.

i. A Serious Harm Test might act as filter for cases without merit.
ii. Bringing a defamation action is relatively low cost whereas defending such an action is not. This arguably advantages well-resourced organisations that can use the threat of legal action against critical coverage and may incentivise out of court financial settlements.
iii. A Serious Harm Test might keep the costs of an action low for defendants and work against libel tourism.

Public Authority

105. Under the General Scheme proposals, a public authority such as a Government Department, a regional assembly or a local authority, would be able to bring a defamation case only if it could satisfy the court that this is in the public interest. A public authority could, however, continue to bring defamation actions on behalf of an individual employee without the public interest test being met.

Honest Opinion

106. The Scheme recommends that the 2009 Act be amended to replace the requirement that at the time of publication '*the defendant believed in the truth of the opinion or, where the defendant is not the author of the opinion believed that the author believed it to be true*' with a requirement that '*the*

defendant genuinely held the opinion or, believed that the author genuinely held the opinion'.

Innocent Publication—Live Broadcasts

107. It is proposed that broadcasters cannot be held responsible for defamatory statements made during live broadcasts provided that they have taken reasonable steps to prevent such occurrences and to minimise the impact of what was said.

Damages etc

108. Punitive damages may be awarded, as outlined in the Scheme, when the defendant conducted their defence in a manner that aggravated the original defamatory statement. This reflects the Supreme Court judgment in the case of *Higgins v The Irish Aviation Authority*.

Next Steps Following the General Scheme

109. Drafting is underway of a Defamation Bill based on the General Scheme and incorporating those parts of the EU Directive 2024/1069 on SLAPPs relevant to defamation law. The Bill is currently being finalised for publication, which is scheduled for mid-July. DOF officials will continue to liaise with their counterparts in Dublin as this progresses.

<u>England and Wales</u>

Defamation Act 2013

110. The Ministry of Justice (MOJ) in London views the Defamation Act 2013 as working well and being applied and interpreted as intended. This includes the Serious Harm Test where the courts are seen as having developed clear

tests, including with regard to business organisations. However, MOJ continues to look closely at relevant cases to assess if reform is required.

Defaming the Dead

111. Recently, MOJ has received several requests to amend the law on defaming the dead. It is a longstanding principle that the dead cannot be defamed but some have argued that this leaves it open for a person's reputation to be attacked posthumously. While the MOJ has no immediate plans to consider this area, it is something it intends to keep under review. (Under Irish law, a defamation action can continue if the claimant dies before it is resolved. Otherwise, the Dublin DOJ's review of defamation, while noting that bereaved families can often be distressed by published statements, did not support enabling defamation actions to be brought on behalf of people recently deceased).

SLAPPs

112. MOJ's main interest in recent years has been to examine and, if necessary, address the issue of SLAPPs. To this end, MOJ launched a call for evidence on the nature and scale of SLAPPs in England and Wales in March 2022. A Report of the main findings of this call and associated proposals for future policy was published in July of that year. This was followed, in June 2023, by initial steps to legislate against SLAPPs via amendments to the Economic Crime and Corporate Transparency Act. These are discussed later in the present Report.

113. Based on the responses received, the Report of the call for evidence accepts that SLAPPs are a '*pernicious form of litigation…designed to silence criticism and investigation conducted in the public interest*.' It does not accept the view, expressed by some respondents to the call, that the problem of SLAPPs has been exaggerated or even non-existent. Rather, the Report concludes that SLAPPs are aimed at preventing the communication

of matters of public interest thereby constituting a threat to freedom of expression. By creating a chilling effect they are deemed potentially harmful to society in general because of their potential to restrict public scrutiny. The Report therefore concludes that '*there is a convincing case for targeted legislative reform to tackle SLAPPs*.'

114. The Report of the call for evidence makes clear that anti-SLAPP measures will *not* immediately entail reform of defamation law through, for example, an 'actual malice' test (the exemption of public figures from the right to being a defamation action unless actual malice can be shown). This is in part because defamation law already includes measures that could be used against SLAPP actions but also because, in the opinion of the Report's authors, the evidence presented for further defamation law reform has not been convincing. However, the Report advises that reforming defamation law in order to address SLAPPs is something that will be kept under review.

115. In order to address the problem of SLAPPs, it is proposed to introduce a dismissal process to strike out identified SLAPPs at an early stage and thereby prevent a lengthy litigation process. The envisaged measure will have three parts:

i. A test to the establish the public interest relevance of the statement.
ii. An assessment of the claim using a set of criteria to enable courts to identify SLAPPs. (The Report proposes that SLAPPs should be defined based on their common characteristics—e.g. if the claimant issues many aggressive letters on a relatively trivial matter, that would suggest that the action is a SLAPP).
iii. A merit test (whether the case have sufficient merit to justify continuation, e.g. might it succeed?)

116. This three-part test is intended to apply across all types of SLAPP—defamation, privacy, data protection, etc.

117. A claim that met all three tests would be dismissed early. However, a claim that met the first and second tests but showed evidence of merit might continue.

118. Many respondents to the call for evidence also noted that, for defendants in a SLAPP action, exposure to potentially high costs is a particular concern. Consequently, in addition to the three-part dismissal procedure, the Report advocates the development of a costs protection scheme. This aims to enable defendants to defend a SLAPP action without incurring high levels of cost—i.e. to prevent potentially high costs from deterring defendants from contesting a SLAPP action. Increasing the financial penalties for the claimant, or imposing punitive damages, where an action is found to be a SLAPP are other options noted.

119. Following the Call for Evidence, amendments were tabled to the Economic Crime and Corporate Transparency Act on 12 June 2023. The amendments are intended to address SLAPPs where these relate to economic crime. They introduce a statutory definition of SLAPPs based on a non-exhaustive list of SLAPP characteristics and an early dismissal mechanism. In addition, the basis for a costs protection scheme will be established via secondary legislation. It is intended that these measures will apply in England and Wales only.

The Strategic Litigation Against Public Participation Bill

120. The Strategic Litigation Against Public Participation Bill is a PMB sponsored by Wayne David MP that had its second reading in the House of Commons on 23 February 2024 and is supported by the Westminster Government.

121. The PMB replicates the provisions on SLAPPs included in the amended Economic Crime and Transparency Act including an early dismissal mechanism but applies these to claims relating to any issue, not simply economic crime.

122. In order for a claim to be categorised as a SLAPP, the PMB requires that a court is satisfied that the claimant intended to harass, inconvenience, or distress the defendant, or cause them expense beyond the extent to which these are experienced in the course of legitimate, properly conducted litigation.

123. This aspect of the Bill has been criticised on the grounds that it requires that a court make a subjective judgment of the claimant's intent before the claim can be considered a SLAPP. Some have suggested that this will result in a time-consuming and uncertain process that will limit the Bill's effectiveness. Critics of this aspect of the Bill have advocated an objective test.

124. DOF officials will continue to liaise with MOJ colleagues on the progress of the PMB.

Developments in Scotland

125. The Defamation and Malicious Publications (Scotland) Act 2021 became law in April 2021 and came into force in August 2022. The Act codifies Scottish defamation law primarily to make it clearer and more accessible to non-specialists. The Act defines defamation as a published statement that lowers a person in the estimation of others and defines publication as the communication of a statement from one person to at least one person other than the person defamed, either verbally or in writing. It has been suggested that, on account of these clarifications, the Act may result in an increase in the number of defamation actions in Scotland.

126. One effect of the Act is that it, in some respects, brings Scottish defamation law into line with that of England and Wales. Relevant developments here include: the ending of the presumption in favour of trial by jury; the introduction of a Serious Harm Test; and the replacement of common law defences with statutory defences that are much the same as those that

feature in the Defamation Act 2013 and, indeed, the Defamation Act (NI) 2022.

127. The Act features an ADR, an offer to make amends, presented in writing prior to any defences being lodged. This entails the following steps: correcting the defamatory statement appropriately; making an apology; publishing both correction and apology; paying compensation and expenses.

128. Under the Scottish Act, defamation actions can normally be brought only against the author, editor or publisher of a statement. An action may, however, be possible against someone who was not the author, editor or publisher if they acted in a way that increased materially the damage caused by the statement. This is particularly relevant to online publication where a person who had nothing to do with the creation of a defamatory statement could, nonetheless, increase the damage that statement caused, most obviously by sharing it to a large number of people but also, in some circumstances at least, simply by indicating that they liked or approved of the statement.

129. Commentators have noted that one possible consequence of the 2021 Act is that people with a high profile on social media and therefore many followers (e.g. celebrities, experts, politicians, journalists) are more likely than ordinary social media actors to increase materially the harm caused by a defamatory statement.

Conclusions and Recommendations

Online Defamation

130. Few if any commentators or practitioners advocate that website operators be treated as analogous to authors, editors and publishers and none of the jurisdictions we have considered have chosen to do so in their defamation

legislation. Nonetheless, 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.

131. Legislative initiatives in this area include more formal arrangements to insist on the permanent or temporary takedown of defamatory comment and the requirement on online service providers to identify those who created it.

132. Scottish law allows that people not involved in the creation of a defamatory statement might yet contribute to the harm it caused by it if they indicate their approval for it or forward it on to other readers. This is clearly relevant to online defamation.

133. Online defamation remains a live issue, one which the Department will continue to monitor and in due course aim to seek expert opinion and the views of interested parties.

Libel tourism

134. There has been little by way of evidence presented to date that libel tourism is a problem in this jurisdiction. It was noted during the passage of the Defamation Act (NI) 2022 that there were already in place mechanisms to ensure that this jurisdiction was the most appropriate place for any particular action and these appear to have been effective. The risk of libel tourism in here was attributed in particular to the absence of the Serious Harm Test and the continuing, at the time, presumption in favour of trial by jury. As the 2022 Act ended that presumption, the risk, such as it was, has been reduced further. In addition, provision was 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.

135. While this is an area that the Department will continue to keep in view, it does not appear to be of as high priority as, for example, online defamation.

Strategic Lawsuits Against Public Participation (SLAPP)

136. Both MOJ in London and DOJ in Dublin 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, following the precedent of Ontario, are proposing to introduce an early dismissal process along with measures to protect defendant costs.

137. This is an area that the Department will continue to monitor carefully in close consultation with relevant colleagues in other Departments. As noted, SLAPPs range wider than defamation and involve policy areas that are the competence of other Departments. Moreover, the proposed remedies for SLAPPs largely focus on court processes, which are the responsibility of DOJ. The developments in both London and Dublin will assist in the scoping of future material for consideration by Ministers. In the meantime, DOF will liaise with colleagues in Justice Departments here and in other jurisdictions, and continue to consider how this can be appropriately addressed.

Access to Justice

138. The Dublin Government's Report of the Review of the Defamation Act 2009 proposed that consideration be given to making defamation cases eligible for legal aid. Our understanding, however, is that the Irish legal aid budget is already under considerable pressure and that it is unlikely that the additional pressure of defamation cases will be agreed to.

139. The situation is no different here. Legal Aid policy is a matter for the Department of Justice and its Executive Agency, the Legal Services Agency.

140. The promotion of Alternative Dispute Resolution (ADR) might be a more effective means of supporting those who believe they cannot afford recourse to conventional legal action.

Alternative Dispute Resolution (ADR)

141. We note the proposals for incentivising parties to use ADR in the Dublin DOJ's General Scheme. The Department will continue to monitor how this issue may develop in that jurisdiction and elsewhere, in order that similar options may in due course be considered for this jurisdiction.

Next Steps

Further Defamation Legislation

142. Only two years have passed since the Defamation Act (NI) 2022 entered into law. Its progress from a PMB based closely on the Defamation Act 2013 naturally involved the full process of Assembly scrutiny both in lengthy plenary debates and, at Committee stage, by the Finance Committee. During this process, it was agreed that certain features of the 2013 Act that were replicated in the PMB such as the Serious Harm Test and the single publication rule should not be included in the Act.

143. Given the extent of scrutiny to which the PMB was subject, the fact that so little time has passed since the 2022 Act received Royal Assent, and given also that there have been too few defamation cases for the impact of the Act to be properly assessed, we believe it too soon to legislate further on defamation particularly in the context of competing legislative priorities and resource constraints. The Department has a busy legislative programme for the remainder of this mandate, and the wider legislative programme that captures the interests of the Executive taken collectively means that

consideration of further defamation legislation in unlikely to be realistically envisaged under what remains of that current mandate.

144. However, the Department will, over the coming years, continue to monitor the performance of the 2022 Act, including with regard to the key issues identified in this report such as online defamation, libel tourism and Access to Justice. This will ensure that we are better placed and informed to comment on the Act's effectiveness—on the impact of ending the presumption in favour of jury trials or whether the absence of a Serious Harm Test is having any negative consequences.

SLAPPs

145. In addition, while no new defamation law appears feasible so soon after the 2022 Act, we acknowledge that legislation on SLAPPs may require closer inspection. As noted previously in the present Report, not all SLAPP actions are defamation claims since SLAPPs can relate to other areas of law and policy such as privacy, data protection, planning and environmental protection. Given this, any future legislation on SLAPPs would range wider than defamation law, involve the policy competences of several Government Departments, not just DOF, and, most likely, as it relates to court processes, capture the interest of DOJ. Reform in this area is likely, therefore, to require cross departmental and, ultimately, Executive endorsement.

146. In anticipation of continuing local debate on SLAPPs, the Department will continue to review commentary on SLAPPs as they relate to defamation law and consider the questions raised during our review including:

i. The extent to which SLAPP actions relating to defamation are an issue in this jurisdiction.
ii. The extent to which our current law and practices are adequate to addressing SLAPPs relating to defamation.
iii. The types of innovation appropriate to addressing SLAPPs in this jurisdiction.

147. We also intend to follow ongoing policy debates on SLAPPs in other jurisdictions. Of immediate relevance in this respect are:

i. The ongoing work of the DOJ in Dublin to amend defamation law in the south, which is likely to include measures to address SLAPPs, and which we expect will enter into law by the autumn.
ii. The PMB on SLAPPs currently progressing through Westminster.

148. We will liaise with colleagues in Dublin and London as appropriate, as well as engaging further with our own DOJ.

149. Defamation law is an area that has seen recent reform and it is an area that does tend to generate opposing views. Charting a path through the competing assessments of further reform will remain on the Department's radar, but in terms of priorities, considerable time was divested on this subject both during the passage of the 2022 Act and subsequently in relation to this statutory review. Scarce resource is currently focussed on other important law reform matters, but nonetheless, the Department will aim to monitor the wider debate on defamation law and policy. Future reform will be judged on how that debate progresses.