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## Reform of defamation law in Northern Ireland

### Report

**Original citation:**

Scott, Andrew (2016) *Reform of defamation law in Northern Ireland*. Department of Finance, Belfast, UK.

Originally available from the [Department of Finance](#)

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# **REFORM OF DEFAMATION LAW IN NORTHERN IRELAND**

**Recommendations to the Department of Finance**

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**June 2016**



## Acknowledgements

An exercise of this nature necessarily involves a range of people in providing assistance of various types.

The work reflected in this report builds upon the earlier work undertaken by the staff of the Northern Ireland Law Commission, and in particular by John Clarke. Paula Martin, now of the Department of Finance, was assiduous in forwarding notices of current developments in Northern Irish defamation practice. Judena Leslie invited me to assist with the NI Law Commission study in the first place. Wendy Murray of the NI Courts Service was extremely kind in responding promptly and thoroughly to requests for information.

Lord Pentland, Heike Gading and Susan Robb of the Scottish Law Commission offered an invaluable sounding board for ideas and discussion of problems, as well as inviting me to participate in workshops hosted in Edinburgh focused on their own related study of Scottish law. These events proved most insightful and fruitful.

The draft Bills included in Appendix 1 and Appendix 2 of the Report build on the earlier drafting work undertaken by Brian Garrett, Austen Morgan and Jeffrey Dudgeon. Indeed, the draft Bill reproduced in Appendix 2 is essentially that published previously by Mike Nesbitt MLA.

In addition, a number of highly experienced individuals - representing all sides of the libel reform debate and none - took the time to meet and discuss the themes of this study. In most instances, these meetings were conducted under obligations of confidence that allowed full consideration of important ideas. I hope that I have respected those confidences.

Finally, I would like to express deepest thanks to Laura McPolin of the Department of Finance for her assistance, engagement, and - most profoundly - her understanding.

Andrew Scott

Belfast, June 2016

## Executive Summary

In September 2013, the NI Law Commission (NILC) was asked by the Minister of Finance and Personnel to carry out a study of the law of defamation. The NILC undertook the first parts of that study and published a consultation document in November 2014. The consultation period closed on 20 February 2015. The NILC itself closed on 31 March 2015.

The research undertaken by the NILC substantiated the perception that the law of defamation wrongly restricts the proper exercise of freedom of expression in Northern Ireland. It also highlighted problems of cost and access to justice as key concerns that “cut both ways”. Harms to reputation caused by false publications are often left unremedied.

In England and Wales, the Defamation Act 2013 was introduced in the hope of addressing similar concerns. It comprises an important step forward, but arguably does not yet provide a regime for the resolution of disputes that might adequately triangulate the individual and social interests in reputation and free speech.

The aim of this report is to build on the work of the NILC, to draw on the consultation responses that it received, to assess the recent experience of the law of defamation in England and Wales under the Defamation Act 2013, and on these bases to set out recommendations for reform of the law of defamation in Northern Ireland.

The key principles underpinning the report are that:

- defamation law must provide a proper balance between individual rights to reputation (Art 8 ECHR) and to freedom of expression (Art 10 ECHR), and promote effective access to justice for all parties (Art 6 ECHR).
- defamation law must recognise the importance of societal interests in the openness of public communications and the accuracy of reputational information.
- defamation law must encourage the efficient, inexpensive and prompt resolution of disputes regarding statements that have been published, limiting any need to revert to court as far as is possible.
- defamation law must be comprehensible to members of the public and to any prospective litigant.
- defamation law should focus responsibility, and potential liability, for statements that have been published primarily on the authors, editors and publishers of those statements.

## Recommendations

In line with these principles, the Report makes a series of recommendations regarding the reform of defamation law in Northern Ireland. Of these, most would require legislative action by the Northern Ireland Assembly. A draft Bill comprising all of the recommended reforms is included as Appendix 1 to the Report. A second draft Bill that would merely emulate the Defamation Act 2013 in Northern Irish law is included as Appendix 2. Some recommended changes could be given effect through the review of civil justice currently being undertaken by Lord Justice Gillen.

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

- Section 2: defence of truth [see paras 2.09-2.16].
- Section 4: defence of publication on a matter of public interest [see paras 2.39-2.42].
- Section 6: qualified privilege for peer-reviewed scientific or academic statements [see paras 2.46-2.47].
- Section 7: extension of existing qualified privileges [see paras 2.48-2.49].
- Section 8: single publication rule [see paras 2.108-2.110].
- Section 12: power of court to order publication of summary of judgment [see paras 2.123-2.125].
- Section 13: power of court to order take-down of statements [see paras 2.123-2.125].
- Section 14: updating of the law of slander [see paras 2.104-2.106].

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

- Section 1: serious harm test [see paras 2.85-2.103].
- Section 9: action against a person not domiciled in the UK or a Member State [see paras 2.111-2.115].
- Section 11: presumption in favour of trial by judge alone [see paras 2.116-2.122].

The Report recommends that a new defence of honest opinion, similar to section 3 of the Defamation Act 2013, should be introduced by the Northern Ireland Assembly [see paras 2.17-2.38]. It proposes, however, that - relative to the English variant - this defence should be augmented in three ways:

- first, it should be possible for a publisher to rely on privileged statements that were published either before or “at the same time as” the opinion. This proposal corrects a drafting error in the 2013 Act [see paras 2.35-2.36].
- secondly, it should be possible for a publisher to rely not only on true underpinning facts or privileged statements as the basis for his or her opinion, but also on “facts” that he or she “reasonably believed to be true at the time the opinion was published”. This expands the defence, especially so as to defend the position of social media commentators [see paras 2.28-2.34].
- thirdly, it is recommended that it be made clear that the defence extends to cover “inferences of verifiable fact”. This is intended to clarify an aspect of the defence that is agreed to be the current law by many legal commentators, but on which there remains a measure of uncertainty in English law [see paras 2.25-2.27].

The aim behind these revisions is to ensure that the honest opinion defence delivers on its promise of significant protection for freedom of expression.

The Report recommends that the jurisdictional exclusion relating to secondary publishers (intermediaries) found in section 10 of the Defamation Act 2013 should not be introduced in its current form. Rather, that exclusion should be extended so as to prevent *any* defamation claim being brought against a person other than the primary author, editor or publisher of a statement [see paras 2.50-2.84]. This reform would absolve (online) intermediaries from potential liability. This recommendation entails that no equivalent to the defence for website operators found in section 5 of the Defamation Act 2013 need be introduced into Northern Irish law, and that existing defences for intermediaries can be repealed. It is acknowledged that reputations are exceedingly vulnerable in the online environment. It is considered, however, that sufficient alternative avenues for the protection of reputations exist that would deliver prompt and efficacious solutions for plaintiffs.

The Report recommends the introduction of a further bipartite reform: the abolition of the common law “single meaning rule” and the introduction of a jurisdictional bar to claims on capable meanings that have been retracted or corrected by a publisher promptly and prominently [see chapter 3]. This combined reform is intended to encourage the swift resolution of disputes generated by ambiguous publications, to secure the correction or retraction of unintended slights on reputation, to obviate the risk of liability for publishers in very many cases, and substantially to reduce the cost of bringing a defamation claim to court for determination. This proposed reform is also intended to make defamation law more comprehensible to the wider public.

The Report notes the potential desirability of a range of further procedural reforms that would reduce cost and enhance access to justice in this context. It recommends that these options should be considered fully during the review of civil justice that is currently being undertaken by Lord Justice Gillen [see chapter 4].



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## Introduction

- 1.01 The purpose of defamation law is to promote accuracy in public discourse by providing a means for individuals to vindicate their reputations and obtain an appropriate remedy should they have been sullied by false and defamatory publications. It is a common perception, however, that in practice defamation law serves to restrain not only false speech but also meritorious criticism of those in positions of public or economic power. The concern is that it has been used to “punish” those who speak out on matters of public importance, or to impose on public-spirited people the dilemma between speaking out on a matter of public importance and facing costly legal action, or staying quiet and thereby allowing perceived problems to perpetuate.
- 1.02 In England and Wales, beginning around 2008, this perception motivated the “Libel Reform Campaign” to seek to document the problems created for free speech in the public sphere and to press for legal change. This political movement culminated in the passing of the Defamation Act 2013 by the Westminster Parliament. That legislation was not extended in its application, as it might have been by way of the passing of a consent motion in the Northern Ireland Assembly, to the Northern Irish jurisdiction. This was notwithstanding the reasonable view that the “chilling effect” of defamation law does impact, and with some force, on publishers in this jurisdiction.
- 1.03 In light of continuing public debate regarding defamation reform in Northern Ireland, in September 2013 the NI Law Commission (NILC) was asked by the Minister of Finance and Personnel to carry out a study of the law of defamation. The Commission undertook the first parts of that study and published a consultation document in November 2014.<sup>1</sup> The consultation period closed on 20 February 2015. The NI Law Commission itself closed on 31 March 2015.
- 1.04 In some measure, the research undertaken by the NILC substantiated the perception that the law of defamation wrongly restricts the proper exercise of freedom of expression in Northern Ireland. This concern was set out in the consultation paper published by the NILC in November 2014. That stated, it is notable that statistics on the number of defamation claims received by the courts in Northern Ireland over the past five years suggest a similar downward trend to that experienced in England and Wales.<sup>2</sup> Clearly, the number of cases reaching court does not reflect the totality of activity in this area. Many complaints never reach the stage of the initiation of proceedings, having been settled quickly to the mutual satisfaction of the parties or simply

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<sup>1</sup> NILC 19 (2014).

<sup>2</sup> Figures for 2015 are provisional only. In addition, a small number of claims for libel and/or slander are heard before the lower civil courts each year. Prior to 2011, the annual figure for cases received was consistently closer to fifty. On the general decline in the number of defamation claims reaching the High Court in London since 1992, see Editorial, ‘Judicial Statistics, 2015: Issued defamation claims down by 40%, the second lowest number since 1992’, *Inform*, 4 June 2016.

	2011	2012	2013	2014	2015
Libel	31	31	27	21	24
Slander	8	5	7	4	4
Total	39	36	34	25	28

#### Queen's Bench writs and originating summons received with libel or slander cause of action 2011-2015

never progressed beyond initial contact. Recent times have seen a small number of cases receive some significant measure of publicity.<sup>3</sup> There has also been the suggestion that particular publications have not taken place on account of the perceived rigidity of defamation law in Northern Ireland, although such contentions do not always withstand serious scrutiny.<sup>4</sup>

- 1.05 The NILC consultation paper also broadened the analysis of defamation law by emphasising two further general themes. The first additional theme was that the problems of cost and access to justice and the impact of such matters on democratic rights were the key concerns in this area, but also that these concerns 'cut both ways'. It was explained that the average prospective plaintiff also faces an "access to justice" problem caused by legal costs,<sup>5</sup> with the result that harms to reputation caused by false publications are often left unremedied. The general picture presented by the NILC was of a body of law that is deficient in multiple respects. It was suggested that 'the key imbalance in this area is arguably not that in favour of reputation over free speech or vice versa... [but rather] that between litigants who can afford to defend their publications or to vindicate their reputations, and those who cannot'.
- 1.06 The second additional theme introduced by the NILC consultation paper was that merely emulating the reform package introduced in England and Wales by the Defamation Act 2013 may prove insufficient to meet the range of concerns identified in the consultation paper. It was suggested that notwithstanding the passing of the Act, the UK Parliament has yet to provide a regime for the resolution of disputes that might adequately triangulate the individual and social interests in reputation and free speech. It was suggested further that

<sup>3</sup> One such case involved an allegation posted on Twitter by a former Sinn Fein MLA to the effect that a senior Unionist MP had been involved in "harassing and shooting people" during his time as a member of the UDR – see Erwin, 'Sinn Fein MLA Phil Flanagan to pay UUP's Tom Elliott almost £50k in compensation for falsely implying he shot people', *Belfast Telegraph*, 3 February 2016. A second involved former MP George Galloway bringing a claim against a victims campaigner and Google with regard to *YouTube* postings of comments made at a rally – see Erwin, 'George Galloway to sue Google and Willie Frazer over Isis rant at Belfast protest', *Belfast Telegraph* 27 January 2016.

<sup>4</sup> Two such cases concerned publications regarding the adherents of Church of Scientology. Most recently, it was reported that 'stricter' Northern Irish laws were to be deployed should a revelatory book authored by the father of the head of the church be published – see Black, 'Scientology leader plans to use Northern Ireland's libel laws in bid to ban dad's book', *Belfast Telegraph*, 2 May 2016. It would appear, however, that claims were to be brought only under English law. In 2015, in what was described as 'one of the first visible effects of Stormont's failure to implement the Defamation Act', it was reported that the broadcast of a documentary on the religion had been postponed by Sky – see Rutherford, 'Sky pulls Scientology show because of Northern Ireland libel laws', *Belfast Telegraph*, 20 April 2015. It is not obvious, however, why there should have been any greater likelihood of successful suit in the context of this case in Northern Ireland than in any other British jurisdiction.

<sup>5</sup> See, for example, Tweed, 'Defamation law: the little man is under threat in war of words', *Belfast Telegraph*, 31 July 2013; Archer, 'New laws would have thwarted Michaela lawsuit', *Irish News*, 9 August 2013.

when designing reforms of defamation law, in the words of Lord May the former Chief Scientific Adviser and President of the Royal Society, ‘we should not look... through a purely legalistic prism’.<sup>6</sup>

- 1.07 The NILC consultation paper then set out additional reform options that it considered might achieve Lord May’s goal of “sensible” regime design. The hope underpinning those proposals was that defamation law could become a mechanism that might ensure access to justice, while yet minimising the role of law, lawyers, and the courts in many cases; to provide adequate redress for people who consider that their reputations have been sullied by false statements made by others, while reducing significantly the “chilling effect” of potential claims on those who wish to unearth and publicise corruption and malpractice and to criticise the powerful.
- 1.08 In sum therefore, the primary aim of the NILC consultation paper was to consider the Defamation Act 2013, and to consult on the question of whether the Act should be introduced in Northern Ireland, either in part or wholesale. Respondents were also asked to comment on whether any element of the 2013 Act should first be revised in minor or more significant ways before being recommended for adoption into Northern Irish law. The consultation paper also mooted a further reform, not seen in the 2013 Act, designed to secure adequate redress for plaintiffs, while reducing significantly the “chilling effect” of potential claims on publishers: withdrawal of the common law “single meaning rule” combined with the introduction of a bar to claims where a publisher has made a correction or retraction promptly and prominently.
- 1.09 The NI Law Commission received 32 responses to its consultation paper.<sup>7</sup> Many of these responses followed the structure of the consultation paper, and responded directly to (a selection of) the consultation questions. A minority of responses offered general commentary on the state of defamation law in Northern Ireland. Two of the responses – those submitted by the Media Lawyers Association and by the Libel Reform Campaign – were reiterated either verbatim or in spirit by a number of further respondents (seven and eight responses respectively). Some of these “coat-tailing” responses added further independent comment on themes raised in the consultation.
- 1.10 The aim of this report is to build on the work of the NILC, to draw on the consultation responses that it received, to assess the recent experience of the law of defamation in England and Wales under the Defamation Act 2013, and on these bases to set out recommendations for reform of the law of defamation in Northern Ireland.

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<sup>6</sup> 741 HL Deb GC429, 17 December 2012.

<sup>7</sup> This is among the highest number of responses received by the NI Law Commission on any consultation. There is also an interesting comparison to be made with the number of responses received by the Ministry of Justice in its consultation on defamation law (95), which at the time was widely understood to relate to defamation law in the UK generally.

- 1.11 Recognising that much valuable work on the law of defamation had already been done by the Ministry of Justice and in the UK Parliament in advance of the passing of the Defamation Act 2013, the NILC consultation paper posed five general and twenty more specific questions. The first three general questions focused on the Defamation Act 2013 in England and Wales, and consulted on the issues of whether measures equivalent to those set out in the Act should be introduced in Northern Ireland, and if so whether any of the elements to be introduced should first be revised in minor or more significant ways before being recommended for adoption into Northern Irish law. The fourth general question focused on the additional or alternative reform option of combining the withdrawal of the “single meaning rule” with the introduction of a bar to claims where a publisher has made a prompt and prominent correction or retraction of a capable meaning conveyed by a publication. The fifth general question invited respondents to the consultation to suggest other reforms to defamation law in Northern Ireland that they would consider desirable.
- 1.12 The discussion in this report is structured around these three dimensions of the NILC consultation paper. In the first respect, it is recommended that a package of provisions equivalent to the Defamation Act 2013 should be introduced in Northern Irish law. However, the recommendations first envisage some amendment of the elements of the 2013 Act. In particular, these revisions concern the section 3 defence of honest opinion, and the position of secondary publishers under sections 5 and 10. The report also offers a brief review of experience in England and Wales under section 1 of the 2013 Act and comment on the ramifications of emulating that provision in Northern Irish law.
- 1.13 The second section of the report discusses the option of withdrawing the single meaning rule in combination with the introduction of a bar to claims on meanings that were promptly and prominently corrected or retracted by publishers. This proposal was met with strong opposition in the consultation response submitted by the Media Lawyers Association, although other respondents were receptive to the proposal in principle. The views expressed to the NILC by the Media Lawyers Association are considered at length in this report. It is recommended, however, that the combined proposal should be introduced as part of a Northern Irish defamation bill. A draft Bill reflecting the proposals set out in the first two sections of the report is included in this report as Appendix 1.
- 1.14 The short third section of the report notes the relative dearth of proposals in the consultation responses submitted to the NILC for reforms that were not contemplated in the consultation document. This deficit reflected the general view of most respondents that the proper course of action would be merely to emulate the provisions of the 2013 Act. Some of the matters that were raised by respondents to the NILC consultation paper regarded the impact of outmoded rules of civil procedure on defamation practice. These suggestions have been “fed in” to the important review of civil justice that is currently being undertaken by Lord Justice Gillen.

1.15 A viewpoint expressed frequently to the NILC by those in favour of the introduction of reforms equivalent to those set out in the Defamation Act 2013 was that Northern Irish law should emulate the English legislation without any substantive change. This was particularly the view of those respondents to the consultation who affirmed the views of the Libel Reform Campaign or the Media Lawyers Association.<sup>8</sup> This preference for the more straightforward option of simply emulating the provisions of the Defamation Act 2013 wholesale was attributed to the perceived benefits of conformity in terms of the ability to rely directly on English precedents, and/or to avoid unnecessary differences that would complicate the practice of publishers who operate across jurisdictions. For this reason, a second draft Bill - the passing of which would achieve this goal – is included as Appendix 2 to the report. This second draft Bill is essentially that prepared previously by Brian Garrett, Austen Morgan and Jeffrey Dudgeon, and published by Mike Nesbitt MLA.

1.16 For a full appreciation of the broader context to this report, it should be read in conjunction with the text of the NILC consultation paper, the consultation responses, and the Defamation Act 2013 and associated materials. As regards this wider context, notably, it was the view of the NILC that neither international nor domestic human rights law compels the introduction of reforms equivalent to those set out in the Defamation Act 2013 or any other reform in this area. That view is correct. Essentially, therefore, the decision to proceed – or not proceed - with any reform of defamation law is a matter of political choice; there is no legal compulsion to act. Any reform must, of course, comply with – and if possible enhance the realisation of – the individual rights of access to justice, reputation, and freedom of expression in Northern Ireland. It must also seek to encourage the fullest possible provision of accurate information on matters of public importance and on the reputations of others so as to facilitate democratic society. It is believed that the introduction of the full package of reforms set out in this report would best meet those objectives.

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<sup>8</sup> Nevertheless, a number of these responses also recommended other or further reforms to the law.

## The Provisions of the Defamation Act 2013

2.01 The primary purpose of the study undertaken by the NI Law Commission was to consider the Defamation Act 2013 in England and Wales, and to consult on the question of whether the reforms reflected in the Act should be extended to Northern Ireland, either in part or wholesale. The consultation paper also asked whether any element of the 2013 Act that might be recommended for adoption into Northern Irish law should first be revised in minor or more significant ways. A large proportion of the questions posed in the consultation paper related to this purpose.

2.02 Perhaps the most straightforward option for reform would be to adopt the provisions of the Defamation Act 2013, subject to amendment consequential on the transposition to the NI jurisdiction. In the view of a significant majority of respondents to the NILC consultation, adoption of the provisions of the 2013 Act would indeed be the preferred way forward. For instance, the Media Lawyers Association (MLA) expressed the view that:

when taken as a whole, the Act strikes a strong and cohesive balance between the right to reputation and the right to freedom of expression which properly reflects the media and communications of the 21<sup>st</sup> century... [and] updates defamation law to make it fit and appropriate for publishing in the 21<sup>st</sup> century... the prompt and wholesale adoption of the Act in Northern Ireland is essential for the development of the legal framework in this area of law.

Alan McAlister of Cleaver, Fulton and Rankin Solicitors suggested that while the 2013 Act was 'by no means perfect... the only sensible approach is to extend [its] application in full to Northern Ireland'.

2.03 Among the reasons given by respondents for the perceived need to introduce the 2013 Act in full were the importance of the reforms to the promotion of free speech and investigative journalism (Brian Garrett); that disparity with England and Wales would see publishers' costs of legal compliance escalate (MLA; News Media Association); the risk that the extent of publication relevant to Northern Ireland might reduce (non-adoption would 'inevitably discourage or disincentivise publishers from participating in Northern Ireland' - MLA), and that the benefit to Northern Irish publishers, legal practitioners and others of cognate common law authority could be lost 'creating uncertainty of principle and outcome' (MLA; News Media Association; Alan McAlister). Other respondents stated simply that 'it makes no sense for Northern Ireland to operate a system that is at odds to that in England and Wales' (Guardian).

2.04 Some respondents contended that it would 'be a serious error to cherry-pick sections of the Act for implementation in Northern Ireland', which could 'only serve to discourage or deter publishers from publishing in Northern Ireland' (MLA). There was an insistence that the Act should be seen as 'a cumulative and coherent

policy framework which reflects modifications and updates to the law of defamation as a whole for both plaintiffs and defendants’, and that there was ‘nothing so obviously harmful’ in the Act ‘which would warrant Northern Ireland following its own unique approach to defamation law for the first time in modern history’ (MLA). A small number of respondents, while emphasising that ‘adoption in full’ was the preferred option, indicated specific provisions of the 2013 Act that were deemed most important: sections 1, 3, 4, 5, 7, 8 and 11 (MLA; News Media Association); *inter alia*, sections 1 and 5 (BBC); section 8 (Google).

2.05 Notably, and notwithstanding the statement of a preference for adoption of the 2013 Act provisions, many respondents who expressed the view that the 2013 Act should be adopted wholesale then proceeded to identify matters not provided for in that legislation as being significant contributors to perceived problems with the operation of the law in Northern Ireland. The MLA emphasised that there are:

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

The substance of this point on procedure was emphasised by others: ‘real improvements to the law on defamation require appropriate rules of procedure and case management policies that emphasise the practical consequences outside and inside the courtroom’ (Eamonn Kennedy). The perceived need for procedural reforms to reduce cost and enhance access to justice for plaintiffs was also highlighted by the one respondent who rejected the generality of the reform agenda and considered that ‘the issue is only on the table as a result of pressure from self-interested lobby groups’ (Paul Tweed, Johnsons Solicitors).

2.06 It is clear therefore that very many respondents, while emphasising the general desirability of emulating the reforms encapsulated in the Defamation Act 2013 and highlighting the value of consistency with England and Wales, acknowledged the scope for further reform to produce better outcomes for this jurisdiction. That approach has informed the preparation of this report and the recommendations it offers. It is considered that the opportunity to introduce “better” laws should not be foregone simply in order to cohere with the law in a neighbouring jurisdiction. Conversely, the value of coherence in terms of both the ability to rely on English precedents and experience and the facilitation of pan-jurisdiction publication installs the need for a second thought before alternative reforms are recommended and introduced. The aim is to recommend reforms that in some respects go beyond those set out in the Defamation Act 2013, and by doing so see the quality of the English law ‘further improved by Northern [Irish] reforms so that that [NI] can become known as a benchmark for other common law jurisdictions’ (Google; Jeffrey Dudgeon). Hence, it is recommended that the Northern Ireland Assembly contemplate and then legislate for reforms that build on but do not merely emulate the English law in every respect.

2.07 In the main, therefore, it is recommended that reforms directly equivalent to those set out in the 2013 Act should be legislated by the Northern Ireland Assembly. Where alternative reforms are recommended, this is done with a view to ensuring that in future Northern Ireland possesses a defamation law that is more easily understood and deployed by all those citizens who may find it necessary to bring or defend defamation proceedings. Ultimately, the goal of this reform initiative must be to ensure that Northern Ireland possesses a law that provides access to justice, protection for reputation, and freedom of expression – all rights underpinned by the European Convention on Human Rights – for all citizens. If that can be achieved, then - far from becoming an ‘international pariah’,<sup>9</sup> or suffering ‘a stain on [its] reputation... [by] replac[ing] London as the libel tourist capital [and] clinging to archaic, unbalanced and uncertain common law’<sup>10</sup> - Northern Ireland might stand in future as an exemplar of enlightened defamation law for the common law world.

### **Reform of Defamation Defences**

2.08 There are three main common law defences in Northern Irish defamation law: justification, honest comment, and responsible publication on a matter of public interest (*Reynolds* privilege). Beyond these, a further category of defence encompasses a range of “privileged” forms of speech. The Defamation Act 2013 revised and recast the main defences, and clarified and expanded the range of privileges available in English law. On account of its interplay with the exclusion of jurisdiction in many cases involving actions against persons other than the author, editor or publisher of material (section 10), the particular defence for the operators of websites (section 5) is considered in the following section. The NILC consultation invited responses on a series of questions concerning the possible emulation in Northern Ireland – whether in whole or in part – of the reforms to defences made in English law.

#### *Defence of Justification (Truth)*

2.09 As far as statements of fact are concerned, the primary defence to a claim for defamation is - and should be - that the allegations made are true. In line with this, the common law defence of “justification” has been a mainstay of defamation.<sup>11</sup> The essence of the defence of justification is that the statement complained of is proven to be “substantially true”. It places a burden on the defendant-publisher to prove that ‘the main

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<sup>9</sup> Rutherford, ‘Defamation laws decision could make Northern Ireland an “international pariah”’, *Belfast Telegraph*, 20 September 2013 (citing Lord Black).

<sup>10</sup> 746 HL Deb GC334, 27 June 2013 (per Lord Lester).

<sup>11</sup> The common law has been refined over time by way of statutory amendment – see, for example, s.5 of the Defamation (Northern Ireland) Act 1955.

charge, or gist, of the libel' is true.<sup>12</sup> This is an objective requirement: it is the facts as they were, not the facts as they appeared to be to the defendant or to some other observer that must be proven.

2.10 While the defence is simple in concept, proving the substantial truth of an imputation in practice - even on the balance of probabilities - is not always straightforward. There are two main problems. The first problem is evidential. As Lord Keith noted in *Derbyshire County Council v Times Newspapers Ltd*, 'quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available'.<sup>13</sup>

2.11 The second problem is more technical, and arises from the fact that any given statement might be interpreted in different ways so as to make more or less strong allegations against the subject of the publication. For example, to allege that a person has "avoided taxes" might be understood as meaning that he or she has done something corrupt or criminal, while more strictly understood it connotes only legitimate behaviour that falls some way short of illicit "tax evasion". The law requires that a "single meaning" should be selected by the court from among those meanings that are semantically possible, and that the case should be determined on the basis of that interpretation alone. Hence, a highly complex set of rules has developed in the law regarding the determination of meaning and the pleading of the defence of justification in light of the chosen interpretation of the words at issue.<sup>14</sup>

2.12 Section 2 of the Defamation Act 2013 abolished the pre-existing common law defence in England and Wales, and replaced it with a statutory alternative. It provides that:

(1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.

(2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.

(3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.

(4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed.

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<sup>12</sup> *Sutherland v Stopes* [1925] AC 47 (HL); *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, at [34].

<sup>13</sup> [1993] AC 534, at 548.

<sup>14</sup> See Parkes and Mullis (eds), *Gatley on Libel and Slander* (12<sup>th</sup> edn, London: Sweet & Maxwell, 2013), at [11.5]-[11.16].

- 2.13 The Explanatory Notes to the 2013 Act emphasise that the new provision, in large part, emulates the existing law set out in *Chase v News Group Newspapers Ltd*.<sup>15</sup> The word “imputation” is used rather than the more common alternatives of “meaning” or the “words or statement complained of”. This is more apt as it encompasses not just natural and ordinary meanings but also meanings that can only be conveyed by inference. Subsections (2)-(4) reproduce section 5 of the Defamation Act 1952 (the equivalent in English law of section 5 of the 1955 Act). In addition, the language in subsection (3) is slightly different to the current Northern Irish law in that it provides that the defence shall not fail so long as the words not proved true do not *seriously harm* - as opposed to *materially injure* - the plaintiff’s reputation. This reflects the change in section 1 of the 2013 Act, and may involve a marginal easing of the defence. Arguably, however, the shift in nomenclature to that of “truth” was the most significant dimension of this restatement of the common law defence.
- 2.14 The NILC consultation paper noted a range of wider options for reform in this context.<sup>16</sup> It sought responses, however, only on the question of whether it would be desirable for a rule equivalent to section 2 of the 2013 Act, the “defence of truth”, to be introduced into Northern Irish law. Among those respondents who replied to this specific question, there was general endorsement of the view expressed in the consultation paper that such reform is desirable.
- 2.15 Therefore, it is recommended that a provision equivalent to section 2 of the Defamation Act 2013 should be included in a bill brought to the Northern Ireland Assembly. This recommendation is reflected in clause 2 of the draft bills included as Appendix 1 and Appendix 2 to this report.
- 2.16 A further reform option that was considered in chapter 5 of the NILC consultation paper – withdrawal of the “single meaning rule”, coupled with the introduction of a bar to the bringing of claims where a publisher has made a correction or retraction promptly and prominently - would also have a significant bearing on future litigation involving the defence of justification. This option is considered separately [see chapter 3].

#### *Defence of Honest Comment (Honest Opinion)*

- 2.17 An important distinction in the law of defamation is that between statements of fact and expressions of opinion or comment. As regards expressions of opinion or comment, the primary defence to a claim for defamation is that of “honest comment” or “honest opinion”.<sup>17</sup> The idea is that it is socially desirable that any

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<sup>15</sup> [2002] EWCA Civ 1772.

<sup>16</sup> For example, a shifting of the burden of proof, the introduction of a rule equivalent to that set out in subsections (2) to (4) that would apply to different “shades of meaning”, or the introduction of an Australian-style defence of “contextual truth”.

<sup>17</sup> The traditional name for the defence – ‘fair comment’ – has been gradually superseded. In *Spiller v Joseph* [2010] UKSC 53, the Supreme Court preferred ‘honest comment’ at [117]. That nomenclature had previously

person should be able to comment freely, even harshly, upon matters with which members of the public generally are legitimately concerned, so long as the comments are based on fact and made in good faith. Hence, the defence of honest comment is intended to promote vigorous free speech, so that ‘a critic need not be mealy-mouthed in denouncing what he disagrees with... [but rather is] entitled to dip his pen in gall for the purposes of legitimate criticism’.<sup>18</sup> Over time, however, the defence has been less effective in promoting free speech than might have been hoped. This is almost certainly due to the high degree of legal technicality that has grown up around its various components. The defence of honest comment is the most complex – and the least understood - of the main defences.

2.18 The defence of honest comment applies where the statement complained of comprises a comment or the expression of an opinion, and not an independent assertion of fact. The essence of the defence is that reasonable members of the audience for the publication can appreciate that what has been published is “merely” the view of the publisher (that is, that the statement is “recognisable as comment”). It applies where a publisher-defendant has drawn a defamatory inference from underpinning facts known to him or her. It entails that no liability arises where (a) the underpinning facts are true, (b) the underpinning facts were alluded to in the publication, (c) the issue discussed is a matter of public interest, (d) the inference is one that could have been drawn by an honest person (objective dimension), and (e) the opinion was not published maliciously (that is, it was genuinely believed by the publisher – subjective dimension). Distinguishing statements of fact from comments or opinions has proven difficult for the courts,<sup>19</sup> and the requirements of the defence have arguably been interpreted in an overly technical fashion.

2.19 In the case of *Spiller v Joseph*, the Supreme Court restated the features of the defence and offered a clear explanation of its origins, its rationale and its purpose.<sup>20</sup> The Supreme Court strongly emphasised “recognisability as comment” as the key aspect of the defence. Hence, the underlying principle would appear to be that the airing of one’s view is not the same as asserting a fact, and – importantly - it is not treated as such by those to whom it is communicated. People understand straightforward allegations of fact differently to how they understand statements of what another person supposes to be the facts. Where facts only are stated, truth is asserted; readers are not invited to demur. Where defamatory opinion is concerned, provided the inferential nature of the assertion is clear and the facts on which the opinion is based are made available, the possibility of reasonable readers being misled by the expressed viewpoint does not arise in the same way.

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been adopted by the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL), at 165 and by the Privy Council in *Panday v Gordon* [2005] UKPC 36.

<sup>18</sup> *Tse Wai Chun Paul v Albert Cheng* [2000] HKCFA 86, at [20] (per Lord Nicholls).

<sup>19</sup> Compare the treatment of the publication involved by the High Court and the Court of Appeal in *Convery v Irish News* unreported NIQB, 8 February 2007 and [2008] NICA 14, and *British Chiropractic Association v Singh* [2009] EWHC 1101 (QB) and [2010] EWCA Civ 350.

<sup>20</sup> [2010] UKSC 53. The leading speech was given by Lord Phillips.

2.20 As noted, the defence has been less effective in promoting free speech than might have been hoped. This is almost certainly due to the high degree of legal technicality that has grown up around its various components. The Explanatory Note to the Defamation Bill proposed by Lord Lester expressed this view succinctly, arguing that honest comment suffers from ‘complex case law limiting [its] practical value’.<sup>21</sup> Yet, the rationale that underpins the honest comment defence is such that, perhaps especially in the context of online and scientific discussions, the circumstances in which it is available should be as clear as possible.<sup>22</sup>

2.21 It can be inferred that the Westminster Parliament, when recasting the defence in the Defamation Act 2013, did not consider the restatement by the Supreme Court in *Spiller* to be sufficient to make the defence more useable going forward. Section 3 of the 2013 Act recast and abolished the common law defence in England and Wales. It made one obvious and apparently significant change: the removal of the requirement that the comment be on a matter of public interest. It also appeared to make a less obvious, but also potentially significant change relating to the knowledge of underpinning facts that the defendant-publisher is required to show. The text of the provision reads as follows:

(1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.

(2) The first condition is that the statement complained of was a statement of opinion.

(3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.

(4) The third condition is that an honest person could have held the opinion on the basis of—

(a) any fact which existed at the time the statement complained of was published;

(b) anything asserted to be a fact in a privileged statement published before the statement complained of.

(5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.

(6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person (“the author”); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.

(7) For the purposes of subsection (4)(b) a statement is a “privileged statement” if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—

(a) a defence under section 4 (publication on matter of public interest);

(b) a defence under section 6 (peer-reviewed statement in scientific or academic journal);

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<sup>21</sup> *Explanatory notes to the Lester Bill*, at [62].

<sup>22</sup> The need for the law to accommodate new forms of speech online was explicitly recognised in *Spiller v Joseph* [2010] UKSC 53, at [99] (per Lord Phillips MR) and [131] (per Lord Walker). On its importance in the context of scientific discussions, see Joint Committee on the Draft Defamation Bill, HL Paper 203 & HC 930, at [47].

(c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);

(d) a defence under section 15 of that Act (other reports protected by qualified privilege).

(8) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.

The NILC consultation paper considered the new statutory version of the honest comment defence (relabelled “honest opinion”) that was set out in section 3 of the Defamation Act 2013. It noted the divergences of the defence from its common law predecessor.<sup>23</sup>

2.22 The consultation paper also highlighted a number of further issues that might warrant reform of the defence, whether this involved the revision of the existing common law variant or the preferment of an alternative new statutory wording over that set out in section 3 of the 2013 Act. This discussion resulted in the posing of a series of specific and distinct consultation questions. The first of these was straightforward: whether a provision equivalent to section 3 of the 2013 Act should be introduced into Northern Irish law, or whether it would be preferable for the common law to be retained. The remaining questions each then focused attention on the further aspects of the discussion offered in the NILC consultation paper and the wider revisions that the discussion suggested might be desirable.

#### Introduction of a statutory defence equivalent to section 3

2.23 The general view on the first question among respondents to the NILC consultation was that introduction of a new statutory version of the defence emulating section 3 of the Defamation Act 2013 was the preferable option. A significant proportion of the respondents to the NILC consultation went further, suggesting that for reasons of consistency between the laws of Northern Ireland and England and Wales a new statutory variant should not differ in any respect. Such respondents emphasised that full coherence with the English statute was desirable as in this complex area divergence should be avoided (e.g. BBC). A provision that would achieve (only) this goal is included as clause 3 in the Bill set out in Appendix 2 to this report.

2.24 The benefits of revising Northern Irish law so as to provide a new statutory version of the honest opinion defence that is similar to section 3 of the Defamation Act 2013 are clear. It is difficult to demur from the aspiration ‘to strip out unnecessary technical difficulties and make the renamed defence... user-friendly... [to] update and simplify... clarifying what the defendant must prove... and stating the elements of the defence in

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<sup>23</sup> The consultation paper concurred with the view that the “public interest criterion” in the common law defence could be safely excised. It expressed some measure of concern regarding the shift in the knowledge required of the underpinning facts on which a comment might be based, but suggested that the practical importance of this change may prove to be limited.

clear terms'.<sup>24</sup> It is also considered, however, that section 3 can and should be further improved and/or clarified in a number of respects if and when the Northern Ireland Assembly moves to pass new legislation on defamation.

#### Inferences of verifiable fact

- 2.25 The NILC consultation paper also asked whether it should be expressly clarified that the defence of honest opinion extends to encompass “inferences of verifiable fact” from underpinning facts.<sup>25</sup> The small number of respondents who replied to this specific question considered either that it is already clear that inferences of verifiable fact are covered by section 3 of the Defamation Act 2013 such that there was no need to make especial note of this intention in any new statutory provision (e.g. MLA; News Media Association),<sup>26</sup> or that minor drafting changes could be included to confirm this intention (e.g. Neil Farris).
- 2.26 It can be agreed that the better view is that the section 3 defence does already extend to cover inferences of verifiable fact. As the editors of *Gatley on Libel and Slander* highlight, however, this is an arguable point. The issue is described in that leading text as one that is ‘ripe for judicial determination’, although it is manifestly clear that their view is that inferences of verifiable fact should be covered by honest opinion.<sup>27</sup> Since the coming into force of the 2013 Act, one judge in the English High Court has recognised that this is a ‘potentially important issue’.<sup>28</sup> A second judge has sought to affirm his own previous view, contrary to the positions expressed by some respondents and in *Gatley*, that such inferences should be defensible by way of the defence of truth / justification only. In that light, it is complacent to expect that the law will necessarily continue in this direction without further legislative prompting. Neither is it sensible to maintain that Northern Irish law should revert to the alternative position – where inferences of verifiable fact fall outside the honest opinion defence – if and when English judges occasioned such a misstep.
- 2.27 It would be sensible in terms of the clarity of the law going forward, therefore, for the coverage of inferences of verifiable fact by the defence of honest opinion to be established by statute in Northern Ireland. This

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<sup>24</sup> *Explanatory notes to the Lester Bill*, at [68].

<sup>25</sup> NILC consultation paper, above n 1, Q8.

<sup>26</sup> It was also the view of the authors of the NILC consultation paper that this position was intended to be reflected in section 3 of the 2013 Act. The Explanatory notes to the Act state that ‘as an inference of fact is a form of opinion, this would be encompassed by the defence’ (at [21]). There is no distinction drawn between inferences of verifiable and inferences of unverifiable fact. This is certainly suggestive of an inclusive approach, although such a note can hardly be determinative of the question of whether the courts will in future take one view or the other on the question of whether that dichotomy provides the fault line between opinion and fact.

<sup>27</sup> Parkes and Mullis (eds), *Gatley*, above n 14, at [12.10]. It was stated there that, ‘if the ability of an audience to recognise words as comment is key, then – as per the views expressed by counsel in *Singh* - it is not obvious why the verifiability or otherwise of the inference should be important’.

<sup>28</sup> *Barron MP v Collins MEP* [2015] EWHC 1125 (QB), [16]-[17] (per Warby J.).

confirmation would remove one level of complexity in the deployment of the defence. A sub-clause confirming this conclusion is included as clause 3(8) in the draft bill set out in Appendix 1 to this report. It provides that:

(8) For the purposes of subsection (2), a “statement of opinion” can include any inference of fact.

Opinions based on facts that were “reasonably believed to be true”

- 2.28 A further question posed by the NILC consultation paper was whether the honest comment defence should explicitly extend to cover inferences drawn from facts that were ‘reasonably believed to be true’ at the time of publication.<sup>29</sup> At present, one of the five elements of the defence at common law is that the comment must be based on underpinning facts that are either true or protected by privilege. Where reliance is placed on “true” underpinning facts, their truth must be demonstrated by the defendant-publisher. If the truth of underpinning facts cannot be demonstrated, then the defence will fail.
- 2.29 The NILC consultation paper suggested that the basis for comment should perhaps extend also to include facts that the defendant-publisher “reasonably believed to be true” at the time of publication. That is, that the defence should be available when the factual basis for opinion expressed was either true, privileged, or reasonably believed to be true.
- 2.30 It explained that this is ‘a matter of no small importance’. Such a change might ‘do much to alleviate the predicament of social media commentators’.<sup>30</sup> Such individuals commonly rely on facts published by someone else. It is clear that what can be expected of people who were traditionally part of the audience for linear media should be very much less than what is expected of those writing for mainstream media. It should be perfectly acceptable for a person to tweet on the basis of something watched on *Newsnight* or the *Channel 4 News*, or read in *The Times* or on the *Guardian* website, even if what has been published by such mainstream media organisations ultimately proves to have been false and irresponsibly published. It is certainly reasonable that this should occur given the legitimate expectation that mainstream media publishers - at least those possessing a reputation for quality journalism - will have exercised a degree of professionalism and legal compliance in developing their output. At present, the social media commentator is in effect asked to prove the section 4 public interest defence by proxy. This is an impossible feat. That such difficulties would be faced was recognised by the Government during the development of the Act.<sup>31</sup>

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<sup>29</sup> NILC consultation paper, above n 1, Q9.

<sup>30</sup> It can also be seen that this change would very readily accommodate situations such as that faced by science-writer Simon Singh in *British Chiropractic Association v Singh* [2010] EWCA Civ 350.

<sup>31</sup> Ministry of Justice, *Government’s Response to the Report of the Joint Committee on the Draft Defamation Bill* (Cm 8295, 2012), at [41].

- 2.31 The consultation paper explained further that the introduction of such extended protection would not mean that the subject of a libel would have no avenue to seek redress. In the modern media environment, blogposts, tweets, links, likes and so on are the reasonably foreseeable result of the initial publication. As such, all harm caused by secondary publication is already attributable in law to the original publisher. An individual's Article 8 right to reputation would be adequately protected. It might be argued that the scenarios envisaged could equally be protected under the revised version of the section 4 defence of publication on a matter of public interest. This is only partially true. Such protection would be available only where comment was offered on a matter of public interest, and where the higher burden of reasonableness (as opposed to honesty or good faith) was met as regards the tenor of the comment itself. It is not obvious how such limitations of the protection envisaged would be justified.
- 2.32 The consultation paper also noted that this reform was recognised as an option by the Ministry of Justice during the development of the Defamation Act 2013, but that it had decided not to proceed in this regard 'in the face of majority support for this development among consultees'.<sup>32</sup> The reasons given by the Ministry of Justice in this respect were limited and unpersuasive.
- 2.33 In terms of responses to the NILC consultation, there was only a small number of responses to this specific question. The viewpoints of those returned were conflicting. The MLA and the BBC considered consistency of approach with English law to be highly desirable for its avoidance of additional complexity. In contrast, other respondents considered that the law could reasonably be extended in this way (eg. Libel Reform Campaign and referencing responses; Neil Farris; News Media Association). Here, as elsewhere, it seems highly preferable to exercise the option to introduce better law rather than emulate alternatives that are less desirable in themselves merely for the sake of consistency.
- 2.34 For these reasons, it is recommended that the bases upon which an honest person could have held the opinion complained of should be extended to include facts that the defendant-publisher "reasonably believed to be true" at the time of publication. This reform would remove a significant measure of practical difficulty in the deployment of the defence. To achieve this goal, an additional element is introduced into clause 3(4) in the draft bill set out in Appendix 1 to this report. That sub-clause provides that:

(4) The third condition is that an honest person could have held the opinion on the basis of—

...

(c) any fact that the defendant reasonably believed to be true at the time the statement complained of was published.

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<sup>32</sup> NILC consultation paper, above n 1, at [3.28].

## Comment on privileged facts published contemporaneously

- 2.35 One element of the section 3 defence set out in the Defamation Act 2013 was identified in the NILC consultation paper as an error, and one attributable to ‘a quirk of the legislative history of the Act’.<sup>33</sup> This is the fact that the language of section 3(4)(b) – specifically, the use of ‘before’ - would appear to preclude the defence of a comment on privileged facts that was published *contemporaneously* with the privileged statement. There was a mixture of views as to whether it would be desirable for any Northern Irish version of the statutory defence to allow opinions published contemporaneously with privileged statements to benefit.<sup>34</sup> The fault line between respondents’ views lay not over whether such a change would be positive – this was agreed by all respondents – but over whether it is desirable for the NI legislature to diverge *in any way* from the provisions of the 2013 Act.
- 2.36 Here, as elsewhere, it seems highly preferable to exercise the option to introduce better law rather than emulate alternatives that are less desirable in themselves merely for the sake of consistency. To achieve this goal, the language of clause 3(4)(b) in the draft bill set out in Appendix 1 to this report has been revised relative to section 3(4)(b) of the Defamation Act 2013. That sub-clause provides that:

(4) The third condition is that an honest person could have held the opinion on the basis of—

...

(b) anything asserted to be a fact in a privileged statement published before or at the same time as the statement complained of;

...

## Interplay between clause 3 and clause 4 defences

- 2.37 The NILC consultation paper included extended discussion concerning the interplay between the section 3 and section 4 defences as set out in the Defamation Act 2013. This discussion centred on the desirability of the extension of the section 4 defence relative to the common law antecedent so as to cover not only statements of fact but also comments and opinions. This discussion included consideration of the various elements of those sections that provide for interplay between them. It was recognised that the innovation in section 4 had been introduced in order to avoid complexity and under-coverage in the deployment of section 3. The consultation paper set out an alternative scheme – which included various of the revisions to section 3 set out

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<sup>33</sup> NILC consultation paper, above n 1, at [3.36].

<sup>34</sup> NILC consultation paper, above n 1, Q10.

above - by which it was considered that such interplay might be made conceptually clearer. It consulted on the desirability of introduction of that alternative.<sup>35</sup>

2.38 The question regarding the inter-relationship between the section 3 and section 4 defences saw responses that sought generally to affirm the approach adopted in the 2013 Act. While some respondents recognised the potential benefit of the approach proposed (e.g. MLA; Neil Farris; BBC; NMA), others considered the suggested approach an ‘unnecessary complication’ (Libel Reform Campaign). In light of these responses, introduction of the further revisions to the two sections that had been mooted in the consultation paper is not recommended here. The refinements to clause 3 that have been recommended for introduction in Northern Irish law (see above) should have the result that the practical difficulties in deploying that defence will be significantly alleviated. Hence, the potential that very difficult questions that have been created by the extension of section 4 of the Defamation Act 2013 to cover opinions – such as whether it could be possible for a defendant reasonably to believe that the publication of honestly held but highly aggressive and vituperative opinion about a person was in the public interest – will not arise before the Northern Irish courts. Defendants here could simply revert to the augmented version of the section 3 defence.

#### *The “Public Interest Defence” / Reynolds Privilege*

2.39 Of the three main defences, that of responsible publication on a matter of public interest (*Reynolds* privilege) is of most recent vintage. It was developed by an essentially unanimous House of Lords from common law qualified privilege in the case of *Reynolds v Times Newspapers Ltd*.<sup>36</sup> It recognised that, in the democratic polity, it is important to accept that despite best endeavours, false statements of fact – or at least statements that cannot be proven to be true - may sometimes be published. The defence provides that where the subject matter of the publication is a matter of public interest, and the publisher has acted responsibly in preparing the publication no liability in defamation will ensue. Giving the leading speech in *Reynolds*, Lord Nicholls set out a non-exhaustive list of ten factors relevant to the assessment of whether publication had been responsible.

2.40 In England and Wales, the transposition of the *Reynolds* privilege into statutory form in section 4 of the Defamation Act 2013 has seen a notable change, at least in terms of form.<sup>37</sup> There has yet been no case in which the section 4 variant of the defence has been deployed, but it is widely expected it will be interpreted broadly in keeping with the common law *Reynolds* privilege. One significant divergence can be noted: the extension of the new form “public interest” defence to cover opinions as well as statements of fact.

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<sup>35</sup> NILC consultation paper, above n 1, Q11.

<sup>36</sup> [2001] 2 AC 127.

<sup>37</sup> Consider the lengthy discussion on the implementation of the defence in the NILC consultation paper, above n 1, at [3.40]-[3.58].

2.41 The NILC consultation paper noted the conceptual awkwardness of the extension of the defence to opinions, and mooted an alternative approach that would clarify the relationship between the section 3 and section 4 defences. The consultation paper then posed questions regarding whether a provision equivalent to section 4 of the 2013 Act should be adopted in NI, and if so whether this should apply to opinions as well as statements of fact.<sup>38</sup>

2.42 The unanimous view expressed in responses to these consultation questions was that such a reform was necessary, and that its form should emulate the English Act. As noted above, therefore, it is not recommended here that the suggested revisions to the two defences in this respect should be introduced into Northern Irish law. It is expected, instead, that the proposed revisions to the proposal for a Northern Irish version of the honest opinion defence set out in clause 3 of the Bill included as Appendix 1 to this report will see that defence deployed in preference to the clause 4 defence in cases where the identified conceptual awkwardness might otherwise cause unnecessary complexity. The recommendation that the Northern Ireland Assembly should enact a provision equivalent to section 4 of the Defamation Act 2013 is reflected in clause 4 of the draft bills included as Appendix 1 and Appendix 2 to this report. That clause provides as follows:

(1) It is a defence to an action for defamation for the defendant to show that—

(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

(4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

(6) The common law defence known as the Reynolds defence is abolished.

#### *Extension and Clarification of Privileges*

2.43 The fourth category of defence is that of “privilege”. Privilege applies where a person has published a statement on a privileged occasion. It can be “absolute”, such as when a person gives evidence in court or speaks during

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<sup>38</sup> NILC consultation paper, above n 1, QQ12-13.

Parliamentary debate, or “qualified”. Qualified privilege can be defeated by proof of “malice”, meaning that the publisher did not themselves believe the facts stated or was motivated by ill-will. Variants of qualified privilege have been introduced by statute over time, while others are derived from the common law. Common law privilege rests upon a reciprocal duty on the publisher and an interest held by the recipient of the publication. Among a wide range of covered communications are the provision of employment references, responses to inquiries about crime, and responses to inquiries as to credit.<sup>39</sup> A wide range of further reports are protected by a number of statutes, and in particular by Schedule I to the Defamation Act 1996.<sup>40</sup> Some variants of qualified privilege require that the defendant-publisher is willing to publish a statement by way of explanation or contradiction.

2.44 The Defamation Act 2013 extended the range of privileges in England and Wales in two ways.<sup>41</sup> First, in section 6 it introduces a new form of privilege applicable to statements published in peer-reviewed scientific or academic journals. Secondly, in section 7 it refines and extends a number of pre-existing statutory privileges.

2.45 The consultation paper noted the susceptibility of some privileges to challenge by reference to the Convention-protected right to reputation,<sup>42</sup> the essential problem being that their blanket nature may not allow for any assessment of the relative strength of the competing interests in reputation and freedom of expression in a given case. When their bright-line requirements are met, privileges accord a presumptive priority to the Article 10 ECHR interest. Whether proof of malice can in many circumstances properly encapsulate the Article 8 right to reputation on the facts of an individual case is a moot point.

2.46 Section 6 introduced a new statutory privilege for statements published in peer-reviewed scientific or academic journals. The NILC consultation paper affirmed that much scientific and academic speech is highly important, and its suppression due to the unwarranted defamation chill is a pressing social problem.<sup>43</sup> Hence, it recognised that ‘there is great merit in the goal of facilitating free speech in this context’.<sup>44</sup> It warned, however, that section 6 might simultaneously do ‘both too little and too much’.<sup>45</sup> On one hand, it offered protection only to limited forms of scientific speech and consequently would not have assisted any of the defendants in the notable scientific *causes célèbres* cases. On the other hand, the consultation paper pondered why it should be that the 2013 Act should not also afford protection to other, equally important, forms of public interest speech. Ultimately, the NILC consultation paper suggested that the section 6 privilege may

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<sup>39</sup> See generally, Parkes and Mullis (eds), *Gatley*, above n 14, ch.14.

<sup>40</sup> See generally, Parkes and Mullis (eds), *Gatley*, above n 14, ch.16.

<sup>41</sup> Sections 6 and 7(9) of the 2013 Act also apply in Scotland.

<sup>42</sup> NILC consultation paper, above n 1, at [3.61]-[3.63]. See also, Mullis and Scott, ‘The Swing of the Pendulum: Reputation, Expression and the Recentering of English Libel Law’ (2012) *Northern Ireland Legal Quarterly*, 63(1), 27-58.

<sup>43</sup> Joint Committee on the Draft Defamation Bill, HL Paper 203 & HC 930, at [47].

<sup>44</sup> NILC consultation paper, above n 1, at [3.66].

<sup>45</sup> NILC consultation paper, above n 1, at [3.68]-[3.70].

amount to little more than a “sticking plaster approach” that ‘implicitly decries the difficulty of deploying the primary defamation defences’. Nevertheless, it concluded that ‘adoption of even this partial solution to the problem of the chilling effect on scientific speech must be seen as a positive step’.

2.47 The responses to the question posed by the NILC consultation paper on the possible extension to Northern Ireland of the qualified privilege for academic and scientific speech set out in section 6 of the Defamation Act 2013 were very strongly and unanimously of the view that a new privilege of that type is absolutely necessary.<sup>46</sup> Some such commentary also acknowledged the concerns expressed in the consultation paper. Hence, it is recommended that a qualified privilege applicable to statements published in peer-reviewed scientific or academic journals equivalent to section 6 of the Defamation Act 2013 should be introduced by the Northern Ireland Assembly. A provision to this effect is included as clause 5 of the draft bill included as Appendix 1 to this report (and as clause 6 in the alternative bill set out in Appendix 2).

2.48 Section 7 of the Defamation Act 2013 is a lengthy provision that makes a series of refinements of and extensions to pre-existing statutory privileges set out in the Defamation Act 1996.<sup>47</sup> The provision was described in the NILC consultation paper as ‘an exercise in reasonable housekeeping’, with its refinements and extensions of privilege being for the most part unproblematic.<sup>48</sup> The consultation paper reiterated, however, that cases may arise in which courts are asked to consider the extent to which the structure of a given privilege adequately permits the balancing of reputational and free speech interests.

2.49 The ‘modernisation’ in section 7 of the Defamation Act 2013 of various statutory privileges was considered by all respondents who expressed a view on the relevant NILC consultation question to be of immense importance.<sup>49</sup> Indeed, it was generally thought that ‘there is no good reason why these important provisions should not be extended to Northern Ireland’, and that ‘they represent prudent and careful extensions of privilege to publications which the media and others have a duty to disseminate in the 21st century for the benefit of all of Northern Ireland’ (MLA). It is recommended that a provision equivalent to section 7 of the Defamation Act 2013 should be passed into the law of this jurisdiction by the Northern Ireland Assembly. A

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<sup>46</sup> NILC consultation paper, above n 1, Q14.

<sup>47</sup> Section 7(1) amends section 14(3) of the Defamation Act 1996 to extend the absolute privilege applying to fair and accurate contemporaneous reports of court proceedings to essentially all domestic and international courts established under domestic laws or international agreements. Subsections (3)-(10) make a number of amendments to the range of qualified privileges set out in Part 2 of Schedule 1 to the 1996 Act that require the defendant-publisher to publish a reasonable letter or statement by way of explanation or correction when requested to do so. Various parts of section 7 also extend protections already afforded to fair and accurate copies of or extracts of certain types of documents also to fair and accurate summaries of those documents. Protections afforded to fair and accurate reports of various public proceedings in the UK and EU are extended to the reporting of equivalent events anywhere in the world. This includes the fair and accurate reporting of public meetings, press conferences and the proceedings of scientific or academic conferences and associated material held anywhere in the world.

<sup>48</sup> NILC consultation paper, above n 1, at [3.72].

<sup>49</sup> NILC consultation paper, above n 1, Q15.

provision that would meet that intention is set out as clause 6 of the draft bill included as Appendix 1 to this report (and as clause 7 in the alternative bill set out in Appendix 2).

### **Defence for Operators of Websites and the Intermediary Exclusion**

- 2.50 Sections 5 and 10 of the Defamation Act 2013 comprised further additions to an area of English defamation law that is already highly complicated.<sup>50</sup> The two provisions were intended in particular to ameliorate the legal predicament of online intermediaries. Section 5 offers a new defence for website operators regarding statements posted on their sites by third parties. To benefit from this defence, the intermediary is required to undertake a relatively burdensome role in liaising between the complainant and the primary publisher (as prescribed in regulations made under the Act).<sup>51</sup> Section 10 excludes the jurisdiction of the court in respect of claims brought against persons who were not the ‘author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher’.
- 2.51 The NILC consultation paper asked whether it would be desirable for the new defence set out in section 5 and the jurisdictional exclusion set out in section 10 of the Defamation Act 2013 to be introduced into Northern Irish law.<sup>52</sup> The NILC received a number of highly developed responses to these questions. All of the respondents who replied emphasised the desirability of a new defence in this area. Similarly, respondents who commented specifically on section 10 unanimously took the view that this was an important reform. Both provisions were thought to be consistent with the policy approach that ‘it is not for website hosts to police content on the internet’, and that instead it is appropriate for responsibility to be laid upon the primary originators of allegations (MLA).
- 2.52 While some commentators merely commended and supported section 5 of the 2013 Act, however, other of its supporters were simultaneously critical of its perceived inadequacy. For instance, Google decried the fact that ‘labyrinthine procedures’ introduced by the implementing regulations passed in England and Wales ‘place a complex and disproportionate administrative burden’ and ‘unreasonably short time-frames’ on website

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<sup>50</sup> See Scott, ‘An Unwholesome Layer Cake: intermediary liability in English defamation and data protection law’, in Mangan and Gilles (eds) *The Legal Challenges of Social Media* (Cheltenham: Edward Elgar, 2016).

<sup>51</sup> Defamation (Operators of Websites) Regulations 2013 SI 3028/2013.

<sup>52</sup> NILC consultation paper, above n 1, QQ16 and 17. The consultation paper also asked whether it should be a requirement for website operators to append a notice of complaint alongside statements that they leave up if such a defence was to be available. This suggestion was rejected by each of the small number of respondents who commented on this specific theme. It was suggested that the requirement could result in undue interference with third party publishers’ freedom of expression (Google; News Media Association; MLA), that it would involve the Northern Irish Assembly in ‘shaking a puny fist at the Internet’ (Neil Farris), and that it could generate ‘practical and technical’ issues of such a scale as ‘to make [adding] any such notice prohibitively complex and inappropriate’ (Google). Other respondents reiterated, as noted in the consultation paper, that this option had been contemplated and rejected in the passage of the Defamation Act 2013 (Libel Reform Campaign).

operators who hope to rely on the new defence. Such viewpoints align with problems identified in the NILC consultation paper. Their proponents called for a 'full review and redrafting of the implementing procedures to be adopted in Northern Ireland in order to provide website operators with a balanced and viable defence'. Other respondents suggested specific revisions before an equivalent to section 5 was introduced into Northern Irish law (Libel Reform Campaign). There was a strong sense among respondents to the NILC consultation that while sections 5 and 10 served a useful purpose, they do not go far enough in devising a workable scheme that both protects reputations online while also validating freedom of speech. The ambivalence of respondents to the NILC consultation is instructive, and justifies a thoroughgoing review.

- 2.53 Potential liability for intermediaries is created through an expansive common law definition of "publication". Online intermediaries have been drawn into this territory through analogies with traditional publishing contexts. The expansive definition of publication proffers easier access to redress for those aggrieved by online publication, but carries with it potentially profound impacts on free speech and the socio-political potential of the internet. Intermediaries have been induced to act as censors, taking-down content irrespective of its accuracy or importance. The extent to which this occurs is quite staggering.<sup>53</sup> Over time courts and policy makers have devised and introduced a complicated array of mitigating defences and jurisdictional exclusions for intermediaries as a necessary corollary of extended liability.<sup>54</sup> In English law, section 5 and 10 of the 2013 Act are only the most recent contributions to this matrix. The complexity of the area has been further exacerbated by the applicability of data protection law to the same questions.
- 2.54 It is arguable that the expansion of the concept of publication beyond primary authors, editors and publishers should be seen as a profound misstep in the development of the law, and one that should be rectified. Absent such broad rules on publication, defamation law might easily offer alternative means by which aggrieved parties could secure adequate redress in the form of the court-compelled take-down of content. The alternative means set out below would not extend liability to intermediaries, and would not place such persons in the role of censor. Broad rules on publication in the context of defamation law may already be superfluous in the context of the expanding remit of data protection law. Effective rules in the defamation context, however, might avoid this field being ceded entirely to this new legal technology which currently offers only blunt and inadequate means of balancing the individual and social interests in reputation and free speech.

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<sup>53</sup> Keller, 'Empirical Evidence of "Over-Removal" by Internet Companies under Intermediary Liability Laws', *Stanford CIS Blog*, 12 October 2015.

<sup>54</sup> See Ministry of Justice, *Draft Defamation Bill: Consultation Paper CP3/11* (Cm 8020, Norwich: TSO), [101]-[122]. See also, Joint Committee on the Defamation Bill [2010-12] *First Report: Draft Defamation Bill* (HL Paper 203 / HC930), [97]-[107].

*Publication for the purposes of defamation*

- 2.55 The general principles of defamation law dictate that, in the absence of a defence, the publisher of a defamatory statement will be strictly liable. A key question becomes that of which persons will be thought to have been so involved in the act of communication that liability should extend to them.<sup>55</sup> The originator of the statement should obviously be liable. So too, reasonably, should any person who is closely and directly involved in the statement's communication. In English and Northern Irish law, however, liability also extends to persons who have been only tangentially involved. Any person who participated in, secured, or authorised the publication can be liable,<sup>56</sup> although "mere facilitation" is not enough.<sup>57</sup> The correct approach is 'to focus on what the person did, or failed to do, in the chain of communication... to impose legal responsibility upon anyone under the common law for the publication of words it is essential to demonstrate a degree of awareness or at least an assumption of general responsibility'.<sup>58</sup> Courts have often found this requirement to be quite easily met however. Traditional service providers and intermediaries that have been drawn within the definition of publisher by the courts include printers,<sup>59</sup> retailers,<sup>60</sup> and libraries.<sup>61</sup>
- 2.56 In the new media environment, courts have had to grapple with the question of how far internet service providers and other online intermediaries – of whom there is a very significant range – can and should be assimilated to traditional publishers and made potentially liable for defamatory comment posted by others online. This has entailed extensive, and not always consistent, analogising by the courts as they have been presented with entities performing different types of online function.
- 2.57 The prospective liability of ISP hosts of online content authored and uploaded by third parties was considered in *Godfrey v Demon Internet*.<sup>62</sup> Morland J. held that an internet service provider is a publisher of material that it hosts (and hence is potentially liable unless it can establish a defence). Recently, a different view was taken by the Court of Appeal in *Tamiz v Google Inc.*<sup>63</sup> In that case, a defendant blogging platform (*Blogger.com*) had failed to remove anonymous comments posted on a blog promptly after notification of their existence and their purportedly defamatory nature. The Court of Appeal suggested that prior to notification the defendant had not been a publisher. Rather, it tended to view the ISP as a "mere facilitator". Following notification, the

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<sup>55</sup> See generally, Parkes and Mullis (eds), *Gatley*, above n 14, ch 6.

<sup>56</sup> See generally, *Watts v Times Newspaper* [1997] QB 650, at 670; *Bataille v Newland* [2002] EWHC 1692 (QB), [8]; Parkes and Mullis (eds), *Gatley*, above n 14, at [6.10].

<sup>57</sup> Parkes and Mullis (eds), *Gatley*, above n 14, give the example of the supplier of newsprint to a newspaper who is not liable for a libel contained in it.

<sup>58</sup> *Bunt v Tilley* [2006] EWHC 407 (QB), [21]-[22] (per Eady J).

<sup>59</sup> Parkes and Mullis (eds), *Gatley*, above n 14, note an old case in which a printer's servant 'whose business was only to clap down the press' was found to have participated in publication and was held liable – see [6.23].

<sup>60</sup> See, for example, *Emmens v Pottle* (1886) 16 QBD 354.

<sup>61</sup> See, for example, *Vizetelly v Mudie's Library* [1900] 2 QB 170. The Legal Deposit Libraries Act 2003 absolves certain libraries from liability in respect of some forms of content.

<sup>62</sup> [2001] QB 201. See, similarly, *Sadiq v Baycorp (NZ) Ltd* [2008] NZHC 403.

<sup>63</sup> [2013] EWCA Civ 68.

defendant became a publisher after it had had a reasonable time in which to act to remove the defamatory comments. The reasoning was that the defendant might be inferred to have associated itself with, or made itself responsible for, the continued presence of the material on the blog.<sup>64</sup>

- 2.58 Other scenarios in the new media context include the potential liability of ISPs that provide third party authors with access to the online platforms on which they post defamatory content, and of the providers of online search services. The former case was considered by the English High Court in *Bunt v Tilley*.<sup>65</sup> Eady J. concluded that in this context the position of the ISP 'is not analogous to someone in the position of a distributor... who might at common law... [be] regarded as having "published"'; rather, 'persons who truly fulfil no more than the role of a passive medium for communication cannot be characterised as publishers'.<sup>66</sup> This reading of the scenario has not been uncontested however.<sup>67</sup> The potential liability of the providers of online search services was considered by the English High Court in *Metropolitan International Schools Ltd v Designtecnica Corp.*<sup>68</sup> Eady J. concluded that there is no publication when a search returns snippets of possibly defamatory page content in its results. He assumed that such search providers have no control over the results and lack any knowing involvement in publication. This position also has been contested, notably in the courts of other jurisdictions where judges have been less forgiving of the purported "passivity" of search operators, and have preferred closer analogies with traditional contexts.<sup>69</sup>

#### *Balancing Reputation and Online Free Speech*

- 2.59 The upshot is that in both the traditional and the new media contexts, the breadth of the concept of publication poses very significant risks to freedom of speech. It generates scenarios in which the law of defamation can be utilised against persons who have very little knowledge of or interest in the accuracy or importance of the content of speech. Where recent decisions have limited the scope of the concept of

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<sup>64</sup> The position adopted by the Court of Appeal in *Tamiz* was criticised by the Hong Kong Final Court of Appeal following its review of international precedents in *Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2013] HKFCA 47. That court concluded that the host of an online publishing platform is clearly a subordinate publisher from the outset in that publication was the *raison d'être* of its service provision. Prior to notification, a host could rely on the defence of innocent dissemination. Following notification, a host could be liable if it failed to take all reasonable steps to remove the offending publication from circulation as soon as reasonably practicable (at [97]).

<sup>65</sup> [2006] EWHC 407 (QB).

<sup>66</sup> *ibid*, [37].

<sup>67</sup> See, for instance, Parkes and Mullis (eds), *Gatley*, above n 14, at [6.27]-[6.29].

<sup>68</sup> [2009] EWHC 1765 (QB).

<sup>69</sup> See, for example, *Trkulja v Google Inc* [2012] VSC 533 in which Beach J. noted that while a search engine might operate in an automated fashion from the moment a request is typed in, it will operate precisely as intended by those who own them and who provide the services. It was also emphasised that the mere fact that an entity's role is passive does not mean that it cannot be a publisher as such a conclusion would cut across principles which have formed the basis for liability in the newsagent/library type cases among others (at [27]). See also *A v Google New Zealand Ltd* [2012] NZHC 2352; *Yeung v Google Inc.* [2014] 4 HKLRD 493. Compare *Bleyer v Google* [2014] NSWSC 897 in which the conclusion was closer to the position adopted by Eady J. See further, Parkes and Mullis (eds), *Gatley*, above n 14, at [6.28].

publisher (and the “direction of travel” in English law is clearly towards narrowing the definition where possible), such judgments have been strongly criticised and remain prone to reassessment. A key problem is that defendants who are not the core originators of libels are unlikely to be in a position to defend a claim using one of the main libel defences, irrespective of the veracity of the allegation levelled, the legitimacy of the opinion expressed, or the degree of public interest in the matter raised. Neither are they likely to be willing to continue publishing material in the face of legal risk. This can only lead to “collateral censorship” that extends far beyond cases in which a complaint is justified:

when the state holds one private party A liable for the speech of another private party B, and A has the power to block, censor, or otherwise control access to B’s speech... this will lead A to block B’s speech or withdraw infrastructural support from B. In fact, because A’s own speech is not involved, A has incentives to err on the side of caution and restrict even fully protected speech in order to avoid any chance of liability.<sup>70</sup>

2.60 One tenable approach to this concern is to provide viable defences for intermediary – or secondary – publishers. Indeed, the obvious iniquity outlined here has prompted the development of a complex array of defences. These can be found in the common law, in the Defamation Act 1996, in European law, and – most recently in English law – in the Defamation Act 2013.<sup>71</sup> As the reform debate that culminated in the Defamation Act 2013 made plain, the protections currently afforded in Northern Irish law are unbalanced and inadequate. The respondents to the NILC consultation suggested that even section 5 and 10 of the 2013 Act have not workably ameliorated the predicament.

2.61 In summary, the inclusion of intermediaries within the definition of publisher and the array of defences introduced to compensate for this overbreadth constructs a complicated “layer cake” regime that an intermediary must understand if it is to avoid liability for acts perpetrated primarily by other parties. This can be challenging even for large commercial operators, let alone less sophisticated internet users. The website operator has little to gain by leaving up information when it has limited means to assess its importance or veracity.<sup>72</sup> Taking content down will invariably be a more straightforward – and hence more likely - response to a complaint than taking up the task envisaged by section 5 of liaising with the poster. Overall, this regime can only act to the detriment of free speech and of public knowledge of matters of importance.

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<sup>70</sup> Balkin, ‘Old-School/New-School Speech Regulation’ (2014) *Harvard Law Review*, 127, 2296-2342, 2309 (references omitted).

<sup>71</sup> See generally, Parkes and Mullis (eds), *Gatley*, above n 14, ch 6. The issue has been considered at the European Court of Human Rights, most notably in *Delfi AS v Estonia* [2013] ECHR 941. That judgment, on an application brought by a host news publisher regarding its liability for readers’ posted comments, concerned the issue of whether host liability breached Article 10 ECHR. The court considered that it did not. For incisive comment, see Cox, ‘*Delfi AS v Estonia*: the liability of secondary internet publishers for violation of reputational rights under the European Convention on Human Rights’ (2014) *Modern Law Review*, 77(4), 619-640.

<sup>72</sup> The impossibility of the predicament facing an intermediary in any assessment of the merits was recognised by HHJ Parkes QC in *Davison v Habeeb* [2011] EWHC 3031 (QB), [68].

- 2.62 If an intermediary is not actively involved in communicating an allegation, then arguably no action should be tenable. The description of intermediaries as “publishers” is a legal construction that is difficult to justify. Failure to take content down after it has been identified as problematic by a complainant does not amount to primary involvement in communicating a libel. It is not justified to assume that such decisions are tantamount to the adoption of the substance of the impugned content. There are other explanations as to why an intermediary might be slow to bowdlerise. The intermediary will appreciate that by taking down the content, it will be limiting the speech rights of the author and the audience for the posting. When this is done, the intermediary effectively becomes the judge over the rights of others. The intermediary can quite reasonably resile from the allocation of such a role.
- 2.63 Ultimately, it should be for a court to determine rights. As a matter of policy, intermediaries should not be asked to do so. When they are so asked, it can only be expected that they will proceed not on the basis of the merits of the allegation made, but rather by reference to the understandable desire to limit their own legal risk as swiftly and efficaciously as possible. There is no “balancing of rights” provided for under such a scheme; only a privileging of reputation over free speech.
- 2.64 Manifestly, the purpose underpinning the extension of liability to persons who have no view whatever on the substance of the allegations made by the originators of the contested statement is to allow the complainant to achieve redress. Primary publishers can be impecunious, absent, or anonymous such that action against them is likely to be ineffective. As the editors of *Gatley* put it, ‘the author (even if he can be traced) may not be worth suing’.<sup>73</sup> In such circumstances, extending liability to secondary publishers is one means by which defamed persons are enabled to achieve redress for harm to reputation and society guards against the pollution of the public sphere with misleading falsity. Action against an intermediary might be particularly effective if the claimant’s aim is to prevent further publication.
- 2.65 Practical difficulties in bringing a claim against one person, however, can hardly justify by themselves the extension of joint and several liability to relatively innocent parties. In the debate regarding the liability of online intermediaries, much effort has been dedicated towards the drawing of analogies with different “real-world” functions. Very little has been expended on the question of why any secondary publisher – whether traditional or online - should be made liable for the conduct of others, especially when the extension of liability impacts on freedom of speech in an unbalanced fashion. Yet, it is important not to throw the baby of protecting reputations out with the bathwater of over-complicated and under-protective laws. Reputations are excruciatingly vulnerable online. It may be that alternative approaches that do not create liability for intermediaries in defamation law could be simpler, but might yet allow adequate access to justice for claimants.

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<sup>73</sup> Parkes and Mullis (eds), *Gatley*, above n 14, at [6.25].

- 2.66 Complaints regarding online publication do not really lie against the conduct of the intermediary. The incipient movement - reflected both in section 5 of the 2013 Act and in judicial decisions on the concept of publication - to require complainants to pursue identifiable primary authors suggests an alternative approach. Section 10 of the 2013 Act also advocates a honing of the focus onto those primarily responsible for the publication. Such developments rather forcefully emphasise the question of whether relatively guiltless persons should ever be liable at all (and beg the question of why the recent legislation did not go further). During the libel reform debates, the Ministry of Justice contended that 'remov[ing] liability altogether... would present a serious impediment to claimants attempting to protect their reputation and secure the removal of defamatory material online'.<sup>74</sup> Yet this need not be the case.
- 2.67 The predicament of the complainant whose reputation has been unfairly besmirched by a will-o'-the-wisp publisher is, of course, the horror that prevented the Westminster Parliament from doing more. It is interesting to contemplate what solutions might have been suggested, however, if it had not been possible for legislators to analogise from the ascription of liability across the full chain of distribution of a publication in traditional, real world contexts. It is difficult to imagine that full liability would have been foisted upon relatively uninvolved parties. Other available options might serve claimants equally well.
- 2.68 If a plaintiff were unable so easily to persuade a secondary publisher to take down content through the (implicit) threat of legal action, he or she might be expected to go to court to seek an interim injunction to prevent further publication. Legal claims can be served across social media platforms.<sup>75</sup> If the primary publisher was unknown or insolvent and did not defend the action, then the rule in *Bonnard v Perryman* that leaves interim orders uncommon in defamation proceedings would not be deployed, and an order would almost certainly be made.<sup>76</sup> Should the primary publisher be unidentified, then this order could be made against a defined category of "persons unknown" in accordance with the principles set out by Sir Andrew Morritt VC in *Bloomsbury Publishing Group v News Group Newspapers*.<sup>77</sup> The operation of the "Spycatcher principle" would then serve effectively to bind by its terms any person on whom notice of the interim order was served.<sup>78</sup> Alternatively, on the assumption that a measure equivalent to section 13 of the 2013 Act was

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<sup>74</sup> Ministry of Justice, *Draft Defamation Bill: Consultation Paper CP3/11* (Cm 8020, Norwich: TSO), [114].

<sup>75</sup> See, for example, Rushton, 'Legal claims can be served via Facebook, High Court judge rules', *Daily Telegraph*, 21 February 2012.

<sup>76</sup> The rule provides that an application for an interim order in libel proceedings will not be granted where the defendant swears that he will plead a defence of justification, privilege or fair comment and the court is satisfied that the defence is not one which cannot succeed.

<sup>77</sup> [2003] EWHC 1205 (Ch). Such orders have been commonplace in the context of claims for misuse of private information. See also, *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628 (QB).

<sup>78</sup> In normal circumstances, orders made by the court – whether at the interim or final stages – bind only those persons to whom they are addressed. The *Spycatcher* principle interjects, however, so that any person on whom notice of an interim order is served will be – in effect – bound by its terms. This situation arises indirectly. As

introduced into Northern Irish law, the claimant might seek a summary judgment and a take-down order on the basis of that provision that could be presented to secondary publishers.<sup>79</sup> Very often, these options alone would meet the plaintiff's aspirations.<sup>80</sup> Ongoing publication would be brought to a swift conclusion. Where damages were sought and the primary publisher was unknown, the application for an interim injunction could be coupled with an application for a *Norwich Pharmacal* order against the intermediary to facilitate an action against the primary publisher.

2.69 The advantages of any such approach would be numerous. It would not require an intermediary to be made potentially liable in tort for something that it has little knowledge of or interest in. It would also absolve the intermediary of the need to reach any judgment on the merits of the impugned statement. The process could be every bit as speedy as the current informal mechanisms. For the first time, there would be a public record – of sorts – concerning the fact that material had been excluded from the public sphere. It might also be expected that even without legal compulsion, many intermediaries would continue to moderate their platforms in order to secure conducive forums for their users.<sup>81</sup>

2.70 In its brief consideration of this option, the Ministry of Justice raised two concerns.<sup>82</sup> First, it noted that any such approach 'could be costly for claimants'. This need not be the case, at least not prohibitively so. Certainly, such an approach would require more of a plaintiff than merely sending a scant notice of complaint to an online intermediary. It would require the plaintiff to make at least a *prima facie* tenable case before a court, including meeting the obligation on the plaintiff in *ex parte* proceedings to provide the court with free and frank disclosure of material which is likely to have a genuine bearing, one way or the other, on his or her chances of success.<sup>83</sup> In counterpoint, it can be noted that some measure of cost would deter some cynical claims that lack merit. Moreover, while bringing any matter to court carries its own costs, the relative simplicity of the action and the remedies envisaged in any such case would leave it feasible to allocate the function to a lower civil court than has habitually been the home of libel actions.

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explained by Gray J in *Jockey Club v Buffham* [2002] EWHC 1866 (QB), [26], 'the claimant... enjoys... a windfall consisting in protection pending trial against invasion of his right... by third parties. But the reason for the existence of that windfall is the need for the Court to be able to enforce, through the machinery of the law of contempt, the object for which the interlocutory injunction was granted'.

<sup>79</sup> Section 13 provides that 'where a court gives judgment for the claimant in an action for defamation the court may order... the operator of a website on which the defamatory statement is posted to remove the statement, or... any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement'. It is unclear whether an order under s.13 could be made to extend the effectiveness of an interim order in lieu of the *Spycatcher* principle. Presumably, this would be possible, and if so then preferable.

<sup>80</sup> In some circumstances, of course, the efficacy of an interim order can be limited – see, for example, *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB), [36].

<sup>81</sup> The desirability of such conduct would necessitate the continuation of the protection against self-conversion to the status of primary publishers afforded to such intermediaries by s.5(12) of the 2013 Act (see above).

<sup>82</sup> Ministry of Justice, *Draft Defamation Bill: Consultation Paper CP3/11* (Cm 8020, Norwich: TSO), [114].

<sup>83</sup> s.12, Human Rights Act 1998.

2.71 The Ministry of Justice also suggested that this approach ‘could add significantly to the volume of urgent applications for injunctions brought before the courts’. There is no reason to expect that the number of urgent actions requiring recourse to court would be prohibitive.

*Form of the proposed new rule*

2.72 Courts and policy-makers have been too ready to impose the burden of regulating online speech onto private intermediaries. In England, Northern Ireland and similar jurisdictions, the law of intermediary liability has become a highly complex and over-reaching construct in consequence. What might appear to be pragmatic solutions carry with them significant costs to freedom of expression and the public knowledge and engagement that it facilitates. It is suggested here that this over-expansion in the law of defamation should be rectified, and that a move to do so would burden plaintiffs in their desire to defend reputation only marginally. It would also reallocate the determinative function over rights questions away from private parties and back towards the proper public authorities.

2.73 Legal reforms that would give effect to the alternative approach suggested here could be designed in a number of ways. For instance, one might seek to redefine and narrow the concept of “publication” so as to focus solely on those immediately involved in communicating a statement. Perhaps the easiest way forward, however, would be to expand the jurisdictional exclusion that was set out for the purposes of English law in section 10 of the Defamation Act 2013. There would be no need to introduce a provision equivalent to section 5 of the Defamation Act 2013. Moreover, other existing defences that limit intermediary liability could be repealed, namely the common law defence and section 1 of the Defamation Act 1996. There would be no need to address the defences introduced under EU law (the E-Commerce Directive) as they apply only after domestic law attaches liability to online intermediaries and hence the dispensation they offer would become irrelevant in the Northern Irish context.

2.74 The realisation that domestic defences would be repealed does introduce a quirk, however, in that the section 10 rule on jurisdiction is parasitic on section 1 of the 1996 Act in terms of its definition of the author, editor and publisher of the statement complained of. For the purposes of Northern Irish legislation, the simplest way forward would probably be the repeal of the earlier provision coupled with the introduction of an expanded equivalent to section 10 that reintroduced the definitions of author, editor and publisher. A provision that would achieve this purpose is set out below:

10 Action against a person who was not the author, editor etc

(1) A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of.

(2) For the purposes of this section, “author”, “editor” and “publisher” have the following meanings, which are further explained in subsection (3)—

“author” means the originator of the statement, but does not include a person who did not intend that his statement be published at all;

“editor” means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and

“publisher” means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.

(3) A person shall not be considered the author, editor or publisher of a statement if he is only involved—

(a) in printing, producing, distributing or selling printed material containing the statement;

(b) in processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part I of the Copyright, Designs and Patents Act 1988) containing the statement;

(c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;

(d) as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;

(e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

(f) ... [see below]

In a case not within paragraphs (a) to (f) the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement.

(4) Employees or agents of an author, editor or publisher are in the same position as their employer or principal to the extent that they are responsible for the content of the statement or the decision to publish it.

(5) ... [see below].

(6) Section 1 of the Defamation Act 1996 is repealed insofar as it applies in Northern Ireland.

(7) The common law defence of innocent dissemination is abolished.

This provision is included as clause 10 in the draft Bill included as Appendix 1 to this report.

2.75 Manifestly, this proposal involves a very significant shift in the law of defamation. It might be expected that legal argument will be focused on the question of whether this or that form of service provider properly falls

within the definition of “editor” or “publisher”.<sup>84</sup> It may also be thought that in some respects this shift, even if desirable overall, is too generous to certain types of online intermediary.

- 2.76 One such category may be the online intermediary that hosts third party content where that content takes the form of third party “reviews” of goods or services provided by others, or otherwise solicits third party criticism of a person’s abilities, capabilities or other qualities. A clear illustration of this concern can be seen in the voluminous litigation surrounding the review website, ‘*Solicitors From Hell*’.<sup>85</sup> It may be argued, conversely, that the general principles established under the proposed clause 10 together with the option of seeking an order against persons unknown to secure the take-down of content is adequate to cope with the risks to reputation posed by such websites.<sup>86</sup>
- 2.77 In order to meet the potential for certain categories on intermediary actively to facilitate the causing of harm to reputation, a power for the Department of Finance to identify such categories as falling within the category of “publisher” has been included as clause 10(5) in the draft Bill found in Appendix 1 to this report:

(5) Regulations may—

(a) define a category of persons who, while not being an author, editor or publisher as defined in subsections (2) and (3), should nonetheless be treated as a publisher for the purposes of defamation law generally.

(b) make provision for an appropriate defence of innocent dissemination applicable to any person who is treated as a publisher in accordance with Regulations made under this subsection.

- 2.78 The second paragraph of this sub-clause recognises that it may be appropriate for provision to be made to reinstate a defence equivalent to section 1 of the Defamation Act 1996 applicable only to any category of intermediary drawn back within the ambit of defamation law by Regulations made by the Department of Finance. Should any such Regulations not include the provision of a defence of this type, it would remain open to such a defendant to rely on the defences set out in the E-Commerce Directive.
- 2.79 In addition, an important feature of section 5 of the Defamation Act 2013 is that it provides a measure of security for website operators that “moderate” third part content on their websites. Section 5(12) provides that the defence for website operators ‘is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others’. To maintain this protection under the revised scheme presented above, an additional element is included relative to the subsections drawn from section 1 of the Defamation Act 1996:

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<sup>84</sup> See, for example, *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628 (QB).

<sup>85</sup> The website generated a large amount of litigation (around 20 actions). For a summary of some of the factual circumstances involved, see *Law Society (and others) v Rick Kordowski* [2011] EWHC 3185 (QB).

<sup>86</sup> See *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628 (QB).

(3) A person shall not be considered the author, editor or publisher of a statement if he is only involved—

...

(f) in the moderation of statements posted on a website by others.

This element of the provision is included in clause 10 in the draft Bill included as Appendix 1 to this report.

#### *Data Protection Law: an Effective Alternative in Future?*

- 2.80 In discussions regarding intermediary liability, it must be appreciated that the availability – and increasing generosity - to complainants of the data protection regime arguably will in future leave intermediary liability in defamation law superfluous.<sup>87</sup> Data protection law will likely offer an alternative basis on which the activities of online intermediaries can be regulated. Nevertheless, at least for the present, under the data protection regime complainants remain obliged to wait on a more leisurely process to obtain any form of redress than that which was introduced by potential liability under libel law. Hence, the availability of some form of relatively speedy means of intervening to secure the take-down of false and defamatory material posted online under defamation law will continue to be a matter of importance.
- 2.81 For the time being, the relevant legislation remains the Data Protection Act 1998 (the domestic legislation that implemented Directive 95/46/EC, the “Data Protection Directive”).<sup>88</sup> This will be superseded in 2018 by the General Data Protection Regulation (GDPR) that was agreed by the European Parliament, the Council and the Commission in December 2015.
- 2.82 As regards “processing” by online intermediaries, a preliminary question will always be that of whether the intermediary acts as a “data controller”. The trend has been for online intermediaries to be drawn within the

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<sup>87</sup> See generally, Hurst and Gilbert, ‘Using and abusing the DP Act to protect reputation’ (2013) *Privacy Laws and Business UK Newsletter*, 66, 16; Erdos, ‘Data protection and the right to reputation: filling the “gaps” after the Defamation Act 2013’ (2014) *Cambridge Law Journal*, 73(3), 536-569.

<sup>88</sup> Data protection law is concerned with the preservation of the security of “personal data” stored in databases, and the protection of the privacy of the individuals on whom such data is processed and stored. Under the Act, a series of obligations are imposed upon the “data controller”. These obligations include the requirement that personal data should be processed fairly and lawfully, and that such data should be accurate and - where necessary - kept up to date. A data controller can also be required to block, erase and destroy inaccurate personal data and any expression of opinion based thereon. Various rights are accorded to the “data subject”. These include the right to have a data controller cease processing personal data where that processing is causing or is likely to cause unwarranted and substantial damage or distress to the data subject or some other person. In various respects, the Data Protection Act 1998 makes exceptional provision for matters pertaining to the “special purposes” of journalism, art and literature. In particular, section 32 establishes an exemption from most obligations under the Act for data controllers who process personal data for these purposes, and installs a bar against the prior restraint of publication under the Act.

category. Those involved in hosting and moderating third party publications almost certainly will be.<sup>89</sup> The position as regards online search engine service providers is also now clear. In *Google Spain SL v Agencia Espanola de Proteccion de Datos (AEPD) and Gonzalez*,<sup>90</sup> the national court wished to clarify the legal position in this regard by way of a preliminary reference. The Court of Justice concluded that because a search engine collects, retrieves, organises, stores and discloses personal information, it thereby engages in the processing of data. Hence, a search engine is the controller of the data it has processed.<sup>91</sup> As was demonstrated at the domestic level by the judgment of the Court of Appeal in *Vidal-Hall v Google*, the providers of internet access and browser services will often also be data controllers.<sup>92</sup>

2.83 For some years, data protection claims under section 15 of the 1998 Act were not extensively developed in the context of protecting reputation or privacy in respect of publication as it has not been possible speedily to obtain an injunction *to prevent* publication on an interim basis. In principle, however, interim orders requiring the take-down of content *after* publication has occurred can be obtained under data protection law (at least insofar as the journalistic exemption in section 32 does not apply).<sup>93</sup>

2.84 The utility of data protection law to complainants is likely to be enhanced by the General Data Protection Regulation (GDPR) that was agreed by the European Parliament, the Council and the Commission in December 2015. It would appear that the obligations placed on intermediaries under the Regulation will be more onerous and less protective of freedom of speech.<sup>94</sup> Once notified of complaints regarding third party content, intermediaries will be obliged to suspend access to that content while assessing the request's legal validity. Given the residual threat of significant fines for data protection breaches, no doubt, many will simply take down such material permanently. The intermediary may be required to provide contact details for the third

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<sup>89</sup> See, for example, Information Commissioner's Office, *Social Networking and Online Forums - When Does the DPA Apply?* (Wilmslow: ICO, 2013); *Law Society v Kordowski* [2011] EWHC 3185 (QB).

<sup>90</sup> Case C-131/12 [2014] QB 1022; [2014] EMLR 27. The factual background involved the continuing publication of personal data by a Spanish newspaper regarding a Mr Gonzalez in an electronic version made available on the internet. The material had originally been published in two printed issues in 1998. Mr Gonzalez argued that this information should no longer be displayed in the search results presented by the internet search engine operated by Google when a search was made of his name. Hence, the primary importance of the case concerns the "right to be forgotten", or more accurately the "right to be de-indexed". In November 2014, the Working Party under Article 29 of Directive 95/46/EC - an independent European advisory body on data protection and privacy - published guidelines in an effort to clarify the reach of *Gonzalez* - see Article 29 DP Working Party, *Guidelines on the Implementation of the Court of Justice of the European Union Judgment on "Google Spain and Inc v. Agencia Española De Protección De Datos (AEPD) and Mario Costeja González"* C-131/12, 14/EN WP225.

<sup>91</sup> Further, the court determined that 'if the data appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed, the information and links concerned in the list of results must be erased'. Thus, the ruling requires internet search engines to delete links to such material so that it is no longer reflected in search returns. This requirement would appear to apply as much to defamatory content as to private information - Article 29 DR Working Party, 15 and 17.

<sup>92</sup> [2015] EWCA Civ 311. The case concerned the implications for user privacy of the operation of the "Safari workaround" that used a combination of cookies to collect internet user data without consent.

<sup>93</sup> See *Law Society v Kordowski* [2011] EWHC 3185 (QB), [139]-[142].

<sup>94</sup> Keller, 'The General Data Protection Regulation's Notice and Takedown Rules: Bad news for freedom of expression but not beyond repair', *Inform*, 11 November 2015.

party to the complainant, while the third party may not receive any notice of - and no opportunity to object to – removal of the content.

### **Serious Harm Test**

2.85 Given the potential impact of defamation law on public communication, it is important that essentially trivial libels are not considered by the courts. To allow such claims to proceed would waste court resources, and may allow undue pressure to be brought to bear upon publishers (both in a given case, and more generally). The common law has developed two related tests designed to exclude such claims at an early stage. These are the *Jameel* “abuse of process jurisdiction”,<sup>95</sup> and the *Thornton* “threshold of seriousness”.<sup>96</sup> A further test was introduced in England and Wales as section 1 of the 2013 Act with the intention of ‘rais[ing] the bar for bringing a claim’,<sup>97</sup> albeit ‘modestly’.<sup>98</sup> The new statutory test includes a particular variant applicable to claims brought by ‘bodies that trade for profit’.<sup>99</sup>

#### *Serious Harm Test: General*

2.86 The NILC consultation paper stated that the option of introducing the section 1 serious harm test into Northern Irish law had been ‘perhaps the most contentious issue addressed during [its] pre-consultation discussions’. The paper highlighted concerns that the section 1 provision seemed likely to require empirical proof that harm had been caused or was likely to be caused by the statement complained of, and that this may have the undesirable effect of increasing the complexity and cost of proceedings. There was concern that mini-trials would take place on the issue of “serious harm” at a preliminary stage and that this would place a more onerous burden on plaintiffs irrespective of the merit of claims. Furthermore, given the diffuse and often intangible nature of harm to reputation, there was concern that it would be difficult in practice for plaintiffs to evidence the extent to which such harm had been caused.

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<sup>95</sup> The *Jameel* abuse jurisdiction was deployed by the NI Court of Appeal in *Ewing v Times Newspapers Ltd* [2013] NICA 74. It permits a defendant publisher to contend that there has been no “real and substantial tort”, and for the court – if it agrees - to strike out the claim as an abuse of process. This may be done where the defamatory sting is a trivial one, but also where the publication was to only a very small number of people, or where winning the case would not achieve any tangible advantage to the plaintiff in terms of vindication. Presumptively, the jurisdiction can also be exercised where there is a question as to whether the plaintiff was sufficiently identified.

<sup>96</sup> *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB).

<sup>97</sup> Explanatory Note to the Defamation Act 2013, at [11].

<sup>98</sup> 741 HLDeb GC423, 17 December 2012, (per Lord McNally).

<sup>99</sup> s.1(2). This rule is considered further in the following subsection.

- 2.87 The NILC consultation paper took into account the judgment of Bean J in *Cooke v MGN Ltd*, the first decision of the English High Court in which the section 1 serious harm test was applied.<sup>100</sup> It suggested that concerns regarding section 1 had been borne out by the judge’s approach in that case.
- 2.88 The NILC consultation paper sought responses on the questions of whether a rule equivalent to section 1(1) of the Act - the “serious harm” test - should be introduced into Northern Irish law; whether it would be preferable to rephrase the statutory test so as better to reflect the stated intention of the authors of the Act, or whether it would be preferable to continue with the common law approach reflected in *Jameel v Dow Jones*.
- 2.89 The divergence of view noted in the NILC consultation paper was also reflected in responses to the consultation. The view of a clear majority was that section 1 is operating effectively and that it comprises an important support for free speech. A small number of respondents questioned the appropriateness of the reform when compared with the common law.
- 2.90 A number of further decisions of the first instance courts in England and Wales have given a somewhat different inflection to the provision than was apparent following the first judicial interpretation of the provision (discussed in the consultation paper).<sup>101</sup> The operation of the provision is by this time more fully understood, although it is as yet somewhat uncertain and contested.<sup>102</sup>
- 2.91 As a first comment, it can be said that the current approach of the English High Court arguably makes good the stated intention of the authors of the Act to ‘build on the consideration given by the courts’,<sup>103</sup> and to raise the threshold of seriousness modestly. In *Ames v Spamhaus Project*, for instance, Warby J noted that ‘the seriousness provision raises the bar over which a claimant must jump, as compared with the position established in [*Jameel and Thornton*]’.<sup>104</sup> In *Lachaux v Independent Print Ltd*, Nicola Davies J agreed that ‘the

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<sup>100</sup> [2014] EWHC 2831 (QB).

<sup>101</sup> See, for example, *McGrath v Bedford* [2016] EWHC 174 (QB); *Sobrinho v Impresa Publishing SA* [2016] EWHC 66 (QB); *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB); *Decker v Hopcraft* [2015] EWHC 1170 (QB); *Theedom v Nourish Training* [2015] EWHC 3769 (QB); *Ames v Spamhaus Project Ltd* [2015] EWHC 127 (QB); *Business Energy Solutions Ltd v Scrivener* [2015] EWHC 2948 (QB); *Lachaux v Independent Print Ltd* [2015] EWHC 915 (QB); *Cooke v MGN Ltd* [2014] EWHC 2831 (QB).

<sup>102</sup> In particular, the point in time at which the assessment of likely future serious harm is to be made remains an open question, with judges taking different viewpoints in different cases – see *Theedom v Nourish Training* [2015] EWHC 3769 (QB), at [15(i)].

<sup>103</sup> *Explanatory Note to the Defamation Act 2013*, at [11].

<sup>104</sup> [2015] EWHC 127 (QB), at [49]. Warby J. noted further the common ground in *Cooke* to the effect that the word ‘likely’ in section 1(1) would ordinarily be interpreted to mean “more probable than not”, although a lower standard of likelihood may be required in some circumstances (for example, where there is a slight risk of very serious damage) (at [53]-[54]). Warby J. considered that this was correct, although he did not need to decide the point in the instant case. The judge also noted that the section 1 test does not “supersede” *Jameel*, in the sense that there could be cases in which the continued pursuit of the claim cannot be justified as a necessary and proportionate interference with freedom of expression even though the publication has caused serious harm to

effect of section 1... is to create a higher hurdle for the claimant and one that is at the threshold of any defamation action'.<sup>105</sup> The nature of this higher hurdle, however, is such that it requires proof. As Warby J. noted in *Lachaux*, 'claimants... have to prove as a fact on the balance of probabilities that serious reputational harm had been caused by, or was likely to result from, the publication complained of'.<sup>106</sup> Thus, the natural consequence is that defamation is no longer actionable without some proof of damage, and the legal presumption of damage would cease to play as significant a role.

2.92 Secondly, as was noted in the NILC consultation paper, in the early section 1 case of *Cooke v MGN Ltd*, the fact that the defendant-publisher had issued a correction and apology was taken to be important in the assessment of whether serious harm had been caused to the plaintiff's reputation so as to satisfy section 1.<sup>107</sup> Later cases have confirmed that such post-publication conduct on the part of the defendant can be significant. In *Lachaux*, Warby J. confirmed that 'a publication may in principle change from being defamatory to being not defamatory (and hence not actionable), for instance by reason of a prompt and full retraction and apology'.<sup>108</sup> In *Theedom*, the absence of any correction, retraction or apology was deemed to be important to the finding that the serious harm test was satisfied.<sup>109</sup> This theme is picked up further below.<sup>110</sup>

2.93 Thirdly, the serious harm question will often but not always be suitable for determination at a preliminary hearing. In *Lachaux*, Warby J. explained that 'if [serious harm] is raised it will *usually* be preferable for it to be tried as a preliminary issue... I emphasise "if" and "usually" because it is not every case in which serious harm will be a real issue; and where it is, a preliminary trial will not invariably be appropriate'.<sup>111</sup> In *Shakil-ur-Rahman v Ary Network Ltd*, the question of whether the section 1 test was satisfied was explicitly excluded from the preliminary hearing, leaving it to focus instead solely on the determination of the meaning of some 25 broadcasts.<sup>112</sup>

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reputation, or such harm is likely (at [51]). In such cases, the insistence in *Jameel* on there being a "real and substantial tort" could yet be applied to statements that had caused serious harm. He gave *Lait v Evening Standard Ltd* [2011] EWCA Civ 849 as a possible example of such a case. He explained, however, that 'it risks confusion to ask first whether the tort is real and substantial and only then to look at the "serious harm" requirements'. Rather, the 'approach should be the other way around'.

<sup>105</sup> *Lachaux v Independent Print Ltd* [2015] EWHC 915 (QB), at [21]

<sup>106</sup> *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB), at [45]. The judge explained further that in addressing this issue, the court might have regard to all the relevant circumstances, including evidence of what actually happened after publication.

<sup>107</sup> [2014] EWHC 2831 (QB).

<sup>108</sup> *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB), at [68]. See also the judge's comment at [52] regarding the intention of Parliament in this respect. On the facts of *Lachaux*, however, it is clear that an apology will not always achieve that goal. In that case, the publisher had apologised for not stating that the claimant denied the allegations in question; it did not retract those allegations or suggest they were false (at [118] and [146]).

<sup>109</sup> *Theedom v Nourish Training* [2015] EWHC 3769 (QB), at [29].

<sup>110</sup> See further, [3.18] et seq below.

<sup>111</sup> *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB), at [66].

<sup>112</sup> [2015] EWHC 2917 (QB).

2.94 Fourthly, and importantly, the more recent cases have explained that the demonstration of serious harm required by section 1 'is capable of being satisfied by an *inferential case*, based on the gravity of the imputation and the extent and nature of its readership or audience'.<sup>113</sup> Hence, it is not in all cases 'necessary for a claimant to adduce evidence to prove that the publication complained of is defamatory of him or her'.<sup>114</sup> Indeed, experience to date suggests that an inferential case will oftentimes be sufficient. Cases in which the potential for serious harm is clear in all of the circumstances can be satisfied by an inferential case. This leaves those instances in which such harm is not immediately obvious to be demonstrated empirically. This would seem to be a suitable division.

2.95 A final comment concerns the risk that section 1 will often generate expensive mini-trials on this point. Certainly, there has been some concern that "section 1" preliminary hearings risk becoming unwieldy. In *Lachaux*, counsel for the claimant presented a 73-page skeleton argument of which a large part was devoted to the issues arising from section 1. Warby J was sanguine. Responding to 'the spectre of section 1 disputes leading to spiralling costs at an early stage', he warned against 'the trap of generalising on the basis of the particular circumstances of this case, which are quite particular'.

2.96 Nevertheless, in *Theedom*, HHJ Moloney QC suggested that the increasing tendency towards the cross-examination of witnesses in such hearings needed to be constrained.<sup>115</sup> He noted that the parties to the instant litigation had expended around £170,000 (including VAT, but prior to any adjustment for success fees and insurance).<sup>116</sup> He warned that such evidence was essentially superfluous, and that it 'added little or nothing to the conclusions that an experienced defamation judge would have drawn simply from reading the [publication and assessing the nature and extent of its circulation]'.<sup>117</sup> He added that as the issue would have to be considered afresh at any ultimate trial there would likely be 'a wasteful duplication of evidence and cross-examination already carried out'.<sup>118</sup> He emphasised the need for caution, suggesting that judges might initially deploy a light-touch consideration of the matter leaving it for fuller consideration at full trials. He warned that 'if a routine practice develops of listing such preliminary issue trials uncritically, that is likely to increase the overall cost and delay of libel cases, which is the opposite of Parliament's clear intentions in passing section 1'.<sup>119</sup>

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<sup>113</sup> *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB), at [57] (emphasis added). This had previously be suggested in *Cooke v MGN Ltd* [2014] EWHC 2831 (QB), at [43]. It is noteworthy that at the time of writing *Lachaux* is scheduled to be heard by the Court of Appeal.

<sup>114</sup> *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB), at [57]. See also, *Theedom v Nourish Training* [2015] EWHC 3769 (QB), at [15(e)].

<sup>115</sup> *Theedom v Nourish Training* [2015] EWHC 3769 (QB), at [31] (per HHJ Moloney).

<sup>116</sup> Anecdotal evidence suggests that in other cases the cost of preliminary hearings in defamation proceedings since the coming into force of the Defamation Act 2013 have far outstripped even this very sizeable figure.

<sup>117</sup> *Theedom v Nourish Training* [2015] EWHC 3769 (QB), at [31(c)] (per HHJ Moloney).

<sup>118</sup> *Theedom v Nourish Training* [2015] EWHC 3769 (QB), at [31(e)] (per HHJ Moloney).

<sup>119</sup> *Theedom v Nourish Training* [2015] EWHC 3769 (QB), at [31(g)] (per HHJ Moloney).

2.97 It may be that such issues can be dismissed as “teething problems”. In *Lachaux*, for instance, Warby J explained that ‘lessons are there to be learned’ and expressed himself ‘confident that in future, with appropriate case management after the applicable principles have been settled, issues such as this can be tried in a more economical and proportionate way’.<sup>120</sup> For the meantime, however, the advent of section 1 in English law would not appear to have obviated the critique that defamation law is beyond the means of the average litigant.

2.98 As to whether a provision equivalent to section 1(1) of the Defamation Act 2013 should be introduced into Northern Irish law, the evidence is somewhat mixed and any conclusion must be provisional. Whether section 1 offers a better regime than that that had developed under the common law is debateable. As noted, section 1 does not appear to have proved a panacea to the high cost of libel proceedings in England, although it may have had some influence over the apparent fall in the overall number of actions being brought.<sup>121</sup> The advent of the inferential case promises to reduce the litigation burden that has been witnessed in early cases for the future. Meanwhile, more is required – legitimately - of plaintiffs in “borderline” cases than might be the case under the common law approach. In addition, the provision has introduced a clear role for and encouragement of the prompt and efficacious publication of corrections or retractions in the wake of erroneous statements. The argument based on consistency between British jurisdictions also bears on the question. Hence, accepting that the issue is finely balanced, a clause equivalent to section 1 of the Defamation Act 2013 is included as clause 1(1) in the draft Bill set out in Appendix 1 to this report (and in the alternative draft Bill included as Appendix 2).

*Serious Harm Test: Bodies that Trade for Profit*

2.99 Section 1(2) of the Defamation Act 2013 adds an additional element to the serious harm requirement in respect of ‘bodies that trade for profit’. It provides that ‘for the purposes of this section, harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss’.

2.100 Corporate reputation is an enormously important, perhaps the most important, asset held by businesses.<sup>122</sup> At present in Northern Irish law, corporations are able to sue.<sup>123</sup> The protection afforded to them, however, is not as extensive as that allowed to natural persons. This is due to the fact that ‘a company cannot be injured in

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<sup>120</sup> *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB), at [64].

<sup>121</sup> Editorial, ‘Judicial Statistics, 2015: Issued defamation claims down by 40%, the second lowest number since 1992’, *Inform*, 4 June 2016.

<sup>122</sup> This fact has been strongly emphasised by the redirection of corporate PR effort in recent years so as to include the “reputational dimension” into all strategic planning. The exercise is no longer limited to lobbying and “fire-fighting” as events occur – see Burt, *Dark Art: the Changing Face of Public Relations* (London: Elliott & Thompson, 2012).

<sup>123</sup> *South Hetton Coal Co Ltd v North-Eastern News Assoc Ltd* [1894] 1 QB 133.

its feelings, it can only be injured in its pocket'.<sup>124</sup> Hence, a company could recover damages for harm to its business or trading reputation, but not for hurt feelings.

2.101 Section 1(2) was introduced as a 'modest reform' by way of amendment to the Government Bill in the House of Lords.<sup>125</sup> It responded to the fact that many of the claims that had generated the momentum for reform had involved such plaintiffs: 'corporations... using their deep pockets and access to lawyers to stifle public criticism of them or their products'.<sup>126</sup> To date, only a small number of cases in England have involved the section 1(2) issue of serious financial loss.<sup>127</sup> None of these has been especially illuminating.

2.102 The NILC consultation paper noted that this provision in English law had featured little in its pre-consultation discussions. It acknowledged the evidence that some corporations had used libel law to "chill" criticism of their activities,<sup>128</sup> but suggested that their capacity to do so might reflect more on the general complexity of defamation law than suggest the need for any specific exclusion or limitation on corporate standing to sue. Nevertheless, the consultation paper set out the Australian model of restrictions on standing. It consulted on whether it would be desirable to introduce into Northern Irish law a rule that 'bodies that trade for profit' must show 'serious financial loss' if they are to bring a claim in defamation, and also on whether it would instead be preferable to introduce a bar on corporate claims equivalent to that introduced under the Australian Uniform Defamation Acts.

2.103 Respondents to the NILC consultation who responded explicitly to these questions preferred that a provision equivalent to section 1(2) should be introduced into Northern Irish law. This was seen as an evolutionary development from the current position in common law, whereas the Australian approach – while evidently pursuing similar policy objectives – was considered somewhat arbitrary in design and liable to lead to ancillary litigation regarding its parameters. Given that it is recommended that section 1(1) should be emulated in Northern Irish law, there is no reason why a concomitant provision equivalent to section 1(2) should not also

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<sup>124</sup> *Lewis v Daily Telegraph* [1964] AC 234, at 262 (per Lord Reid). As Lord Hope explained in *Jameel v Wall Street Journal Europe* [2006] UKHL 44 at [95], however, 'this does not mean... that it can only be injured in a way that gives rise to loss which, because it can be calculated, has the character of special damage. What it means is that it must show that it is liable to be damaged in a way that affects its business as a trading company.'

<sup>125</sup> 741 HL Deb GC442, 17 December 2012 (per Baroness Hayter).

<sup>126</sup> 741 HL Deb GC441, 17 December 2012 (per Baroness Hayter). Baroness Hayter explained further: 'it was an American corporation that sued cardiologist Dr Peter Wilmshurst; the British Chiropractic Association sued Simon Singh; GE Healthcare sued Danish radiologist Professor Thomsen; Trafigura sued the BBC; manufacturers are forever threatening or trying to sue *Which?*; and McDonald's infamously and, as it turned out, rather stupidly sued two individuals. *Nature*, the *Lancet* and the *British Medical Journal* - organisations that almost by definition exist for the public good - are no strangers to the threatening letters, mostly from corporations. Similarly, we heard in the Joint Committee from Mumsnet, which told us that it was very often the purveyors of baby foods and products, rather than individuals protecting their reputations as parents, which threaten to take action'.

<sup>127</sup> *McGrath v Bedford* [2016] EWHC 174 (QB); *Undre v Harrow LBC* [2016] EWHC 931 (QB); *Business Energy Solutions Ltd v Scrivener* [2015] EWHC 2948 (QB).

<sup>128</sup> See, for instance, Donson, 'Libel cases and public debate' (2010) *Review of European Community and International Environmental Law*, 19(1), 83-94.

be included as part of a reform Bill. Such a measure is included as clause 1(2) in the draft Bill appended to the report.

### **Other Substantive Provisions: Slander**

2.104 The law of slander normally requires that special damages – that is particular losses – must be proven if a claim is to succeed. In a small number of areas, no special damage need be proven. One of these, set out in the Slander of Woman Act 1891, arises where ‘words spoken and published... impute unchastity or adultery to any woman or girl’. A second arises on the basis of the common law, and relates to imputations that a person suffers from a contagious or infectious disease.

2.105 Section 14 of the Defamation Act 2013 made two changes to the law of slander in England Wales. It provides that:

(1) The Slander of Women Act 1891 is repealed.

(2) The publication of a statement that conveys the imputation that a person has a contagious or infectious disease does not give rise to a cause of action for slander unless the publication causes the person special damage.

The effect of section 14 is to require the proof of special damage in respect of claims brought on account of such imputations.

2.106 All respondents to the NILC consultation who expressed a view on this question contended that such reform was also desirable in Northern Ireland: ‘the existing law in this area is otiose and a relic of history’ (MLA). The NILC consultation paper described the effect of the reform as being to modernise the law in ‘an obviously sensible manner’.<sup>129</sup> It is difficult to demur from either viewpoint. A provision intended to modernise Northern Irish law in similar fashion is included as clause 15 of the draft bill included as Appendix 1 to this report (and as clause 14 in the alternative bill set out in Appendix 2).

### **Other Jurisdictional and Procedural Provisions**

2.107 Many commentators on the law of defamation assert that the primary problems in the area arise on account of procedural complexity and the associated cost of embroilment in defamation disputes. Attempts have been made over time to address this theme in both English and Northern Irish law and practice. Yet, there is significant evidence that this essential problem of defamation law has not been adequately mitigated. The Defamation Act 2013, in section 11, took a significant step in this regard by reversing the presumption that

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<sup>129</sup> NILC consultation paper, above n 1, at [3.82].

defamation claims will be heard by a judge and a jury. In section 8, the Act introduced a temporal “single publication rule” that is intended to obviate the perpetual risk of legal suit that arises due to the fact that the “publication” of defamatory material is understood to occur when a statement is read and not when it is printed, broadcast or uploaded. In section 9, the Act also introduced a change to the jurisdictional test in an attempt to address the perceived problem of “libel tourism”. Whether any or all of these provisions should be emulated in Northern Irish law is considered in the paragraphs that follow.

#### *Limitation and the Single Publication Rule*

- 2.108 In the law of defamation in Northern Ireland, one of three elements of a claim that a plaintiff must prove is that publication has occurred. This happens when a statement is received, heard or read by a third party (that is, someone other than the plaintiff or defendant-publisher). Hence, publication can occur at multiple different points in time, with each such publication generating a separate and distinct cause of action. This is sometimes known as the “multiple publication rule”.
- 2.109 The NILC consultation paper explained that the multiple publication rule ‘can generate injustice and social detriment by creating potentially perpetual liability for publishers’, and noted that this ‘is especially problematic in the context of online publication’.<sup>130</sup> It also warned, however, that criticism of the existing rule was ‘somewhat partial’, and that there was a danger of eliding the harms that can be caused by ongoing publication. It noted concerns regarding the potential efficacy of the single publication rule in difficult cases, and suggested that the supposed “safe harbour” may prove illusory.<sup>131</sup> There is as yet little insight to be drawn from the operation of the section 8 rule in England and Wales.
- 2.110 The NILC consultation paper asked whether a ‘single publication rule’ taking the form of that set out in section 8 of the Defamation Act 2013 comprised a desirable reform of the Northern Irish law of defamation. The uniform view of respondents who addressed this particular issue was that the reform was significant and highly desirable. Hence, while it may yet prove to be of symbolic importance only, it is recommended that a provision equivalent to section 8 of the Defamation Act should be introduced by the Northern Ireland Assembly into the law of this jurisdiction. A provision that would achieve that goal is included as clause 8 in the draft Bill that is included as Appendix 1 to this report (and in the alternative draft bill included as Appendix 2).

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<sup>130</sup> NILC consultation paper, above n 1, at [4.36].

<sup>131</sup> NILC consultation paper, above n 1, at [4.38]-[4.39]. The consultation paper also noted the possibility that the section 8 rule would be redundant in any event in the context of the section 1 serious harm test.

## *Libel "Tourism"*

- 2.111 As the NILC consultation paper explained, a major motivating factor behind the political campaign to reform the law of defamation in England and Wales had been the perception that the law encouraged "libel tourists". Such litigants sought to take advantage of the relatively restrictive character of British law and thereby unacceptably to undermine freedom of speech.<sup>132</sup>
- 2.112 The NILC concluded that 'it has been sufficiently demonstrated that the use of threats to bring legal proceedings in England by corporations and others from other jurisdictions has been a fact of life for journalists, NGOs, media organisations and others'.<sup>133</sup> Nevertheless, it acknowledged that 'very few such cases in fact ever reached the English courts'. The consultation paper also noted that it 'is difficult to identify many firm cases of "libel tourism" that have occurred in the Northern Irish courts', although it surmised that such cases may have occurred. The NILC noted that none of the pre-consultees with whom it had engaged had raised the prospect of reform in this area as a matter of concern, although it also explained that some such persons had indicated that existing jurisdictional rules are perfectly appropriate and effective.<sup>134</sup> The existing law provides that a claim can be summarily dismissed where it discloses no "real or substantial tort" that has occurred in Northern Ireland.
- 2.113 A rule restricting the opportunity for libel tourism from outside the EU and other state signatories to the Lugano Convention was passed by the Westminster Parliament in section 9 of the Defamation Act 2013.<sup>135</sup> The NILC consultation paper mooted whether an equivalent reform should be introduced into Northern Irish law. The unanimous view of all respondents who explicitly addressed this point was that such reform was desirable. The reform was variously described as 'important', and 'small but significant'.
- 2.114 Two respondents to the consultation recommended that such a rule should be introduced, but that this should be subject to modification or clarification relative to the section 9 version (Libel Reform Campaign; Google). It was intended that such revision would ensure that the test was understood to be 'just one hurdle that claimants must pass'; 'that they are also required to satisfy any other tests imposed by common law or other sources' (Libel Reform Campaign). It was thought that this would 'help to ensure that Northern Irish law remains "future proof" and [adaptable] as the common law and international position changes' (Google). It is considered, however, that it is already tolerably clear that any new rule would not be the exclusive standard in this regard. The 2013 Act has not obviated pre-existing common law rules. Moreover, it is to be expected that any revision to the rules of private international law – an infrequent and manifest occurrence - would see an

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<sup>132</sup> NILC consultation paper, above n 1, at [1.11]-[1.12].

<sup>133</sup> NILC consultation paper, above n 1, at [4.42].

<sup>134</sup> See, for example, *Ewing v Times Newspapers Ltd* [2013] NICA 74.

<sup>135</sup> For an early illustration, see *Ahuja v Politika Novine I Magazini Doo* [2015] EWHC 3380 (QB).

explicit concomitant revision to any new provision of this type in Northern Irish law. Accepting the desirability of “automatic” legal evolution, it is considered that the risks of unwitting obsolescence in this respect are minimal.

2.115 It is recommended, therefore, that a provision equivalent to section 9 of the 2013 Act should be introduced by the Northern Ireland Assembly into the law of this jurisdiction. A provision achieving that goal is set out below, and included as clause 9 in the draft bill included as Appendix 1 to this report:

(1) This section applies to an action for defamation against a person who is not domiciled—

(a) in the United Kingdom;

(b) in another Member State; or

(c) in a state which is for the time being a contracting party to the Lugano Convention.

(2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

(3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of.

(4) For the purposes of this section—

(a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation;

(b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention.

...

The operative part of this provision is subsection (2) which installs the rule that an action cannot be brought against a publisher domiciled in a non-EU or “non-Lugano” jurisdiction, unless ‘of all the places in which the statement complained of has been published, Northern Ireland is clearly the most appropriate place in which to bring an action’. The meaning of ‘the most appropriate place’ will fall for consideration by the courts. Notably, the potential impact of this measure is limited by the international obligations of the United Kingdom.

*Mode of trial: presumption against trial by jury*

2.116 The NILC consultation paper noted the anomalous position that defamation trials, alone in civil law proceedings, currently involve a presumption in favour of trial by a judge with a jury. It noted a number of reasons why jury trials can be more cumbersome and expensive to pursue, and the impact that this has on decisions by litigants on whether to settle actions in advance of trial. The consultation paper also noted that there are powerful arguments of principle that push for retention of the current approach.

2.117 The NILC consultation paper posed the question as to whether a measure equivalent to section 11 of the Defamation Act 2013— a provision that introduces a presumption in favour of trial by judge alone - should be introduced in Northern Ireland. While the provision does not abolish the jury trial as such, in England and Wales the recent decision in *Yeo v Times Newspapers* - a case in which the argument for a jury trial was peculiarly strong given the identity of the plaintiff - suggests that use of a jury will occur only in truly exceptional circumstances.<sup>136</sup>

2.118 Interestingly, and although some reservation was expressed, a strong view among those respondents who replied specifically to this question was that the jury should be removed from defamation proceedings. It was generally thought that the continued role for the jury was a barrier to the efficient management of defamation cases, and that it negated opportunities for the early resolution of key facets of defamation proceedings. The Media Lawyers Association offered perhaps the most developed critique:

the presumptive right under s.62 of the Judicature (Northern Ireland) Act 1978 for a trial by jury represents one of the most significant obstacles to the prompt and efficient resolution of libel claims in Northern Ireland and which ultimately serves either to delay the rightful vindication of a plaintiff's reputation or unnecessarily chills freedom of expression. It prolongs defamation claims and ensures they take a disproportionate amount of court time and resources.

This contention, developed more fully in the substantive response than is presented here, comprised a powerful expression of what would appear to be a generally held perspective.

2.119 As things stand, the reversal of the presumption could have a quite profound impact on the management of cases. It might be expected that applications for the early determination of the actual meaning of the words complained of would become commonplace. In turn, this would allow counsel to dispense with the need to prepare alternative arguments to accommodate the fact that a jury may select one meaning over another only at the end-point of the trial. Costs should be significantly reduced in consequence, while the early determination of meaning may see a significant proportion of cases settle as the parties appreciate that grounds for fighting on have been lost. All that said, even to get to the point at which a judge determines meaning would yet be sufficiently costly as to preclude the option of going to law for many plaintiffs and defendants.

2.120 There are some reasons to be circumspect about the removal of the role of the jury in defamation trials. First, in the context of the further recommendation developed below – that to the effect that the single meaning rule should be abolished and with that a jurisdictional bar to proceedings should be introduced in respect of meanings that had been corrected or retracted promptly and prominently - the rationale for the presumption against a jury trial is correspondingly weakened. That separate proposal would see the process of

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<sup>136</sup> [2014] EWHC 2853 (QB). During the Parliamentary debates on the Defamation Bill, it was suggested that such circumstances might arise should one of the parties be a member of the judiciary or somehow drawn from a similar social or “Establishment” background to judges generally. In such a case, a jury may serve as a hedge against subconscious bias or the suspicion thereof.

determination of meaning become redundant, and disputes would be immediately focused on core areas of factual uncertainty. It might be thought that juries are pre-eminently qualified to determine matters of fact. Even in that context, however, there would likely be cost-related grounds for introducing a presumption of trial by judge sitting alone.

2.121 A second point on the converse side of this debate was considered and explained in the judgments of Stephens J in *Stokes v Sunday Newspapers Ltd (Nos 1 and 2)*.<sup>137</sup> This is the argument that the historical and constitutional importance of the jury in the Northern Irish context should not lightly be undermined. Especially, where decisions to be taken by the court have a factual character, their legitimacy in the eyes of the wider public may be peculiarly dependent in some socio-political contexts on community involvement in the reaching of outcomes.

2.122 This issue is finely balanced. Hence, while it is recommended that a measure equivalent to section 11 of the Defamation Act 2013 should be introduced into Northern Irish law, it is also suggested that the issue be revisited should any decision be taken to limit the task to be undertaken by the court through the adoption of the bipartite proposal elaborated in chapter 3. A provision that would achieve the purpose of reversing the presumption in favour of trial by judge and jury is set out as clause 12 in the draft Bill that is included as Appendix 1 to this Report (and also as clause 11 in the alternative draft Bill set out in Appendix 2).

#### **Remedies: Summary of Judgment and “Take-Down” Orders**

2.123 Sections 12 and 13 of the Defamation Act 2013 provide English courts with new powers to make orders following the determination of defamation cases, although it is arguable that such powers were available in the common law in any event. Section 12 empowers a court to order the defendant to publish a summary of the judgment following a successful claim. Section 13 permits a court, following a successful claim, to order the operator of a website on which a defamatory statement has been posted to remove the statement, or to require a person to stop distributing, selling or exhibiting material containing the statement.

2.124 The NILC consultation paper suggested that these provisions ‘appear to be sensible additions to the law’.<sup>138</sup> Most of those respondents to the consultation who commented expressly on these themes agreed that provisions equivalent to those introduced in England and Wales should be extended to Northern Ireland. However, a voluble minority disagreed. Some respondents rejected the power to require the publication of summaries of judgments on principle, and contended further that were such a change be recommended for Northern Irish law this should be done only subject to the exclusion of ‘intermediary’ defendants from its

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<sup>137</sup> [2015] NIQB 53, and unreported decision of 6 January 2016 respectively.

<sup>138</sup> NILC consultation paper, above n 1, at [5.51].

ambit (Google). This particular concern would be addressed by the exclusion of such intermediaries from liability proposed above. Other respondents also expressed significant disquiet at the editorial function accorded to the court under this power (News Media Association). Furthermore, one respondent raised significant concerns with regard to the power to compel the take-down of content, and again suggested a number of revisions that might be made to the section 13 power before it should be introduced in Northern Ireland.

2.125 The view taken here is that these remedial powers will be available under the proposed Bill (see Appendix 1) only as against the primary author, editor or publisher after a statement has been found to be defamatory, indefensible, and to have caused or be likely to cause serious harm. In that context, it is not considered disproportionate that the court should be able to exercise such powers. Hence, it is recommended that provisions equivalent to sections 12 and 13 of the Defamation Act 2013 should be introduced into Northern Irish law. Provisions achieving that goal are included as clauses 13 and 14 of the draft bill included as Appendix 1 to this report (and as clauses 12 and 13 in the alternative bill set out in Appendix 2).

## Single Meaning Rule and Bar to Claims on Corrected Meanings

- 3.01 Alongside consideration of whether the Defamation Act 2013 should be introduced in Northern Ireland, either in part or wholesale, the NILC Consultation Paper also asked whether a further reform not seen in the 2013 Act should be introduced. This possible reform comprised the withdrawal of the “single meaning rule” combined with the introduction of a jurisdictional bar to claims where a publisher has made a correction or retraction promptly and prominently. It was suggested that such a reform might often secure adequate redress for plaintiffs without recourse to law, while also reducing significantly the “chilling effect” of potential claims on publishers. This was contrasted with the concern that “merely” emulating the Defamation Act 2013 would be ‘unlikely to address the core problem with libel law: the juridification and over-complication of public sphere disputes, and the attendant cost of embroilment in legal proceedings’.<sup>139</sup>
- 3.02 The combined proposal was elaborated in Chapter 5 of the NILC consultation paper. The consultation question relating thereto generated a number of substantive comments from respondents to the consultation. The tenor of these responses differed markedly as between those respondents who represented the interests of recurrent, “media” publishers (notably the Media Lawyers Association (MLA)) and those who mainly represented “non-traditional” libel defendants (eg Libel Reform Campaign).<sup>140</sup>
- 3.03 The Libel Reform Campaign response to the NILC consultation suggested that the combined proposal ‘had merit’, although it pondered whether a reform in this direction might be exploitable by ‘vexatious litigants’. Beyond that, the response noted that the proposal would likely have ‘similar outcomes to the policy recommendations [made by] the English PEN and Index on Censorship “Alternative Libel Project”’, namely that it ‘could significantly reduce costs and the chill from legal bullying’. The response made further comment regarding the desirable approach to corrections and retractions, and emphasised the need to couple such reform with the introduction of revised versions of the main defamation defences ‘to give the publisher the confidence to defend their actual stated intention (even after it has been narrowed thanks to this procedure)’.
- 3.04 The response of the Media Lawyers Association, in contrast, indicated strong opposition to the mooted proposal. It stated that the proposal ‘would be highly damaging to the proper and necessary exercise of freedom of expression by all members of society within Northern Ireland and... if implemented, may well be incompatible with Article 10 ECHR’. It added that ‘the scheme is impractical and would have real and harmful consequences for the media and publishers generally in Northern Ireland and in the United Kingdom’. The MLA was motivated to return a ‘detailed examination of [the proposal] and of the problems that [it] believes would

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<sup>139</sup> See, generally, Mullis and Scott, ‘Tilting at Windmills: the Defamation Act 2013’ (2014) *Modern Law Review*, 77(1), 87-109; Phillipson, ‘The “Global Pariah”, the Defamation Bill and the Human Rights Act’ (2012) *Northern Ireland Legal Quarterly*, 63(1), 149-186.

<sup>140</sup> As noted above, each of these responses was reiterated by a number of ‘coat-tailing’ respondents.

arise'. The specific criticisms made in the MLA response are set out and discussed below. At this point, however, it is worth reiterating that the views expressed were not endorsed by the Libel Reform Campaign. Nor, perhaps importantly, do they concur with views expressed by senior media lawyers speaking under 'Chatham House rules' at events attended by the author of this report.

- 3.05 As specific recommendations are made regarding this proposal below, its basic features are reiterated in the paragraphs that follow. Further detail can be found in Chapter 5 of the NILC consultation paper which includes a developed critique of the ramifications of the single meaning rule and considers the arguments made in favour of its role. Thereafter, the criticisms of the proposal included in responses to the NILC consultation are considered, before the recommendations of this report in respect of the proposal are set out.

### **The Bipartite Proposal**

- 3.06 The NILC consultation paper suggested that the Defamation Act 2013 may represent a missed opportunity to address the worrisome impact of the law on freedom of expression while ensuring the proper valorisation of reputation. It suggested that a more sensible and effective, although perhaps counter-intuitive, target for reform may have been the longstanding "single meaning rule". More particularly, the consultation paper proposed the abolition of the single meaning rule in conjunction with the introduction of a jurisdictional bar on claims based on meanings of publications that had been corrected or retracted promptly and prominently.
- 3.07 Disputes about meaning are usually central to defamation actions: they are 'very often if not always the most important issue'.<sup>141</sup> If a court is able to determine meaning early in proceedings, very often the dispute will be settled.<sup>142</sup> The test is that of how the words would have been understood by the ordinary, reasonable recipient of the publication in question.<sup>143</sup>
- 3.08 When a dispute is transposed from the public sphere to the courtroom, the "single meaning rule" dictates that each set of "words complained of" must be understood to hold one meaning only. Where language is ambiguous or uncertain, a single interpretation from the range of possibilities must be selected. The court is required to pretend that only that interpretation will have been inferred by all ordinary, reasonable members of the audience of the publication. This is thought to simplify the task confronting the court; to make it manageable.

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<sup>141</sup> Joint Committee on the Draft Defamation Bill, HL Paper 203 & HC 930-II, Q622 (per Mr Justice Tugendhat).

<sup>142</sup> For a recent example, see *RBoS Shareholders Action Group Ltd v News Group Newspapers Ltd* [2014] EWHC 130 (QB). For discussion, see 'Sun settles claim by RBoS Shareholders Action Group', *Inform*, 19 February 2014.

<sup>143</sup> An 'impeccable synthesis of the authorities' on this theme offered by Eady J was reiterated by the Court of Appeal in *Gillick v Brooke Advisory Centre* [2001] EWCA Civ 1263 (per Lord Phillips MR).

- 3.09 Plainly, the single meaning rule involves a legal abstraction from reality. This abstraction is often explicitly recognised by the courts.<sup>144</sup> Intuitively, dealing with one meaning only promises to make the task of the court more straightforward. The process of selecting the single meaning, however, is so highly complex and technical as to border on the arcane. Having assumed the task of determining the meaning of imputations, the courts have been compelled to develop highly complicated semantic tools with which to divine singular meanings.<sup>145</sup> In turn, this has generated complex rules and practice on the pleading of meanings.
- 3.10 Simplification in this sense may not equate to good public policy. The process of fixing on a single meaning is perplexing to non-lawyers. In cases where the meaning of the impugned publication is ambiguous or multifarious, the abstraction from reality involved in applying the single meaning rule must always result in a measure of injustice.
- 3.11 If the court was merely asked to deal with cases as of now but absent the single meaning rule, defamation proceedings would be unmanageable and wholly unfair to the defendant-publisher. Hence, the proposal in the NILC consultation paper was to couple the abolition of the rule with a scheme intended to ensure that only disputes over contested meanings – that is, for example, an interpretation that the defendant asserts positively to be true which the plaintiff insists is false – might be considered by the court. All other meanings would be weeded out in advance of proceedings such that disputes focused on language and not truth might be quickly resolved.
- 3.12 To achieve this, where publications had been ambiguous, it was proposed that the law should stipulate that the prompt and prominent correction or retraction of unintended meanings following receipt of a complaint would serve to preclude any further action in respect of the corrected or retracted meanings in question. Complainants could be obliged to communicate the imputations complained of and the meaning ascribed to the words in question to the publisher in advance of bringing any action, thereby allowing publishers the opportunity to publish a correction or retraction.
- 3.13 Very often, it might be expected that this would bring the dispute to a conclusion: the plaintiff would be vindicated, and the defendant's original meaning would be clarified. Where a contested meaning was left uncorrected – that is, because the publisher maintained the veracity of an allegation that the complainant repudiated - that issue might result in court proceedings. In those court proceedings, however, there would be no need to waste time and resources on the complex and conceptually unsatisfactory task of determining a

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<sup>144</sup> *Slim v Daily Telegraph* [1968] 2 QB 157, 171-173; *Bonnick v Morris (Jamaica)* [2002] UKPC 31, at [20]. In *Lait v Evening Standard*, Lord Justice Laws introduced the rule precisely as 'a fiction adopted by the law for practical reasons' - see [2011] EWCA Civ 859

<sup>145</sup> For an overview – and a recent illustration of the complexity of the determination of meaning by a court - see *Shakil-ur-Rahman v Ary Network Ltd* [2015] EWHC 2917 (QB). See further, Parkes and Mullis (eds), *Gatley*, above n 14, chapter 11.

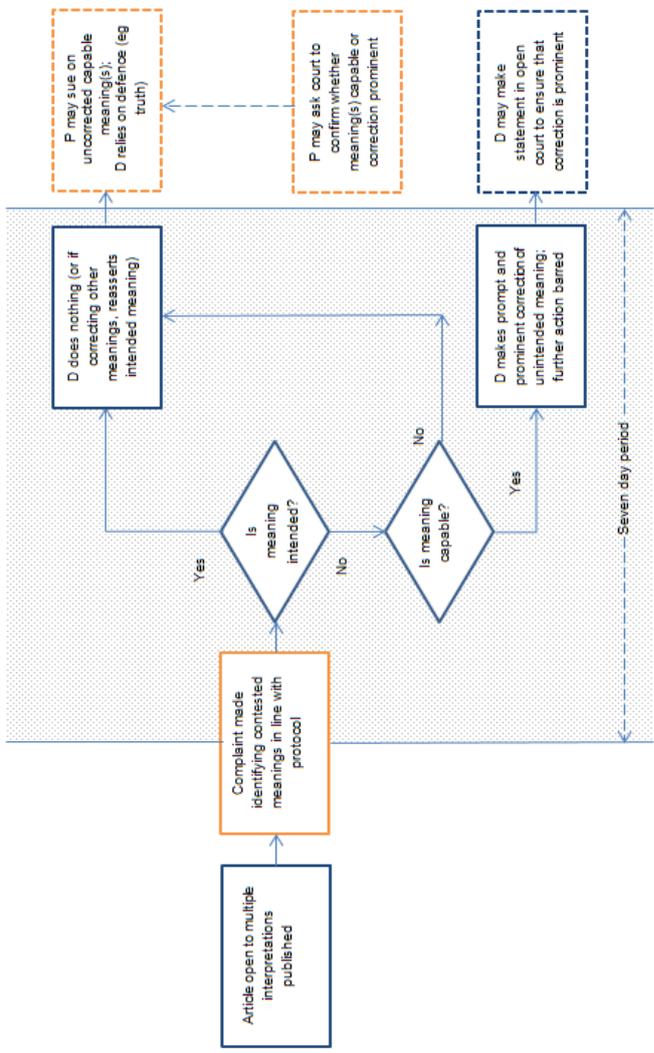


Chart 1: Complaints process under proposed scheme

- Actions / decisions for publisher (D)
- Actions / decisions for prospective plaintiff (P)

single meaning. The meaning would be given to the court having been narrowed down through the initial iterations between the parties.

- 3.14 Aside from processing disputes over contested meanings, provision could be made for a complainant to apply to court for a judicial assessment of whether the statement complained of was reasonably “capable” of carrying any uncorrected meanings that the complainant read into the publication. Provision could also be made for a court to assess whether the complained of meaning had been properly, promptly and prominently corrected before any action could proceed.

### **Criticisms of the Proposal**

- 3.15 A series of criticisms of the bipartite proposal to abolish the single meaning rule and couple this with the introduction of a jurisdictional bar where meanings had been corrected or retracted promptly and prominently were included in some responses to the NILC consultation. The exemplary response in this regard was that submitted by the Media Lawyers Association (with which a number of other respondents agreed). Some of the arguments presented by the MLA focus attention on matters of crucial importance. It is stated at the outset, however, that the generality of the criticism offered by the MLA is rejected in the paragraphs that follow. The MLA response offers a smorgasbord of reasons why any legislator should not proceed with the combined proposal. There are a number of respects, however, in which the response suggests that its authors have not fully appreciated the nature of the scheme proposed in the NILC consultation paper. In some respects, the arguments set out in the response are strained. In other respects, they strain credulity.

#### *Criticism: the proposed change is unnecessary*

- 3.16 A first criticism of the proposal made in the MLA response to the NILC consultation is that it is essentially unnecessary. It is explained that if the presumption in favour of trial by jury is removed, it becomes possible for the single meaning of a statement complained of to be determined at an early stage in the litigation. The MLA response expects that that reform ‘will allow for the prompt and expeditious determination of libel claims’. It is further asserted that ‘the determination of meaning is a proportionate (and usually a binary) exercise’. The response also notes the role of the “offer of amends” process under sections 2-4 of the Defamation Act 1996.
- 3.17 Experience in recent years in England and Wales under the judicial tendency to proceed without a jury and more recently under the Defamation Act 2013 tends to bear out the first part of this assertion. The “early” determination of meaning at a preliminary hearing has become a regular feature of defamation litigation. When the determination of meaning does not have to be left to a jury at the end of a trial process, the

parameters of the dispute that must be argued before the court can be narrowed to the benefit of all parties. Indeed, it can be supposed that such determinations will often result in the subsequent resolution of claims one way or the other without the need subsequently to go to full trial. There is no question that this is an advance on the position prior to the introduction of the Defamation Act 2013 in England.<sup>146</sup>

3.18 It is notable, however, that the preliminary hearings that have been conducted by the High Court in London have often coupled the determination of meaning with other preliminary questions such as whether the section 1 serious harm threshold has been satisfied and whether the statement complained of comprises allegations of fact or of opinion. As noted above, even the determination of preliminary issues by a court can sometimes generate such very significant legal costs that it becomes financially prohibitive for many potential claimants to pursue legal action.<sup>147</sup>

3.19 Time is a further factor. The NILC consultation paper presented evidence that - even on the most generous analysis of recent cases - there is a mean time elapse of 499 days between the date when publication occurs and the date on which the court's judgment on determination of meaning is handed down. This was contrasted with the almost immediate clarification of contested meanings - and correction or retraction of meanings that the publisher did not wish to stand by - under the proposed scheme. This was done in order to identify the incongruity of attaching the label "early" to the determination of meaning by the court. The wider point is that transposing the task of fixing on contested meanings to any court process necessarily results in stasis - setting the dispute in aspic - and denies the plaintiff access to swift vindication on capable meanings that were harmful but perhaps unintended. The MLA response on this theme - which argued that the date of issue of the claim and not the date of publication should have been used, in which case the mean delay falls to 336 days - plainly misses the point.<sup>148</sup>

3.20 In light of the above, it is very difficult to concur with the suggestion that the need to dedicate time and resources to the determination of meaning under existing litigation practice is at all 'proportionate'. Moreover, the fact that it is left to the court to determine meanings has the result that it can become tactically sensible for litigators to pursue actions that could be resolved at an earlier stage. It must be remembered that the task the court is currently required to undertake is *only* the determination of the meaning(s) that would be inferred by the ordinary reasonable person on a fairly superficial reading of the publication concerned. This plainly does not require legal or judicial expertise; quite the opposite in fact.

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<sup>146</sup> The MLA response notes, by way of example, that this is precisely what occurred in *RBOS Shareholders Action Group Ltd v News Group Newspapers* [2014] EWHC 130 (QB).

<sup>147</sup> See [2.92] above.

<sup>148</sup> The MLA response noted further that the time taken in two cases brought under the Defamation Act 2013 - *Cooke and Ames* - was 179 days after publication in the former and 138 days after the claim was issued in the latter. This small sample clearly suggests that matters have improved - as one would expect - under the Defamation Act 2013. It does not indicate that the problem identified has been in any way resolved.

3.21 The single meaning rule makes sense only if it is first assumed that this task *must* be undertaken in court. Then, the desirability of narrowing the issues between the parties to be determined by the court becomes obvious. This assumption is far from sensible in most cases however. Far from simplifying proceedings, the single meaning rule complicates massively the transposition of a dispute from the public sphere into the courtroom. This is in the interests only of litigants – whether defendants or claimants – who consider that they might benefit tactically from complicating and prolonging a given dispute.

*Criticism: the proposal would lead to self-censorship*

3.22 The second criticism offered by the MLA is that a multiple meaning rule would inevitably cause publishers to self-censor for fear of what a minority of readers may take from an article rather than focussing on what is conveyed to the majority. Hence, it is asserted, the proposal would have an enormous chilling effect on freedom of expression. This argument is misplaced. It ignores the fact that the proposal couples withdrawal of the single meaning rule with the introduction of a bar to defamation claims where a publisher retracts or withdraws an unintended but possible, harmful interpretation of what has been published. Any putative “chilling effect” is utterly negated by the option of disposing of a complaint by the simple expedient of offering clarification after the fact of the initial publication.

*Criticism: proposal rests on misreading of the relevance of tort of malicious falsehood*

3.23 A third criticism offered by the MLA concerns the reliance placed in the NILC consultation paper on the judgment of the English Court of Appeal in *Ajinomoto Sweeteners v ASDA Stores*.<sup>149</sup> It is asserted in the response that ‘it was precisely because the Court of Appeal did not believe that a claim in malicious falsehood was “closely analogous” to the tort of libel that it was possible to rule that the single meaning rule did not apply to claims in malicious falsehood’. The response leans heavily on the ideas that the torts of defamation and malicious falsehood are different in character, that malicious falsehood includes additional requirements that are protective of the defendant’s position, and that the protection afforded by the single meaning rule could therefore be safely foregone in that context. In contrast, the MLA response emphasised the role of the single meaning rule in defamation as ‘a mechanism of public policy which strikes a proper and necessary balance between the need to protect reputation and the use of excessive or improper complaints which inhibit and chill freedom of expression’.

3.24 This is a thoroughly tendentious argument, and one that turns the logic of the decision of the Court of Appeal in *Ajinomoto* on its head. The Court of Appeal considered that single meaning rule is an unjust, unfair and anomalous rule, but one that is probably ‘immovable’ by the courts in terms of its application in defamation

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<sup>149</sup> [2010] EWCA Civ 609.

law. As the tort of malicious falsehood was different in structure to defamation, the court – applying the common law approach – could distinguish it, and therefore refuse to apply the single meaning rule in that context. Contrary to the implication of the MLA response, this says precisely nothing about the supposed normative desirability of the single meaning rule in the defamation context. Rather, it is the basis on which the Court of Appeal refused to extend what it considered to be a bad rule from one context to the other. The Court of Appeal clearly found it unfortunate that the rule was ‘irredeemable’ in the defamation context. For the avoidance of any uncertainty on this theme, the views expressed by Lord Justice Rimer are reiterated here at length:

The single meaning rule in defamation is the product of an accident of history resulting in a fiction... Like most legal fictions, it is artificial and has something of the absurd about it... If the single meaning rule does achieve a fair balance in defamation law between the parties’ competing interests, that would appear to be the result of luck rather than judgment; and how the measure of such claimed fairness might be assessed may anyway be questionable. The application of the rule can also be said to carry with it the potential for swinging the balance unfairly against one party or the other, resulting in no compensation in cases when fairness might suggest that some should be due, or in over-compensation in others... If the single meaning rule did not exist, I doubt if any modern court would invent it, either for defamation or any other tort. If the resolution of the present claim [based on malicious falsehood] has to be forced into the artificial straitjacket of that rule, it will, I consider, carry with it the potential for the production of an injustice.<sup>150</sup>

3.25 In pursuing the contention that the single meaning rule provides for a proper and necessary balance between the interests of plaintiffs and defendants in the face of the ambiguity of language, the MLA response emphasised the judgment delivered by Lord Neuberger in the Hong Kong Court of Final Appeal in *Oriental Daily Publisher v Ming Pao Holdings*.<sup>151</sup> This judgment was considered at length in the NILC consultation paper. Lord Neuberger’s view is encapsulated well in the following statement quoted in the MLA response:

If the single meaning rule did not apply in defamation, it would... lead to greater uncertainty in outcome and increased legal expenses. Instead of a statement with two possible meanings giving rise to a problem requiring a binary resolution, it would give rise to a problem which had a multiplicity of potential answers, along what might be seen as a continuous spectrum. Abolition of the single meaning rule would also lead to the dispiriting, expensive, and time-consuming prospect of many witnesses being called by each party, to explain how they understood the statement in question.<sup>152</sup>

On similar grounds, the MLA response considered that any move to withdraw the single meaning rule would be contrary to Article 10 ECHR.

3.26 The NILC consultation paper recognised the problem that was highlighted by Lord Neuberger and in the MLA response. However it postulated that the solution offered by the single meaning rule, while superficially attractive, is ultimately a poor one. It was recognised in the NILC consultation paper – and it is reiterated here – that any withdrawal of the single meaning rule that was not also coupled with further measures protective of the position of defendants would be a profound error. That was not, however, what was proposed in the NILC

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<sup>150</sup> [2010] EWCA Civ 609, at [40] and [43].

<sup>151</sup> [2012] HKCFA 59.

<sup>152</sup> [2012] HKCFA 59, at [142].

consultation paper. Hence, the force of Lord Neuberger’s concerns does not weigh against the bipartite proposal.

3.27 Rather, the consultation paper emphasised that withdrawal of the rule must be coupled with the introduction of a bar on any claim in circumstances where a capable meaning of a statement complained of had been either corrected or retracted both promptly and prominently. The intention underpinning this paired reform is to ensure that only singular and contested meanings – that is, for example, an interpretation that the defendant asserts positively to be true which the plaintiff insists is false – might be considered by the court. The aim of the combined proposal would be to ensure that all other meanings are weeded out *in advance of proceedings* such that disputes focused on language and not on truth might be quickly resolved. As noted in the NILC consultation paper, this approach could take all but the intractable disputes on specific contested meanings out of the legal forum. Most disputes would be resolved through enhanced public sphere engagement, not bowdlerising legal chill. Lord Neuberger’s nightmare vision of horrifically complex litigation would simply not arise.

3.28 Under the bipartite scheme, the only circumstance in which multiple meanings would be presented to a court would be that in which a publisher had failed to correct or retract those meanings that it had not intended to convey (or at least those that it did not intend to defend). Given the insulation from liability that it would offer, it might reasonably be asked why any publisher would fail to correct such unintended but capable and harmful meanings promptly and prominently. Indeed, the imperative of making such corrections is universally recognised in journalists’ statements of professional ethics. For example, clause 1(ii) of the *Editors’ Code of Practice* overseen by IPSO requires that ‘a significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence’. Clause 3 of the *NUJ Code of Conduct* states that ‘[a journalist] does her/his utmost to correct harmful inaccuracies’.

3.29 It can be surmised that the real concern underpinning the MLA response might be that any concession in terms of correction or retraction to satisfy the requirements of Northern Irish law may weaken a publisher’s litigation strategy under English law, given that the same publication could generate litigation in both jurisdictions. If this is the case, it is not obvious why the development of policy in Northern Ireland should take account of such considerations.

*Criticism: publishers would “play the system” created by the proposal*

3.30 A further comment on the proposal is implicit in the MLA response and also in comment offered in the response to the consultation returned on behalf of the Libel Reform Campaign. This is that meaningful vindication would not be achieved for plaintiffs if it became habitual for publishers simply to retract meanings

on every occasion that a complaint was brought irrespective of whether the meaning had in fact been intended by the publisher. This is a potential concern. As was noted in the NILC consultation paper, there are two potential guards against cynical practice of this type.<sup>153</sup>

3.31 First, it might be expected that publishers would seek to defend their journalism, and would be willing to defend intended meanings before the courts if called upon to do so. Hence, it might be expected that media organisations that valued their reputations for quality journalism would be loath to capitulate and to retract merely in order to avoid legal action. Moreover, it could be expected that the reputation of media organisations that regularly retracted willy-nilly would be correspondingly discounted by the wider public.

3.32 A second guard against the exploitation of the bar to the bringing of claims can also be envisaged. This would involve the lifting of the bar where there is evidence of “malice” or an absence of good faith in the publication of the retraction or correction. It is not clear that such a disincentive would be necessary. In any event, there would continue to be the potential for a claim for malicious falsehood to be brought. In addition, any clear inadequacy in the correction or retraction afforded to the plaintiff would permit him or her to proceed to court.

*Criticism: Northern Ireland would become a magnet for plaintiffs*

3.33 A further argument raised in the MLA response is that ‘if Northern Ireland were to become the only jurisdiction within the UK which abolished the single meaning rule for libel claims, it would undoubtedly become a magnet for... plaintiffs, including those who were seeking to improperly chill freedom of expression’. The envisaged result would be that ‘Northern Ireland would be regarded by publishers internationally as a jurisdiction which was seriously inimical to publishing’.

3.34 There is some merit in the first part of this assertion. As the MLA response highlights, on account of the rules of private international law the impact on publishing would be felt across the UK (and potentially beyond) insofar as publication extended to Northern Ireland in any significant way. The tenor of the argument is curious, however, insofar as it is predicated on the idea that - under the combined proposal - defamation law in Northern Ireland would become more plaintiff-friendly to the detriment of publishers. Certainly, the combined scheme should give a plaintiff ready access to corrections or retractions if the meaning at which he or she had taken umbrage was not that intended by the publisher.

3.35 At the same time, however, the proposed scheme would have the result that defamation law in Northern Ireland would be very much more “friendly” to every responsible publisher. Indeed, again, only publishers who

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<sup>153</sup> NILC consultation paper, above n 1, at [5.37].

for some reason refused to retract or correct harmful meanings that they had not wished to convey would be in a worse position than would currently be the case. Every other responsible publisher would be liable to suit only on meanings that they chose to sustain, and would proceed into litigation without having to prepare argument on anything other than their intended meaning. The combined proposal is intended to strip out complexity from defamation litigation to the benefit of all parties.

- 3.36 Again, if litigation strategy under English law disincentivises the publishing of a correction or retraction when that would otherwise be appropriate, it is difficult to see why this should be of concern of Northern Irish policy makers.<sup>154</sup>

*Criticism: proposal introduces focus on publisher's "intended meaning"*

- 3.37 The MLA response suggests that, rather than simplify it, the combined proposal would increase the complexity of defamation litigation. One complaint in this regard is that the combined proposal introduces the concept of a publisher's intention in relation to meaning and liability, when it has been a 'longstanding principle of law that a publisher's intention is irrelevant to the determination of meaning'. Two points can be made in response to this criticism.

- 3.38 First, it is salutary that this point is usually made to emphasise the fact that it is not for a publisher to dictate the meaning that should be adopted by the court. In the context of the combined proposal, however, the point is very odd. The combined proposal provides a mechanism by which the publisher is able to achieve precisely that outcome: that is, to ensure that only the meaning intended by the publisher is contested before the court, and not any wider or alternative meaning. That is done through correcting or retracting any other meaning proposed by the plaintiff. This capacity is entirely to the benefit of responsible publishers who might wish to defend the accuracy of their journalism. For this reason, the MLA response is simply and categorically wrong to contend that:

the proposed scheme fails to take account of the fundamental importance... indeed the clear public interest... in maintaining editorial integrity and supporting responsible journalism... [and the] fundamental public interest in publishers defending proper, responsible and accurate publications.

On the contrary, the proposal facilitates precisely this form of defence of proper journalism. Indeed, it would allow publishers to have the court "cut to the chase", and deal with a claim exclusively on this basis.

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<sup>154</sup> The MLA response offers one such reason in its reference to the fact that Northern Ireland makes up only 2.8% of the UK media market, and its noting of the cost/benefit analysis undertaken by commercial publishers when deciding whether to publish in this jurisdiction. The implicit suggestion is that one or more publishers may decide to withdraw from publishing in Northern Ireland insofar as that is possible. This would be hugely ironic given the succour offered to freedom of expression and responsible media publishing by the recommendations made in this report.

3.39 The second, admittedly facetious, response to the complaint about focusing attention on the publisher's intention is that *as a matter of law*, and notwithstanding the practical result outlined above, the combined proposal does not do this. As a matter of law, the publisher's intention would remain irrelevant. The NILC consultation paper did refer often to "intended meanings". This was due, however, to the expectation that in practice a publisher would preclude the risk of liability for every meaning other than that which was in fact intended through the expedient of correcting or retracting all unintended meanings (other than those, perhaps, that were plainly fanciful). Under the combined proposal, the publisher's intention could not be relevant to the determination of meaning for the simple reason that the court would not be required to involve itself in the determination of meaning.

*Criticism: proposal would shift focus of, not diminish, disputes on meaning*

3.40 A second supposed basis on which the MLA suggests the combined proposal would increase the complexity of defamation litigation concerns disputes over meaning. The MLA response contends that 'the proposal would simply shift the focus of the legal disputes and indeed increase legal disputes about meaning, not diminish them'. It contends that the combined proposal 'would encourage plaintiff's lawyers to propose hyperbolic or unreasonable meanings which may be understood by a small proportion of the audience... with the result that the proposal would give a plaintiff a cause of action where none existed previously'. The response adds that there would be disagreement over whether in a given case 'there is a realistic distinction in the sting of different meanings sufficient to give a plaintiff a claim in respect of an unintended meaning and intended meaning'.

3.41 The "fifty shades of grey" that the MLA response supposes can be found in the interpretation of any statement exist only in the minds of lawyers schooled in current defamation practice in which context obscurantist hair-splitting can be worthwhile. To highlight this practice, the NILC consultation paper quoted interviews conducted with leading legal practitioners conducted by Professor Andrew Kenyon:

when I get a claim, I would have a look at that article and do two things. One is I would form my own view [about its meaning], as any person in the world would... and the second thing I'd do is [ask] what meaning can I extract out of it which is most helpful to my clients. The two things are often quite different.<sup>155</sup>

The ordinary reasonable audiences for publications are not so picky. It is salutary that the common law rule on "strengths of meaning" exemplified in the *Chase* levels involve only three options (the direct allegation of fact; the assertion of reasonable suspicion, and the suggestion of a need for investigation), of which only the

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<sup>155</sup> Kenyon, *Defamation: Comparative Law and Practice* (UCL Press, 2006), at 119-120. Furthermore, on the strength of interviewees' comments Kenyon notes that the meanings pleaded by defendant's are often verbose and general, not because the lawyers wish to establish those meanings *per se*, but rather because the general meaning provides a wider gateway to evidence (at 120).

first two are generally deployed. Allegations usually mean only one thing or another, or possibly a third. It is also salutary that the MLA response does not illustrate its concerns in this respect.

- 3.42 Importantly, under the combined proposal a publisher would need only to respond to meanings set out in a notice of complaint from a prospective plaintiff. The meanings contended for by the plaintiff would be definitely set out. The bar to a claim on any meaning could be achieved by way of the publication of a correction or retraction on that meaning.
- 3.43 Should a plaintiff set out a ‘hyperbolic or unreasonable’ meaning, one option would be for the publisher to obviate any potential liability by retracting or correcting that meaning, no doubt with an appropriate rhetorical flourish attached. Should the publisher choose instead simply to ignore any such meaning, liability would still almost certainly not ensue. On one hand, as is currently the case, if a plaintiff pursued a claim to court on such a meaning, the meaning could be struck out by a judge as not being capable (this capacity is reemphasised in the proposed statutory provision set out below). With the proposed removal of the presumption in favour of a jury trial, the primary reason for judicial reticence in this regard – the constitutional propriety of not intruding on the functions of the jury – would be negated. On the other hand, with the advent of a rule equivalent to section 1 of the Defamation Act 2013, the plaintiff would have to show that an unreasonable or hyperbolic meaning – by definition not a meaning that would have been taken by significant proportions of a publication’s audience – nonetheless caused “serious harm”.
- 3.44 The MLA response suggests that if the combined proposal was introduced, there would often be substantial disagreement over ‘whether there is a realistic distinction in the sting of different meanings sufficient to give a plaintiff a claim’. This suggestion seems strained. If there was marginal room in a given case to distinguish between a meaning proposed by a plaintiff and a meaning that the publisher wishes to sustain, then this should be readily appreciable by the publisher (as it would be by anyone else). In retracting or correcting the former meaning, the publisher would be at liberty, first, to reassert the latter meaning, and secondly to emphasise the plaintiff’s perceived semantic pedantry. It is difficult to imagine that any plaintiff would wish to highlight an allegation that could be sustained against themselves by complaining of some similar but marginally different meaning. Nor could it be expected that a judge would give anything other than short shrift to a plaintiff who sought to sustain a legal claim on the basis of a meaning that was only marginally different to one that had been corrected or retracted by the publisher. Again, serious harm from the marginally different meaning would have to be demonstrated to the satisfaction of the court.

*Criticism: there would be uncertainty over the meaning of promptness and prominence*

- 3.45 A key complaint in the MLA response is that the proposed scheme would be 'highly impractical'; there would be 'extensive disputes and litigation about whether a publication has been sufficiently prompt and prominent'. This potential for uncertainty was recognised in the NILC consultation paper: 'there is clearly room for debate... on how the concepts of "promptness" and "prominence" should be understood'. It is suggested by the MLA that the proposed scheme would lead to newspapers and news bulletins being filled with articles and packages correcting or apologising for meanings which were not intended'.
- 3.46 This concern regarding the manner in which corrections or retractions will be required in order to benefit from the bar to claims would appear to be at the root of the reservation underpinning the MLA response as regards the treatment of different meanings. The MLA highlights a concern that the combined proposal would entail 'draconian consequences', and that these consequences would severely and improperly impact on the editorial journalistic function and would chill freedom of expression.
- 3.47 The concerns raised by the MLA serve to focus attention on what should be required of publishers in terms of the publication of retractions and/or corrections, and on when the requirements of promptness and prominence would be satisfied. To suggest that required measures would necessarily be 'highly impractical' and 'draconian', however, is to very substantially overstate the case. Indeed, such language suggests again that the authors of the MLA response have not fully appreciated the nature of the scheme proposed in the NILC consultation paper.
- 3.48 Necessarily, any assessment of the promptness or prominence of a correction or retraction that has been published must be left to a judge who would be required to take all the circumstances of the case into account in making his or her assessment. The exercise of this discretion could be tightly controlled, however, by way of norm-setting, statutory guidance from the legislator. The NILC consultation paper invited comment on the general theme of ensuring the prominence of corrections and retractions. No specific consultation responses were received on this theme.

#### Promptness

- 3.49 As regards promptness, the suggestion in the NILC consultation report was that a seven day timeframe following the communication of a complaint may be appropriate. The MLA response to the consultation asserted that this thinking 'demonstrates a lack of appreciation for the inevitable complexity of libel disputes and the time which it often takes to properly and thoroughly investigate complaints'. It added that 'even large and well-resourced media organisations may require a significant period of time to consider properly and

respond to complaints'. The upshot, it was supposed, would be that publishers would be obliged 'significantly [to] increase their reliance on lawyers given the draconian consequences which could follow from failing to apologise promptly'.

3.50 Rather than identifying naivety on the part of the NILC, this suggestion further illustrates the failure of the authors of the MLA response properly to reflect on the proposal set out in the NILC consultation paper. In the case of a complaint from the subject of a publication, there would be no need for a publisher or its lawyers to "investigate the complaint". All that would be required would be that the publisher reread the statement complained of in its context, and then determine (1) whether the publication was capable of bearing the meaning attributed to it, and (2) whether it had been intended to convey that meaning. The first, according to Professor Kenyon's interviewees (see above), is always the first thing that a lawyer does when considering a complaint. The second may involve an interchange with a journalist or author, and an editor. If it was considered that the meaning was capable but unintended, then a correction or retraction would absolve the publisher of potential liability. It is difficult to see what complexity could require more than a relatively cursory assessment and engagement with colleagues.

3.51 If the meaning was capable and intended, it would then be for the publisher to determine how to proceed. At that stage, when a complaint would have moved beyond the scheme prescribed by the NILC consultation proposal, there would no doubt need to be an investigation and perhaps the preparation a defence. Notably, however, that exercise would already be based upon a single given meaning.

#### Prominence

3.52 As regards prominence, it is sometimes argued that corrections or retractions should be published in a manner commensurate with the original publication of erroneous or ambiguous content. As the MLA response highlights, however, it is clearly undesirable and disproportionate that routine publication by a media organisation should be swamped - or even significantly affected - by the need to correct or retract prior inaccuracies. Only in the truly exceptional case could it ever be appropriate to expect a broadcaster to dedicate scarce time in a news programme or a newspaper publisher to allocate front-page space to the making of corrections or retractions.

3.53 A degree of realism must dictate what it is appropriate to expect in the normal case. In the NILC consultation paper, it was suggested that different 'rules of thumb' might be established by statute regarding different media, subject to the overall discretion of the court. In cases where the publisher enjoyed limited capacity to provide an adequate correction or retraction directly to the recipients of the original publication on account of the absence of any continuing engagement with the audience, such as where the defamatory statement was

included in a hard copy book, the publisher might be expected to make relatively more expansive use of webpages and social media.

- 3.54 Certainly, webpages and online social media could be used to provide a low-cost, but pervasive means of ensuring that persons who might have received the original publication might subsequently also receive the clarification. They would also allow a plaintiff to point to the clarification in future to rebut repeated erroneous claims in much the same way as substantial money damages and declarations in open court are perceived to do at present.
- 3.55 In any circumstance where there was concern over the capacity of a publisher to give sufficient prominence to a correction or retraction, that person should be enabled to make a statement in open court. This option may require a change to the rules of the High Court in Northern Ireland to permit such statements to be made prior to the issuing of proceedings. It is notable, however, that in only the past month the courts have advanced the law in this respect. In a dispute between Campbell College and INM (*Belfast Telegraph*), Mr Justice Stephens provided for the making of a statement in open court prior to the issuing of proceedings. This highly innovative and welcome practice was based upon the “over-riding principle” that justice should be done.
- 3.56 A publisher who was found by a judge not to have published the retraction or correction with sufficient prominence would face liability – unless a defence was available - as all uncorrected errors on all capable meanings would be actionable.

*Criticism: the proposal would increase difficulty over the assessment of damages*

- 3.57 The MLA response asserted that the proposed scheme would lead to more disputes over the assessment of damages. It maintained that evidence would be required to determine the proportion of an audience that had understood the statement complained of in the various capable ways, and therefore to assess the corresponding quantum of damages. These are valid points; such issues would indeed arise in some cases. It might be expected, however, that in general only “mainstream”, clear, obvious and intended meanings would be defended by publishers. Moreover, the law already has developed rules governing such situations, and judges can be expected to manage such tail-end argumentation sensibly. Beyond such circumstances, it is not obvious why public policy should be oriented towards protecting irresponsible publishers who have not taken the opportunity to limit their own potential liability in respect of harmful statements that they never intended to communicate.

*Criticism: the proposed scheme would induce publishers to not defend journalism*

- 3.58 The MLA response also includes a further criticism: ‘by simply offering publishers a “cheap get out” for making prompt apologies, the scheme ignores the importance and public interest in defending claims for libel in appropriate cases’. The response highlighted the ‘fundamental public interest in publishers defending proper, responsible and accurate publications’, and berated the combined proposal on that basis that it would act as ‘a further reason why publishers would be encouraged not to defend journalism but to make prompt “corrections”, however unnecessary or injurious to freedom of expression such correction or apologies would be’.
- 3.59 This is a truly remarkable suggestion. First, as a matter of precision, the proposal does not offer any reward to publishers for the making of an “apology”. Contrition on the part of the publisher is profoundly irrelevant. A publisher would be, of course, at liberty to express remorse at the fact of inaccuracy in their publications and the impact of this. Secondly, the scheme is designed precisely to facilitate publishers in defending proper, responsible and accurate publications. If publishers elect not to do so, that is for them.

### **Recommendations**

- 3.60 It is recommended that the Northern Ireland Assembly legislate to introduce the bipartite scheme first proposed in the NILC consultation paper. This involves, first, abolition of the “single meaning rule”, and secondly, the introduction of a jurisdictional bar to claims in defamation based on meanings that had been corrected or retracted by the publisher promptly and prominently. A clause that would abolish the single meaning rule is included as clause 7 in the draft Bill that is included as Appendix 1 to this report:

#### 7 Abolition of the single meaning rule

The common law rule known as the single meaning rule is abolished.

- 3.61 A clause that would give effect to the second part of the bipartite proposal – the jurisdictional bar to claims in defamation on meanings that had been corrected or retracted - is included as clause 11 in the draft Bill that is included as Appendix 1 to this report:

#### 11 Capability and action following correction or retraction

- (1) A court has no jurisdiction to hear a claim in defamation in respect of a publication, unless
- (a) the statement complained of is capable of bearing the specific meaning attributed to it by the plaintiff, and
  - (b) the specific meaning attributed by the plaintiff to the statement complained of has been communicated to the defendant.

(2) Where a statement complained of is capable of bearing two or more specific meanings, a court has no jurisdiction to hear a claim in defamation in respect of any specific meaning regarding which the defendant has published a correction or retraction promptly and prominently.

(3) On an application by the plaintiff, the court shall determine whether a correction or retraction of a specific meaning attributed to the statement complained of was made promptly and prominently, and in accordance with the requirements of subsection (7).

(4) For the purposes of subsection (2), a defendant cannot correct or retract all specific meanings that the statement complained of is capable of bearing.

(5) For the purposes of subsection (4), 'promptly' means normally within seven days.

(6) For the purposes of subsection (4), 'prominently' is to be understood in accordance with the provisions of Schedule 1.

(7) For the purposes of this section, the publication of any correction or retraction must

(a) clearly state the specific meaning attributed by the plaintiff to the statement complained of, and

(b) include further information that corrects the specific meaning attributed by the plaintiff to the statement complained of or a statement that that specific meaning is not true.

3.62 Some elements of this proposed clause require further elaboration. The first sub-clause of clause 11 entails that where a claim is brought to court the judge will confirm, first, whether the meanings attributed to statement complained of by the plaintiff had been communicated to the publisher allowing him or her an opportunity to correct or retract the meaning at issue. Secondly, the judge will assess whether the words complained of are "capable" of bearing the attributed meaning. If the statement is not so capable, then the action would be struck out. With the proposed removal of the presumption in favour of a jury trial, the primary reason for judicial reticence in this regard – the constitutional propriety of not intruding on the functions of the jury – would be negated.

3.63 The third sub-clause of clause 11 provides for a plaintiff to apply to a court and to contend that a purported retraction or correction was not made promptly or prominently in the hope of escaping the jurisdictional bar imposed by sub-clause (2). This application might also contend that a correction was not made properly in accordance with the requirements set out in sub-clause (7). The effect of a ruling in favour of the plaintiff on any of these grounds would be that the meaning attributed by the plaintiff would require consideration by the court should a claim be pursued. Any such claim would still have to satisfy the clause 1 serious harm test and might otherwise be defended by the publisher.

3.64 The fourth sub-clause of clause 11 provides that a defendant is not able to correct or retract all specific meanings that the statement complained of is capable of bearing. This provision would prevent a publisher merely retracting every specific meaning that was communicated by a complainant and thereby evade all liability. It can be assumed that a publisher intended to assert some capable meaning in what it published. If

the attempt was made to correct or retract every capable specific meaning, the court would then treat the correction of one of those meanings as a factor to be taken into consideration in assessing whether the statement complained of had caused or was likely to cause serious harm for the purposes of clause 1. Any claim on other corrected meanings would be barred under clause 11(2).

3.65 The sixth sub-clause of clause 11 provides that further guidance on the concept of “prominence” for the purposes of clause 11(2) will be provided in a Schedule to the Bill. This Schedule is included as part of the draft Bill that included as Appendix 1 to this report, and is set out below:

#### Schedule 1

(1) When determining whether a retraction or correction was made prominently for the purposes of section 1(3), the court should normally take into account:

(a) whether the correction or retraction was communicated directly to the recipients of the statement complained of, if such direct communication was reasonable and practicable in the circumstances,

(b) the extent to which the correction or retraction was published on social media or similar online platforms,

(c) whether the correction or retraction was published in a clearly designated section on a publisher’s webpages,

(d) whether the correction or retraction was published in a clearly designated section in any relevant physical or electronic publication, and

(e) whether the correction or retraction was afforded prominence by any other means.

(2) If the statement complained of was published in a radio or television broadcast, in exceptional circumstances the court may also take into account whether the correction or retraction was broadcast.

(3) If the statement complained of was published in a regularly published physical publication, in exceptional circumstances the court may also take into account whether the correction or retraction was published on the face of the publication or in some other preminent part of the physical publication.

(4) For the purposes of paras. (2) and (3), ‘exceptional circumstances’ include those where the specific meaning of the statement complained of that the defendant has corrected or retracted is very highly defamatory of the plaintiff.

(5) A correction or retraction made in a statement in open court is prominent for the purposes of section 11(2).

3.66 On the assumption that the bipartite reform was introduced by the Northern Ireland Assembly, it is further recommended that the jurisdiction of the county court in defamation claims should be increased from £3,000 to £30,000 in line with other civil claims (notably claims for misuse of private information).<sup>156</sup> It would become feasible for many claims to be determined at this lower level as much of the conceptual and practical

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<sup>156</sup> Art.10(2), County Courts (Northern Ireland) Order 1980.

complexity of defamation proceedings would be stripped out with the end of court-based determination of meaning. The focus instead would lie on proof of pleaded defences.

## Other Reform Options: Civil Justice Reforms

4.01 At the time of writing, Lord Justice Gillen has been asked by the Lord Chief Justice of Northern Ireland to undertake a review of civil justice. The recommendations made in the foregoing chapters of this report and reflected in the draft Bill included in Appendix 1 would entail a number of procedural changes in the consideration of any defamation claim. Prominent among these are the recommendations that:

- in light of any adoption of the bipartite reform set out in chapter 3, the jurisdiction of the county court in defamation claims should be increased from £3,000 (Art.10(2), County Courts (Northern Ireland) Order 1980) to £30,000 in line with other civil claims (notably claims for misuse of private information).

4.02 In addition, a small number of respondents to the NILC consultation suggested additional reform options for consideration by the NI Law Commission. Of these, most would also involve revisions to civil procedure. These options for reform to civil procedure are noted below, and have been fed into the review process being undertaken by Lord Justice Gillen:

- The issuing of a Practice Direction to emphasise the importance of proper compliance with the Pre-Action Protocol for Defamation, which would have actual cost consequences if not followed by plaintiffs and defendants (MLA; BBC; News Media Association). The ways in which “proper compliance” has previously been lacking is not entirely evident. It might be expected that any such failure would be treated in the same fashion by judges in Northern Ireland as it would be in England and Wales. Clearly, however, there is a perception of difference among some litigants that should be considered further.
- The issuing of a Practice Direction to encourage preliminary hearings in libel claims to determine key issues such as meaning, serious harm, and issues relating to fact or comment (MLA; BBC). Notably, this assumes that the determination of meaning would remain a function of the court. Whether a Practice Direction would be required in this area – above the active case management for which Northern Irish judges have been commended in recent times – is a moot point for consideration under the review of civil justice.
- The ability for a prospective defendant to make a statement in open court prior to the initiation of a claim. As noted above, the innovative recent decision of Mr Justice Stephens in *Campbell College v INM* to allow the making of a statement in open court prior to the issuing of proceedings may have sufficiently

addressed this call.<sup>157</sup> It may be, however, that a more full rendition of this rule could sensibly be written into the civil procedure rules on the culmination of the review of civil justice.

- The introduction of a rule requiring plaintiffs to evidence the existence of funds adequate to meet any costs arising from an unsuccessful action (Libel Reform Campaign). The potential value of such a rule is evident, but any consideration must also contemplate the potential impact of such a rule change on access to justice.
- Incentivisation of early neutral evaluation and forms of alternative dispute resolution (Libel Reform Campaign; others).

4.03 A number of further reform options were mooted by respondents to the NILC consultation. These included the desirability of recognising genuine and sufficiently prominent retraction as a defence (Jeffrey Dudgeon); modification of the public interest defence (Libel Reform Campaign), and the introduction a bar on claims by emanations of the state or corporate bodies delivering services with public money (Libel Reform Campaign).

4.04 The first of these suggestions is in large measure catered for by the serious harm test set out in clause 1 of the draft Bill appended to this report insofar as the issuing of a correction and/or apology is one of the factors taken into consideration by the court when assessing the extent of harm. It is also addressed in the bipartite proposal reflected in clauses 7 and 11 of the draft Bill. It is considered further that the underpinning purpose of the call for a bar on claims by emanations of the state or corporate bodies delivering services with public money may also be adequately addressed through the clause 1 requirement that serious harm be demonstrated if any such claim is to be successful.

4.05 Modification of the public interest defence set out in clause 4 of the draft Bill appended to this report in the manner suggested by the Libel Reform Campaign is considered inappropriate in light of competing Convention obligations, as noted by the Joint Committee on Human Rights in its consideration of the Defamation Bill.

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<sup>157</sup> Unreported decision of 8 June 2016. A correction was also published – see Editorial, ‘Campbell College’, *Belfast Telegraph*, 8 June 2016.

# Appendix 1: Draft Bill Reflecting Full Package of Recommendations

This draft Bill includes the full package of proposals that are recommended in this report.

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## Defamation (Northern Ireland) Bill

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A BILL TO amend the law of defamation.

BE IT ENACTED by being passed by the Northern Ireland Assembly and assented to by Her Majesty as follows:-

Requirement of serious harm

1 Serious harm

- (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
- (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss.

Defences

2 Truth

- (1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.
- (2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.
- (3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant’s reputation.
- (4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation (Northern Ireland) Act 1955 (Justification) is repealed.

3 Honest opinion

- (1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
- (2) The first condition is that the statement complained of was a statement of opinion.
- (3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.
- (4) The third condition is that an honest person could have held the opinion on the basis of—
  - (a) any fact which existed at the time the statement complained of was published;

- (b) anything asserted to be a fact in a privileged statement published before or at the same time as the statement complained of;
  - (c) any fact that the defendant reasonably believed to be true at the time the statement complained of was published.
- (5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.
- (6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person (“the author”); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.
- (7) For the purposes of subsection (4)(b) a statement is a “privileged statement” if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—
- (a) a defence under section 4 (publication on matter of public interest);
  - (b) a defence under section 6 (peer-reviewed statement in scientific or academic journal);
  - (c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);
  - (d) a defence under section 15 of that Act (other reports protected by qualified privilege).
- (8) For the purposes of subsection (2), a “statement of opinion” can include any inference of fact.
- (9) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation (Northern Ireland) Act 1955 (fair comment) is repealed.

#### 4 Publication on matter of public interest

- (1) It is a defence to an action for defamation for the defendant to show that—
- (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
  - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
- (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
- (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.
- (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.
- (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

(6) The common law defence known as the Reynolds defence is abolished.

#### 5 Peer-reviewed statement in scientific or academic journal etc

(1) The publication of a statement in a scientific or academic journal (whether published in electronic form or otherwise) is privileged if the following conditions are met.

(2) The first condition is that the statement relates to a scientific or academic matter.

(3) The second condition is that before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by—

(a) the editor of the journal, and

(b) one or more persons with expertise in the scientific or academic matter concerned.

(4) Where the publication of a statement in a scientific or academic journal is privileged by virtue of subsection (1), the publication in the same journal of any assessment of the statement's scientific or academic merit is also privileged if—

(a) the assessment was written by one or more of the persons who carried out the independent review of the statement; and

(b) the assessment was written in the course of that review.

(5) Where the publication of a statement or assessment is privileged by virtue of this section, the publication of a fair and accurate copy of, extract from or summary of the statement or assessment is also privileged.

(6) A publication is not privileged by virtue of this section if it is shown to be made with malice.

(7) Nothing in this section is to be construed—

(a) as protecting the publication of matter the publication of which is prohibited by law;

(b) as limiting any privilege subsisting apart from this section.

(8) The reference in subsection (3)(a) to "the editor of the journal" is to be read, in the case of a journal with more than one editor, as a reference to the editor or editors who were responsible for deciding to publish the statement concerned.

#### 6 Reports etc protected by privilege

(1) For subsection (3) of section 14 of the Defamation Act 1996 (reports of court proceedings absolutely privileged) substitute—

"(3) This section applies to—

(a) any court in the United Kingdom;

(b) any court established under the law of a country or territory outside the United Kingdom;

(c) any international court or tribunal established by the Security Council of the United Nations or by an international agreement;

and in paragraphs (a) and (b) "court" includes any tribunal or body exercising the judicial power of the State."

(2) In subsection (3) of section 15 of that Act (qualified privilege) for “public concern” substitute “public interest”.

(3) Schedule 1 to that Act (qualified privilege) is amended as follows.

(4) For paragraphs 9 and 10 substitute—

“9(1) A fair and accurate copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of—

- (a) a legislature or government anywhere in the world;
- (b) an authority anywhere in the world performing governmental functions;
- (c) an international organisation or international conference.

(2) In this paragraph “governmental functions” includes police functions.

10 A fair and accurate copy of, extract from or summary of a document made available by a court anywhere in the world, or by a judge or officer of such a court.”

(5) After paragraph 11 insert—

“11AA fair and accurate report of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest.”

(6) In paragraph 12 (report of proceedings at public meetings)—

- (a) in sub-paragraph (1) for “in a member State” substitute “anywhere in the world”;
- (b) in sub-paragraph (2) for “public concern” substitute “public interest”.

(7) In paragraph 13 (report of proceedings at meetings of public company)—

- (a) in sub-paragraph (1), for “UK public company” substitute “listed company”;
- (b) for sub-paragraphs (2) to (5) substitute—

“(2) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company—

- (a) by or with the authority of the board of directors of the company,
- (b) by the auditors of the company, or
- (c) by any member of the company in pursuance of a right conferred by any statutory provision.

(3) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company which relates to the appointment, resignation, retirement or dismissal of directors of the company or its auditors.

(4) In this paragraph “listed company” has the same meaning as in Part 12 of the Corporation Tax Act 2009 (see section 1005 of that Act).”

(8) In paragraph 14 (report of finding or decision of certain kinds of associations) in the words before paragraph (a), for “in the United Kingdom or another member State” substitute “anywhere in the world”.

(9) After paragraph 14 insert—

“14AA fair and accurate—(a) report of proceedings of a scientific or academic conference held anywhere in the world, or

(b) copy of, extract from or summary of matter published by such a conference.”

(10) For paragraph 15 (report of statements etc by a person designated by the Lord Chancellor for the purposes of the paragraph) substitute—

“15 (1) A fair and accurate report or summary of, copy of or extract from, any adjudication, report, statement or notice issued by a body, officer or other person designated for the purposes of this paragraph by order of the Lord Chancellor.

(2) An order under this paragraph shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.”

(11) For paragraphs 16 and 17 (general provision) substitute—

“16 In this Schedule—“court” includes—

(a) any tribunal or body established under the law of any country or territory exercising the judicial power of the State;

(b) any international tribunal established by the Security Council of the United Nations or by an international agreement;

(c) any international tribunal deciding matters in dispute between States;

“international conference” means a conference attended by representatives of two or more governments;

“international organisation” means an organisation of which two or more governments are members, and includes any committee or other subordinate body of such an organisation;

“legislature” includes a local legislature; and

“member State” includes any European dependent territory of a member State.”

Single meaning rule

7 Abolition of the single meaning rule

The common law rule known as the single meaning rule is abolished.

Single publication rule

8 Single publication rule

(1) This section applies if a person—

(a) publishes a statement to the public (“the first publication”), and

(b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

(2) In subsection (1) “publication to the public” includes publication to a section of the public.

(3) For the purposes of article 6(2) of the Limitation (Northern Ireland) Order 1989 (Time limit: certain actions founded on tort) any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

(4) This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.

(5) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters)—

- (a) the level of prominence that a statement is given;
- (b) the extent of the subsequent publication.

(6) Where this section applies—

- (a) it does not affect the court's discretion under section 51 of the Limitation (Northern Ireland) Order 1989 (Discretionary extension of time limit: actions for libel or slander), and
- (b) the reference in paragraph (a) of that section to the operation of article 51 of that Act is a reference to the operation of Article 6(2) (or, where applicable, the period allowed by Article 48(1) as modified by Article 48(7)) together with this section.

## Jurisdiction

### 9 Action against a person not domiciled in the UK or a Member State etc

(1) This section applies to an action for defamation against a person who is not domiciled—

- (a) in the United Kingdom;
- (b) in another Member State; or
- (c) in a state which is for the time being a contracting party to the Lugano Convention.

(2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

(3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of.

(4) For the purposes of this section—

- (a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation;
- (b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention.

(5) In this section—

“the Brussels Regulation” means Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended from time to time and as applied by the Agreement made on 19th October 2005 between

the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ No L299 16.11.2005 at p 62);

“the Lugano Convention” means the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30th October 2007.

#### 10 Action against a person who was not the author, editor etc

(1) A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of.

(2) For the purposes of this section, “author”, “editor” and “publisher” have the following meanings, which are further explained in subsection (3)—

“author” means the originator of the statement, but does not include a person who did not intend that his statement be published at all;

“editor” means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and

“publisher” means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.

(3) A person shall not be considered the author, editor or publisher of a statement if he is only involved—

(a) in printing, producing, distributing or selling printed material containing the statement;

(b) in processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part I of the Copyright, Designs and Patents Act 1988) containing the statement;

(c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;

(d) as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;

(e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

(f) in the moderation of statements posted on a website by others.

In a case not within paragraphs (a) to (f) the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement.

(4) Employees or agents of an author, editor or publisher are in the same position as their employer or principal to the extent that they are responsible for the content of the statement or the decision to publish it.

(5) Regulations may—

(a) define a category of persons who, while not being an author, editor or publisher as defined in subsections (2) and (3), will nonetheless be treated as a publisher for the purposes of defamation law generally.

(b) make provision for an appropriate defence of innocent dissemination applicable to any person who is treated as a publisher in accordance with Regulations made under this subsection.

(6) Section 1 of the Defamation Act 1996 is repealed insofar as it applies in Northern Ireland.

(7) The common law defence of innocent dissemination is abolished.

## 11 Capability and action following correction or retraction

(1) A court has no jurisdiction to hear a claim in defamation in respect of a publication, unless

(a) the statement complained of is capable of bearing the specific meaning attributed to it by the plaintiff, and

(b) the specific meaning attributed by the plaintiff to the statement complained of has been communicated to the defendant.

(2) Where a statement complained of is capable of bearing two or more specific meanings, a court has no jurisdiction to hear a claim in defamation in respect of any specific meaning regarding which the defendant has published a correction or retraction promptly and prominently.

(3) On an application by the plaintiff, the court shall determine whether a correction or retraction of a specific meaning attributed to the statement complained of was made promptly and prominently, and in accordance with the requirements of subsection (7).

(4) For the purposes of subsection (2), a defendant cannot correct or retract all specific meanings that the statement complained of is capable of bearing.

(5) For the purposes of subsection (4), 'promptly' means normally within seven days.

(6) For the purposes of subsection (4), 'prominently' is to be understood in accordance with the provisions of Schedule 1.

(7) For the purposes of this section, the publication of any correction or retraction must

(a) clearly state the specific meaning attributed by the plaintiff to the statement complained of, and

(b) include further information that corrects the specific meaning attributed by the plaintiff to the statement complained of or a statement that that specific meaning is not true.

#### Trial by jury

##### 12 Trial to be without a jury unless the court orders otherwise

In section 62 of the Judicature (Northern Ireland) Act 1978 (Trial with and without jury) in omit paragraphs (a) and (b).

#### Summary of court judgment

##### 13 Power of court to order a summary of its judgment to be published

(1) Where a court gives judgment for the claimant in an action for defamation the court may order the defendant to publish a summary of the judgment.

(2) The wording of any summary and the time, manner, form and place of its publication are to be for the parties to agree.

(3) If the parties cannot agree on the wording, the wording is to be settled by the court.

(4) If the parties cannot agree on the time, manner, form or place of publication, the court may give such directions as to those matters as it considers reasonable and practicable in the circumstances.

(5) This section does not apply where the court gives judgment for the claimant under section 8(3) of the Defamation Act 1996 (summary disposal of claims).

#### Removal, etc of statements

#### 14 Order to remove statement or cease distribution etc

- (1) Where a court gives judgment for the claimant in an action for defamation the court may order—
  - (a) the operator of a website on which the defamatory statement is posted to remove the statement, or
  - (b) any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement.
- (2) In this section “author”, “editor” and “publisher” have the same meaning as in section 1 of the Defamation Act 1996.
- (3) Subsection (1) does not affect the power of the court apart from that subsection.

#### Slander

#### 15 Special damage

- (1) The Slander of Women Act 1891 is repealed.
- (2) The publication of a statement that conveys the imputation that a person has a contagious or infectious disease does not give rise to a cause of action for slander unless the publication causes the person special damage.

#### General provisions

#### 16 Meaning of “publish” and “statement”

In this Act—

“publish” and “publication”, in relation to a statement, have the meaning they have for the purposes of the law of defamation generally;

“statement” means words, pictures, visual images, gestures or any other method of signifying meaning.

#### 17 Consequential amendments and savings etc

- (1) Article 9 of the Rehabilitation of Offenders (Northern Ireland) Order 1978 is amended in accordance with subsections (2) and (3).
- (2) In subsection (3) for “of justification or fair comment or” substitute “under section 2 or 3 of the Defamation (Northern Ireland) Act 2016 which is available to him or any defence”.
- (3) In subsection (5) for “the defence of justification” substitute “a defence under section 2 of the Defamation (Northern Ireland) Act 2016”.
- (4) Nothing in section 1 or 15 affects any cause of action accrued before the commencement of the section in question.
- (5) Nothing in sections 2 to 6 or 10 has effect in relation to an action for defamation if the cause of action accrued before the commencement of the section in question.

(6) In determining whether section 8 applies, no account is to be taken of any publication made before the commencement of the section.

(7) Nothing in section 9 or 12 has effect in relation to an action for defamation begun before the commencement of the section in question.

(8) In determining for the purposes of subsection (7)(a) of section 3 whether a person would have a defence under section 4 to any action for defamation, the operation of subsection (5) of this section is to be ignored.

## 18 Regulations and orders

(1) Regulations and orders under this Act shall be subject to negative resolution of the Assembly.

(2) Regulations and orders made by the Department under this Act may contain such incidental, supplementary, transitional, transitory and savings provisions as appear to the Department to be necessary or expedient.

(3) “the Department” means the Department of Finance.

## 19 Commencement

(1) This section, section 16 and subsections (4) to (8) of section 17 come into operation on the day after the day on which this Act receives Royal Assent.

(2) The other provisions of this Act come into operation on such day or days as the Department may by order appoint.

## 20 Short title

This Act may be cited as the Defamation (Northern Ireland) Act 2016.

## Schedule 1

(1) When determining whether a retraction or correction was made prominently for the purposes of section 1(3), the court should normally take into account:

(a) whether the correction or retraction was communicated directly to the recipients of the statement complained of, if such direct communication was reasonable and practicable in the circumstances,

(b) the extent to which the correction or retraction was published on social media or similar online platforms,

(c) whether the correction or retraction was published in a clearly designated section on a publisher’s webpages,

(d) whether the correction or retraction was published in a clearly designated section in any relevant physical or electronic publication, and

(e) whether the correction or retraction was afforded prominence by any other means.

(2) If the statement complained of was published in a radio or television broadcast, in exceptional circumstances the court may also take into account whether the correction or retraction was broadcast.

(3) If the statement complained of was published in a regularly published physical publication, in exceptional circumstances the court may also take into account whether the correction or retraction was published on the face of the publication or in some other preeminent part of the physical publication.

(4) For the purposes of paras. (2) and (3), 'exceptional circumstances' include those where the specific meaning of the statement complained of that the defendant has corrected or retracted is very highly defamatory of the plaintiff.

(5) A correction or retraction made in a statement in open court is prominent for the purposes of section 11(2).

## Appendix 2: Draft Bill Emulating Defamation Act 2013

This appendix comprises a draft Bill that if, if passed, would see the provisions of the Defamation Act 2013 emulated in Northern Irish law. This draft Bill is that authored previously by Brian Garrett, Austen Morgan and Jeffrey Dudgeon.

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### Defamation (Northern Ireland) Bill

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A BILL TO amend the law of defamation.

BE IT ENACTED by being passed by the Northern Ireland Assembly and assented to by Her Majesty as follows:-

#### Requirement of serious harm

##### 1 Serious harm

- (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
- (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss.

#### Defences

##### 2 Truth

- (1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.
- (2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.
- (3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant’s reputation.
- (4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation (Northern Ireland) Act 1955 (Justification) is repealed.

##### 3 Honest opinion

- (1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
- (2) The first condition is that the statement complained of was a statement of opinion.
- (3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.
- (4) The third condition is that an honest person could have held the opinion on the basis of—
  - (a) any fact which existed at the time the statement complained of was published;

- (b) anything asserted to be a fact in a privileged statement published before the statement complained of.
- (5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.
- (6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person (“the author”); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.
- (7) For the purposes of subsection (4)(b) a statement is a “privileged statement” if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—
  - (a) a defence under section 4 (publication on matter of public interest);
  - (b) a defence under section 6 (peer-reviewed statement in scientific or academic journal);
  - (c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);
  - (d) a defence under section 15 of that Act (other reports protected by qualified privilege).
- (8) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation (Northern Ireland) Act 1955 (fair comment) is repealed.

#### 4 Publication on matter of public interest

- (1) It is a defence to an action for defamation for the defendant to show that—
  - (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
  - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
- (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
- (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.
- (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.
- (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.
- (6) The common law defence known as the Reynolds defence is abolished.

#### 5 Operators of websites

(1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.

(2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.

(3) The defence is defeated if the claimant shows that—

- (a) it was not possible for the claimant to identify the person who posted the statement,
- (b) the claimant gave the operator a notice of complaint in relation to the statement, and
- (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

(4) For the purposes of subsection (3)(a), it is possible for a claimant to “identify” a person only if the claimant has sufficient information to bring proceedings against the person.

(5) Regulations may—

- (a) make provision as to the action required to be taken by an operator of a website in response to a notice of complaint (which may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal);
- (b) make provision specifying a time limit for the taking of any such action;
- (c) make provision conferring on the court a discretion to treat action taken after the expiry of a time limit as having been taken before the expiry;
- (d) make any other provision for the purposes of this section.

(6) Subject to any provision made by virtue of subsection (7), a notice of complaint is a notice which—

- (a) specifies the complainant’s name,
- (b) sets out the statement concerned and explains why it is defamatory of the complainant,
- (c) specifies where on the website the statement was posted, and
- (d) contains such other information as may be specified in regulations.

(7) Regulations may make provision about the circumstances in which a notice which is not a notice of complaint is to be treated as a notice of complaint for the purposes of this section or any provision made under it.

(8) Regulations under this section—

- (a) may make different provision for different circumstances;
- (b) are to be made by statutory rules.

(9) A statutory rule containing regulations under this section may not be made unless a draft of the rule has been laid before, and approved by a resolution of the Assembly.

(10) In this section “regulations” means regulations made by the Department.

(11) The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice in relation to the posting of the statement concerned.

(12) The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.

## 6 Peer-reviewed statement in scientific or academic journal etc

- (1) The publication of a statement in a scientific or academic journal (whether published in electronic form or otherwise) is privileged if the following conditions are met.
- (2) The first condition is that the statement relates to a scientific or academic matter.
- (3) The second condition is that before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by—
  - (a) the editor of the journal, and
  - (b) one or more persons with expertise in the scientific or academic matter concerned.
- (4) Where the publication of a statement in a scientific or academic journal is privileged by virtue of subsection (1), the publication in the same journal of any assessment of the statement's scientific or academic merit is also privileged if—
  - (a) the assessment was written by one or more of the persons who carried out the independent review of the statement; and
  - (b) the assessment was written in the course of that review.
- (5) Where the publication of a statement or assessment is privileged by virtue of this section, the publication of a fair and accurate copy of, extract from or summary of the statement or assessment is also privileged.
- (6) A publication is not privileged by virtue of this section if it is shown to be made with malice.
- (7) Nothing in this section is to be construed—
  - (a) as protecting the publication of matter the publication of which is prohibited by law;
  - (b) as limiting any privilege subsisting apart from this section.
- (8) The reference in subsection (3)(a) to "the editor of the journal" is to be read, in the case of a journal with more than one editor, as a reference to the editor or editors who were responsible for deciding to publish the statement concerned.

## 7 Reports etc protected by privilege

- (1) For subsection (3) of section 14 of the Defamation Act 1996 (reports of court proceedings absolutely privileged) substitute—

"(3) This section applies to—

  - (a) any court in the United Kingdom;
  - (b) any court established under the law of a country or territory outside the United Kingdom;
  - (c) any international court or tribunal established by the Security Council of the United Nations or by an international agreement;

and in paragraphs (a) and (b) "court" includes any tribunal or body exercising the judicial power of the State."
- (2) In subsection (3) of section 15 of that Act (qualified privilege) for "public concern" substitute "public interest".

(3) Schedule 1 to that Act (qualified privilege) is amended as follows.

(4) For paragraphs 9 and 10 substitute—

“9(1) A fair and accurate copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of—

- (a) a legislature or government anywhere in the world;
- (b) an authority anywhere in the world performing governmental functions;
- (c) an international organisation or international conference.

(2) In this paragraph “governmental functions” includes police functions.

10 A fair and accurate copy of, extract from or summary of a document made available by a court anywhere in the world, or by a judge or officer of such a court.”

(5) After paragraph 11 insert—

“11AA fair and accurate report of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest.”

(6) In paragraph 12 (report of proceedings at public meetings)—

- (a) in sub-paragraph (1) for “in a member State” substitute “anywhere in the world”;
- (b) in sub-paragraph (2) for “public concern” substitute “public interest”.

(7) In paragraph 13 (report of proceedings at meetings of public company)—

- (a) in sub-paragraph (1), for “UK public company” substitute “listed company”;
- (b) for sub-paragraphs (2) to (5) substitute—

“(2) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company—

- (a) by or with the authority of the board of directors of the company,
- (b) by the auditors of the company, or
- (c) by any member of the company in pursuance of a right conferred by any statutory provision.

(3) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company which relates to the appointment, resignation, retirement or dismissal of directors of the company or its auditors.

(4) In this paragraph “listed company” has the same meaning as in Part 12 of the Corporation Tax Act 2009 (see section 1005 of that Act).”

(8) In paragraph 14 (report of finding or decision of certain kinds of associations) in the words before paragraph (a), for “in the United Kingdom or another member State” substitute “anywhere in the world”.

(9) After paragraph 14 insert—

“14AA fair and accurate—(a) report of proceedings of a scientific or academic conference held anywhere in the world, or

(b) copy of, extract from or summary of matter published by such a conference.”

(10) For paragraph 15 (report of statements etc by a person designated by the Lord Chancellor for the purposes of the paragraph) substitute—

“15 (1) A fair and accurate report or summary of, copy of or extract from, any adjudication, report, statement or notice issued by a body, officer or other person designated for the purposes of this paragraph by order of the Lord Chancellor.

(2) An order under this paragraph shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.”

(11) For paragraphs 16 and 17 (general provision) substitute—

“16 In this Schedule—“court” includes—

(a) any tribunal or body established under the law of any country or territory exercising the judicial power of the State;

(b) any international tribunal established by the Security Council of the United Nations or by an international agreement;

(c) any international tribunal deciding matters in dispute between States;

“international conference” means a conference attended by representatives of two or more governments;

“international organisation” means an organisation of which two or more governments are members, and includes any committee or other subordinate body of such an organisation;

“legislature” includes a local legislature; and

“member State” includes any European dependent territory of a member State.”

## Single publication rule

### 8 Single publication rule

(1) This section applies if a person—

(a) publishes a statement to the public (“the first publication”), and

(b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

(2) In subsection (1) “publication to the public” includes publication to a section of the public.

(3) For the purposes of article 6(2) of the Limitation (Northern Ireland) Order 1989 (Time limit: certain actions founded on tort) any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

(4) This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.

(5) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters)—

(a) the level of prominence that a statement is given;

(b) the extent of the subsequent publication.

(6) Where this section applies—

(a) it does not affect the court's discretion under section 51 of the Limitation (Northern Ireland) Order 1989 (Discretionary extension of time limit: actions for libel or slander), and

(b) the reference in paragraph (a) of that section to the operation of article 51 of that Act is a reference to the operation of Article 6(2) (or, where applicable, the period allowed by Article 48(1) as modified by Article 48(7)) together with this section.

## Jurisdiction

### 9 Action against a person not domiciled in the UK or a Member State etc

(1) This section applies to an action for defamation against a person who is not domiciled—

(a) in the United Kingdom;

(b) in another Member State; or

(c) in a state which is for the time being a contracting party to the Lugano Convention.

(2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

(3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of.

(4) For the purposes of this section—

(a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation;

(b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention.

(5) In this section—

“the Brussels Regulation” means Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended from time to time and as applied by the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ No L299 16.11.2005 at p 62);

“the Lugano Convention” means the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30th October 2007.

#### 10 Action against a person who was not the author, editor etc

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

(2) In this section “author”, “editor” and “publisher” have the same meaning as in section 1 of the Defamation Act 1996.

#### Trial by jury

#### 11 Trial to be without a jury unless the court orders otherwise

In section 62 of the Judicature (Northern Ireland) Act 1978 (Trial with and without jury) in omit paragraphs (a) and (b).

#### Summary of court judgment

#### 12 Power of court to order a summary of its judgment to be published

(1) Where a court gives judgment for the claimant in an action for defamation the court may order the defendant to publish a summary of the judgment.

(2) The wording of any summary and the time, manner, form and place of its publication are to be for the parties to agree.

(3) If the parties cannot agree on the wording, the wording is to be settled by the court.

(4) If the parties cannot agree on the time, manner, form or place of publication, the court may give such directions as to those matters as it considers reasonable and practicable in the circumstances.

(5) This section does not apply where the court gives judgment for the claimant under section 8(3) of the Defamation Act 1996 (summary disposal of claims).

#### Removal, etc of statements

#### 13 Order to remove statement or cease distribution etc

(1) Where a court gives judgment for the claimant in an action for defamation the court may order—

(a) the operator of a website on which the defamatory statement is posted to remove the statement, or

(b) any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement.

(2) In this section “author”, “editor” and “publisher” have the same meaning as in section 1 of the Defamation Act 1996.

(3) Subsection (1) does not affect the power of the court apart from that subsection.

## Slander

### 14 Special damage

- (1) The Slander of Women Act 1891 is repealed.
- (2) The publication of a statement that conveys the imputation that a person has a contagious or infectious disease does not give rise to a cause of action for slander unless the publication causes the person special damage.

## General provisions

### 15 Meaning of “publish” and “statement”

In this Act—

“publish” and “publication”, in relation to a statement, have the meaning they have for the purposes of the law of defamation generally;

“statement” means words, pictures, visual images, gestures or any other method of signifying meaning.

### 16 Consequential amendments and savings etc

- (1) Article 9 of the Rehabilitation of Offenders (Northern Ireland) Order 1978 is amended in accordance with subsections (2) and (3).
- (2) In subsection (3) for “of justification or fair comment or” substitute “under section 2 or 3 of the Defamation (Northern Ireland) Act 2016 which is available to him or any defence”.
- (3) In subsection (5) for “the defence of justification” substitute “a defence under section 2 of the Defamation (Northern Ireland) Act 2016”.
- (4) Nothing in section 1 or 14 affects any cause of action accrued before the commencement of the section in question.
- (5) Nothing in sections 2 to 7 or 10 has effect in relation to an action for defamation if the cause of action accrued before the commencement of the section in question.
- (6) In determining whether section 8 applies, no account is to be taken of any publication made before the commencement of the section.
- (7) Nothing in section 9 or 11 has effect in relation to an action for defamation begun before the commencement of the section in question.
- (8) In determining for the purposes of subsection (7)(a) of section 3 whether a person would have a defence under section 4 to any action for defamation, the operation of subsection (5) of this section is to be ignored.

### 17 Regulations and orders

(1) Except as provided by section 5(9), regulations and orders under this Act shall be subject to negative resolution of the Assembly.

(2) No regulations shall be made under section 5 unless a draft of the regulations has been laid before, and approved by, a resolution of the Assembly.

(3) Regulations and orders made by the Department under this Act may contain such incidental, supplementary, transitional, transitory and savings provisions as appear to the Department to be necessary or expedient.

(4) “the Department” means the Department of Finance.

#### 18 Commencement

(1) This section, section 15 and subsections (4) to (8) of section 16 come into operation on the day after the day on which this Act receives Royal Assent.

(2) The other provisions of this Act come into operation on such day or days as the Department may by order appoint.

#### 19 Short title

This Act may be cited as the Defamation (Northern Ireland) Act 2016.