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Your reference: *2021/493*
Our reference: *GM 0982 2021*

Date: *9 December 2021*

Dear Peter

DEFAMATION BILL—CLAUSE BY CLAUSE SCRUTINY

Thank you for your letter of 26th November, 2021 about the Committee's ongoing consideration of the Defamation Bill.

I have read your letter which sets out a series of questions to be considered by the Department. Officials have examined those questions and the Department offers the following comments.

First of all, this Bill is a Private Members Bill. The Department has previously outlined its concerns relating to the manner in which the Bill was brought forward, where no fresh thinking or further consultation had been undertaken since 2013, the short time in which the Committee and the Assembly has at the tail end of this mandate to consider the Bill, and aspects of the provisions contained in the Bill that have simply been lifted from the Defamation Act 2013 that applies to England and Wales. While some work had been undertaken by the Department on defamation law generally, that work is not at a stage where the extensive policy development, required to shape an evidence-based and bespoke piece of legislation for this jurisdiction, is ready for consideration by Ministers. As the Committee will know, our preference, which was made clear by the Minister when the Private Members Bill was debated in the Assembly in September, is to tailor legislation suited to the needs of this region. Legislation that would take account of the criticism of the 2013 Act and of new, relevant thinking in this area. We proposed to the Bill sponsor that he meet with us to chart a way forward for defamation law over the next mandate, but this offer was not taken up. And while the Minister conveyed his reservations around proceeding with this legislation, the Assembly agreed with the general principles of the Bill and that it should stand referred to the Committee.

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There is a limit to the extent that we can now assist. This is not an Executive Bill, developed and consulted upon by the Department, and the Committee's scrutiny has, naturally, unearthed areas worthy of interrogation and further consideration. Matters

such as the protection of personal reputation at a time when it has never been easier for defamatory comment to be published and circulated quite literally to the world are serious issues that need serious consideration. Some of those issues, particularly around social media, are likely to require broader consideration that would be both outside the remit of defamation law and, perhaps, the competence of the Assembly.

The Department recognises that the Committee is industriously scrutinising this Bill and is legitimately attempting to consider how it can be improved, but, given the short period of time left under the present mandate, there is some risk, a risk that is in our view unnecessary, that the eventual policy and legislation might be insufficiently evidence-based, flawed or even unfit for purpose. Our existing legislation violates no human rights and has not resulted in any evident curtailment of free speech here. There is time to give this policy area the detailed consideration it merits.

Our response below must be seen in the context of these limitations. Many of the questions set out in the paper are ones that require detailed policy consideration and interrogation, and straightforward answers are not necessarily possible. What we have set out below are relatively high-level responses to your questions, in order to assist the Committee with its thinking around these issues. But in order for those general policy questions to be translated into concrete and workable legislative amendments, much more thought would be required. The small team of officials charged with the broad remit of civil law – of which the law of tort forms one small part – is simply not resourced in a way to currently provide the type of thought and testing required in the time available. The responses to date have been developed at the expense of ongoing work on other areas, but that cannot continue indefinitely. The team have commitments over the next few months that will necessarily restrict the level of input that as a minimum would be required to match what appears to be the expectations of the Committee on this Bill. While we cannot speak for our colleagues in the Office of the Legislative Counsel – which provides the highly specialised and therefore scarce skill of legislative drafting that will be required if the Committee intends to bring forward a series of amendments to this Bill – it is likely that that office is also experiencing similar pressures given the sheer volume of legislation that is making its way through the system at this point of the mandate.

The Department has already outlined to the Committee and to the Bill sponsor its reservations around the serious harm test set out in Clause 1 of the Bill. This particular provision is arguably the focal point of this Bill. Without it, we query whether the general principles behind the Bill – already agreed by the Assembly - will work. In tandem with clause 11, which relates to the removal of the presumption of jury trials, the aim of the Bill, as previously highlighted by Mike Nesbitt, is to calibrate the right to freedom of expression as compared with the right to protect reputation. It is with this in mind that we reflect on the questions set out in your letter.

Questions 1-4 all relate to Clause 1 of the Bill (Serious Harm). It is clear from the responses received by the Committee in its Call for Evidence, and the oral evidence supplied to date, that this particular provision both divides opinion in relation to its necessity, and also on how it has developed in practice in England and Wales. It is not our intention to rehearse those arguments. The retention, or otherwise, of the serious harm test appears to the Department to be a binary policy choice. There are those who indicate that in practice, the test is important, yet there are those who

consider that it has had limited impact. There are others who suggest that the test will impact significantly, and disproportionately, on the "ordinary person", and this is certainly a concern shared by the Department.

Your first question notes that some respondents have suggested that clause 1 should be strengthened to enable parties to apply to the court at an early stage to have an action struck out if it is established that it is without merit and/or merely strategic litigation to censor free speech. The second question goes on to note that others argue that Rules of Court and the common law already include provisions to allow claims without merit to be struck down. Those two questions are clearly linked.

As the Department understands it, the position currently is that, the common law has developed two tests designed to exclude trivial libels at any early stage. Those are the Jameel "abuse of process jurisdiction" and the Thornton "threshold of seriousness". The Jameel test has been deployed in the Court of Appeal here in the Ewing v Times Newspapers Ltd case [2013] NICA 74 and permits a defendant publisher to contend 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 available 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.

The Thornton threshold arose from the case of Thornton v Telegraph Media Group Ltd [2010] EWHC 1414, in which the court held that words complained of in a defamation action must pass a "threshold of seriousness, so at to exclude trivial claims". The court held that the publication must substantially affect in an adverse manner the attitude of other people towards the Claimant, or have a tendency to do so.

Under the common law therefore there already exists the opportunity for the court to deal with cases that are without merit.

As regards Rules of Court, there appear to be two provisions that are relevant as regards the striking out of unmeritorious claims. The first is a general power of the court to strike out any pleading on the ground it discloses no reasonable cause of action, is scandalous, frivolous or vexatious, or is otherwise an abuse of process of the court. Where it does so, the entire action can be stayed or dismissed (order 18, rule 19).

The second is a rule specific to sections 8 and 9 of the Defamation Act 1996 which allow for summary disposal of cases. Section 8(2) states that

(2) The court may dismiss the plaintiff's claim if it appears to the court that it has no realistic prospect of success and there is no reason why it should be tried.

Procedural rules in respect of Section 8 are set out in Order 82 Rule 9 of the Rules of the Court of Judicature. The Committee is invited to consider that Rule which is appended to this reply.

The effect of these provisions appear to already give power to the court to stay actions, or give summary judgments in clearly unmeritorious cases. While it may become

apparent that a case is unmeritorious during or after trial, it would clearly be impossible to strike it out on that basis until the arguments had been heard, and evidence presented. But these rules deal specifically with weak cases or defences that are clearly deficient from the beginning.

The Department notes the opposing views on this as outlined in a number of responses to the Committee's Call for Evidence. The similar responses of UTV and Olivia O'Kane specifically call for provision of the nature outlined in the question. We also, however, note that one response took a fundamentally different view on largely the same point, that of Peter Girvan BL. He noted that both the common law power of the court to dismiss a case that did not show a 'real or substantial tort', or the powers set out in the Rules of Court previously cited provided ample authority for the court to take such action if required to deal with frivolous or unmeritorious claims.

It is noted that neither UTV nor Ms O'Kane addressed the existence of this body of rules, or sections 8, 9 and 10 of the Defamation Act 1996 which give them statutory force and which appear to emerge unchanged from the Bill. In the absence of comment on those rules, Mr Girvan BL's argument would appear perhaps more persuasive in terms of recognising whether a deficiency exists in the current law.

Accordingly, in relation to question 1, the Department notes the existing vehicles by which unmeritorious claims can be dealt with as outlined above. It is unclear how an additional amendment would materially assist. As regards the question posed at 2, the Department has previously indicated its concerns with the serious harm test in principle. There is some evidence that suggests that the effect of the test in England and Wales appears to have justified fears that it would bring an undue burden of both proof and costs on plaintiffs. The Supreme Court judgment in Lachaux has been interpreted in some quarters as a victory for press freedom and a loss to plaintiffs, although it is noted by the Department that other commentators believe this has been over-stated. We are not at all certain that a move to this test will be the silver bullet envisaged by those who have spoken to the Bill with freedom of expression as their primary objective in terms of deterring libel actions or indeed threats to bring libel actions from powerful figures within society. However, it will almost certainly deter most ordinary citizens.

It does seem difficult to escape the analysis that the test, combined with the de-facto abolition of jury trials, has increased the importance of preliminary proceedings in England, as whether the serious harm threshold has been met is often treated as a preliminary issue. There is some narrative suggesting this has increased expense with mini-trials occurring and that the financial burden has mainly been shifted, as opposed to being reduced. It is worth noting that Dr Scott himself has suggested that the test does not appear to have been a panacea to the high cost of libel proceedings in England, though it may well have had some influence on the number of actions being brought.

Question 3 goes on to ask about potential strengthening of the provision to prevent companies and public authorities from bringing defamation claims. It is not immediately clear to the Department why such a provision is required. The common law indicates that a local authority, and by extension, a public authority, has no right to sue for libel to protect its governing or administrative reputation. This is known as

the Derbyshire rule after the House of Lords decision in Derbyshire County Council, v Times Newspapers [1993] AC 534. The position in relation to companies is slightly different, and a company can bring forward an action in cases where its business reputation has been damaged. The removal of this right – as appears to have been suggested – would need to be treated very carefully. While on one hand the argument that has been outlined is that companies do not have "feelings" and therefore defamation claims should not be possible, the contrary view could be that defamation against a company can have serious repercussions for that company – share prices can fall, business can be lost, and the pervasiveness of defamatory publications on business can be quite difficult to quantify. The Department has not fully appraised the pros and cons of the suggestion, but would caution against the development of any possible amendment without further careful scrutiny of all of the pertinent factors in this area.

Question 4 asks whether the provision at clause 1 establishes a test for serious harm as a matter of fact or inference. The Clause 1 test, if accepted in its current form, will require claimants to prove on the balance of probabilities that serious reputational harm has been caused or is likely to be caused by the publication complained of. The common law rule that defamation is actionable per se will no longer apply. The courts in England have now reached the point where there is some clarity around the application of the test. When the Lachaux case reached the Court of Appeal, the ruling appeared to conclude that serious harm could be inferred. This was seen by many as a victory for claimants, and a blow for press freedoms, as the test swung back more towards the existing common law position. The Supreme Court however disagreed with the Court of Appeal's analysis and has held that Section 1 of the Act (repeated in clause 1 of the Bill) requires its application to be determined by reference to the actual facts about its impact, not merely the meaning of the words. The provision, according to the court, necessarily means that a statement that would previously have been regarded as defamatory is no longer actionable unless it "has caused or is likely to cause" harm which is serious. The authority of a Supreme Court decision on this matter will be binding on courts in this jurisdiction and therefore it is not clear to the Department that if the serious harm test is brought into effect, whether further amendment is required to make the test clearer. Development of such an amendment is also likely to be rather more involved than may meet the eye.

Question 5 relates to Clause 2 which is drafted to provide a statutory defence in relation to truth. The Department is broadly content with the provision as drafted but notes the query around whether the clause should (or could) be amended to include a requirement for pre-trial hearings in order to require a judge to determine a single meaning of the words complained of. This on the face of it appears to be an issue that is of procedural relevance and the Department is cautious around commenting on matters that will impact on the procedural aspects of defamation. Rules of the Court of Judicature and amendments to them are of particular importance to the judiciary and are discharged by the Courts and Tribunal Service. Any amendment that would impact on this function would require careful consideration and consultation with the judiciary, through the office of the Lady Chief Justice, and the NI Courts Service.

Question 6 concerns Clause 3 and the defence of honest opinion. You have asked whether the amendment outlined by Dr Scott is a necessary and beneficial amendment. The defence contained at clause 3 will replace the common law fair

comment defence and is available if the defendant can show that the statement was an opinion, there was an apparent factual basis to the opinion and the opinion comprising the statement is one that an honest person could have reasonably held on those facts.

Dr Scott's draft Bill contains a different provision that would extend the protection of the "honest opinion" defence to any opinion that an honest person could reasonably hold in reliance on "any fact that the defendant reasonably believed to be true at the time the statement complained of was published". In other words, the defendant would rely on the defence of "honest opinion" even if the "facts" upon which they based their opinion were untrue, so long as they believed them at the time, and it was reasonable for them to do so.

It was suggested that this expanded defence was aimed at the needs of the mass of social media commentators who might reasonably rely on statements of supposed fact made by professional journalists and broadcasters in making comments. Others have argued that this would lean too heavily against an injured plaintiff, although the point was made that any damage suffered as a result of this publication of opinion could still raise an action against the original defamatory publication upon which the honest opinion had been based, as all harm caused by secondary publication is already attributable in law to the original publisher.

The view therefore with which Dr Scott supported his proposed amendment was that such a provision could be seen as a method by which liability for the secondary effects of the original defamatory statement fell where they should fall, with the original defamer.

The provision did not find favour when considered in the context of what would become the Defamation Act 2013, upon which clause 3 is currently based. The Department's view is that while the work on this particular issue carried out by Dr Scott and the NILC before that is certainly worthy of interest, a fully worked through amendment would require more policy consideration and further work. The Department has not reached a conclusion as to the merits of this and it would have to be considered in the context of the Bill as a whole and any other amendments that may be proposed.

Question 7 relates to Clause 10 of the Bill and is linked to an extent with Clause 5. This is an area – how to deal with social media – that the Department has raised as being particularly relevant in the context of the development of the law relating to defamation, and upon which the Department has held reservations. In particular, we have reservations regarding moves that might exempt or significantly limit the liability of website operators based on one particular idea of what a website operator is (e.g. that a website operator is a neutral facilitator of online comment). We believe that some, perhaps many, website operators have a more hands on role with regard to online content they host than facilitation. To the extent that a website operator influences or controls online content, that operator might arguably be more properly compared to an editor or publisher rather than, say, a printer, distributor or retailer. Moreover, whereas conventional editors and publishers (i.e. of hard copy publications) typically review material prior to publication, including a review for potentially defamatory content, some website operators appear to provide little or no filter for the material they allow to be posted on their sites—people can post at will. Indeed, some

operators might not be able to identify the person who posted any particular statement (for example, if the statement was posted anonymously or pseudonymously). At the same time, at least some website operators might be aware that they are operating a site on which defamatory postings are possible (e.g. a website that encourages reviews, or a site that encourages comment on current news stories). We also note that online publication is a form of publication more durable than print. A printed defamatory statement can be taken out of circulation but an online defamatory statement might be impossible to stop once it has been copied and pasted and forwarded multiple times. In short, proposals to limit the liability of website operators or to exempt them from liability, even when they operate as, in effect, publishers, are likely to increase the possibility that defamatory comment will be put into online circulation. We therefore believe that this is an area that requires more research, including not just a consideration of definitions but some consideration of practice in other jurisdictions. We note, for example, The Defamation and Malicious Publication (Scotland) Act 2021 which states that the Scottish Ministers may, by regulations, specify that certain categories of people, who are not the author, editor or publisher of a particular statement, can, if appropriate, be designated as such and defamation actions brought against them. The Committee will know that we have been awaiting the report of the Dublin Government's review of defamation law and its recommendations. This is the most recent review of defamation law undertaken in these islands and, it is our understanding, that it will include proposals for addressing the significant challenges raised by online publication.

The Department is aware of considerable interest from the Committee on Clause 5 and the related Clause 10, and calls for amendments that appear to have gone as far as attempting to advocate a much broader European-wide response to the concerns relating to social media. Such consideration potentially goes far beyond the scope of this Bill, which relates to the relatively narrow matter – in the context of social media – of the tort of defamation. It is that tort that falls within the remit of the Department's civil law reform responsibility. Wider regulation of social media – clearly a matter that is worthy of further consideration – falls outside the Department's expertise and remit, and indeed, as has been alluded to, can merge into areas that are reserved to the UK Parliament. The provisions that relate to social media have been expressly agreed for inclusion in the Bill by the Secretary of State for Northern Ireland. It is likely that any amendments proposed to those provisions will almost certainly require further agreement. Developing effective clauses on social media, certainly of the type that appear to have excited discussion in oral and written evidence presented to the Committee so far, are unlikely to be possible within the narrow vehicle of this, or indeed any, Defamation Bill alone.

Question 8 asks if the provision at clause 9 amounts to an additional and unnecessary hurdle for someone seeking to take defamation action against a person not domiciled in the UK or a Member State. The purpose of clause 9 as drafted – and the Committee will note that we have previously indicated that the provision is drafted in a way that is inconsistent with the decision of the British Government to leave the European Union and therefore will require amendment on that point alone – is to deter libel tourism. Leaving aside the lack of evidence that libel tourism has materialised as an issue for this jurisdiction in the 8 years since the 2013 Act was introduced, the purpose of this provision is to ensure the court does not have jurisdiction to hear a case unless it is satisfied that, of all the places in which the statement complained of has been

published, this jurisdiction is clearly the most appropriate place to bring an action in respect of the statement.

It appears that the rationale for this provision in the 2013 Act was Parliament's desire to address concerns about foreign litigants using the courts in England and Wales to sue foreign publishers where the libel was more widely published elsewhere. But it does seem that Section 9 went beyond that as it applies equally to a British citizen and UK resident who complains about a publication from abroad as it does to anyone outside the UK. It is worth noting that the courts in England have been quite active in regard to this issue.

In Akuja v Politika Novine Magazini D.O.O & Ors [2015] EWHC 3380, the court held that it had to consider all of the jurisdictions in which the defamatory statement had been published in order to determine which was the most appropriate jurisdiction for the case to be heard. While it was argued by the plaintiff in the case that they had suffered harm in a number of different jurisdictions, they had failed to adduce evidence other than the harm suffered in England. The court decided therefore that it could not be satisfied that England and Wales was the most appropriate jurisdiction to bring forward an action.

This line of thinking was applied in further cases although recently the question was considered by the Court of Appeal for the first time. In the case of Wright v Ver [2020] EWCA Civ 672 the Court of Appeal held that in order to meet the test in Section 9 a number of factors would be considered including

- The best evidence available to show all the jurisdictions in which the statement is published;
- The number of times that the statement has been published in each jurisdiction;
- The amount of damage to a claimant's reputation in England and Wales compared with elsewhere; and
- The availability of fair judicial process or remedies in alternative jurisdictions.

Therefore, it is likely that clause 9 (which will require amendment to relate to cases involving defendants who are domiciled outside of the UK) will be construed in such a way that jurisdiction in NI will only be established where it can be demonstrated this is clearly the most appropriate place in which to bring an action. This will clearly present, as the question asks, an additional hurdle for someone to take an action against a person not domiciled in the UK, and although the courts here will not necessarily have to follow the jurisprudence in England and Wales (we are unaware of a case on this point that has reached the Supreme Court) it is likely that the Court of Appeal judgment in the Wright case will be the starting point.

Question 9 relates to Clause 10 of the Bill and whether it needs to be amended in such a way to replace the common law defence of innocent dissemination. The law in this area appears to be relatively well understood.

Section 1(3) of the Defamation Act 1996 states –

"(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;"

Clause 10(2) of the Defamation Bill explicitly retains these definitions and meanings

10.—(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."

At common law, a defence of innocent dissemination is available to a person who, neither knowingly nor negligently, had merely a subordinate role in the dissemination of the matter containing the defamatory statement.

- the defendant did not know that the publication complained of contained a libel;
- the defendant had no grounds to suppose that it was likely to contain defamatory matter; and
- the absence of knowledge was not due to any negligence on the defendant's part.

At common law, it appears that a printer cannot evoke this defence.

S.1 (3) a of the Defamation Act 1996 now makes clear that a person will not be the author, editor or publisher if he is only involved in printing, producing, distributing or selling printed materials containing the statement.

The common law defence of innocent dissemination was therefore largely codified in section 1 of the Defamation Act 1996. The statutory defence was expanded to include printers, who had historically been excluded from the common law defence. The new Draft bill retains the definitions and does not explicitly alter that defence.

Clause 10, however, appears to introduce a further restriction, alongside but not identical to, the defence of innocent dissemination. Both the common law defence and its 1996 statutory counterpart required the dissemination of the material to be 'innocent' – the common law defence required that the defendant, in addition to not being an author, editor or publisher, did not know the publication contained a libel, and no grounds to know that it did, and that the lack of knowledge was not due to his own negligence. S1 of the 1996 Act required, in addition to not being an author, editor or publisher, that the defendant took reasonable care in relation to the publication, and did not believe, or have reason to believe, that it contained defamatory material.

The provision removes jurisdiction from the court unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or

publisher of the defamatory comment, regardless of whether that defendant knew or had cause to know the information was defamatory. It does however leave the defendant who is neither the author, editor or publisher as a defendant of last resort if a case against these potential defendants is not reasonably practicable, and the existing defences of innocent dissemination at common law and responsibility for publication under section 1 of the 1996 Act may still be required by defendants in such a scenario. We do not necessarily think this requires a specific amendment.

Question 10 asks for the Department's comments in relation to clause 11 (trial to be without a jury). It is not the intention to rehearse the previously outlined reservations held around the removal of trial by jury. Those have been set out in previous correspondence and it is worth noting that similar reservations were expressed by the Review of Civil Justice in the development of the alternative position upon which this question specifically seeks views. Equally, the Department notes that one of the themes that has emerged from the evidence presented to date appears to treat the removal of the presumption of trial by jury as a key component in meeting the aims, and therefore the general principles, of the Bill. This appears to be another policy choice for stakeholders, with the majority appearing to favour the approach taken in this Bill.

The adaptation of the current position as recommended by the Civil Justice Review appears to the Department to represent a compromise worthy of further consideration and discussion. To give judges a power – one which they do not currently possess – to keep complex defamation cases from a jury, whilst raising some of the thematic issues around the particular resonance of juries in this jurisdiction, certainly does not appear to have the deeper ramifications that the de-facto removal of the jury trial has. The Department notes that the evidence points to the practice of juries rarely being empanelled in defamation cases – in part possibly due to the majority of cases settling in this jurisdiction – but an amendment of this nature may go some way to allay broader concerns around the complete removal of jury trials in such cases.

The separate issue of judges having powers to compel parties to undertake Alternative Dispute Resolution (ADR) or face possible financial penalties is an interesting theme developed by the Review. Whether this is appropriately dealt with in primary legislation – where defining or shaping how ADR would occur could be involved and require considerable thought – or by ongoing work that the Department understands is being undertaken by the shadow Civil Justice Council around amendment to the Pre-Action Protocol on Defamation of 2011 is something that the Committee may wish to consider and further explore.

Question 11 asks the Department to comment on the suggestion that the Defamation Bill be amended in order to abolish the single meaning rule in conjunction with the introduction of a jurisdictional bar on claims based on the meanings of publications that have been corrected or retracted promptly and prominently—the bipartite proposal. We are unsure how this might work in practice and, more fundamentally, if there is the need for it. Perhaps the Committee has evidence that existing procedures cannot identify and exclude defamation claims based on a genuine misunderstanding or whether there have been many occasions where an offensive meaning was assumed where none was ever intended and yet the defamation claim allowed. One immediate concern we have with this proposal is that it might allow an author, editor

or publisher to rely on an inoffensive meaning where an offensive meaning was in fact always intended. More generally, a rationale for proposals of this type is that they might encourage clarification and/or retraction as an alternative to a defamation action. However, we are not convinced that there is always an equivalence of impact between a published defamatory statement and the subsequent retraction or clarification of that statement, however prompt and fulsome that retraction or clarification might be.

Question 12 covers similar ground to Question 11 as it asks the Department to comment on whether the Defamation Bill should be amended in order to support and encourage the use of discursive remedies and a jurisdictional bar on defamation actions in such cases. As stated above, we remain to be convinced that retraction, however prompt and fulsome, is equivalent in force, profile or effect to the initial act of publication. We note, in particular, online publication where a statement might never, in practice, be withdrawn.

Yours sincerely

DEPARTMENTAL ASSEMBLY LIAISON OFFICER

Order 82 Rule 9

Summary disposal under the Defamation Act 1996

9.—(1) This rule applies to proceedings for summary disposal under sections 8 and 9 of the 1996 Act.

(2) The Court may, at any stage of the proceedings—

(a) treat any application, pleading or other step in the proceedings as an application for summary disposal; or

(b) make an order for summary disposal without any such application.

(3) The Court may, on any application for summary disposal, direct the defendant to elect whether or not to make an offer to make amends under section 2 of the 1996 Act.

(4) When it makes a direction under paragraph (3), the Court will specify the time by which and the manner in which—

(a) the election is to be made; and

(b) notification of the election is to be given to the Court and other parties.

(5) An application for summary disposal must be supported by an affidavit which—

(a) states that it is an application under section 8 of the 1996 Act;

(b) verifies the facts on which the application is based;

(c) identifies concisely any point of law on which the application relies;

(d) states that in the deponent's belief the claim or the defence has no realistic prospect of success and that there is no reason why the claim should be tried; and

(e) states whether or not the defendant has made an offer to make amends and whether or not the offer has been withdrawn.

(6) An application for summary disposal may be made at any time after the

service of the statement of claim.

(7) Where the Court makes an order for summary disposal, the order will specify the date by which the parties should reach agreement about the content, time, manner, form and place of publication of the correction and apology.

(8) Where the parties cannot agree on the content of any correction and apology within the time specified in the order of the Court, the plaintiff must—

(a) prepare a summary of the judgment by the Court; and

(b) serve it on all the other parties within 3 days of the date specified in the order.

(9) Where the parties cannot agree the summary of the judgment prepared by the plaintiff, they must within 3 days of receiving the summary—

(a) lodge with the Court and serve on all the other parties a copy of the summary showing amendments they wish to make to it; and

(b) apply to the Court for the Court to settle the summary.

(10) An application to settle the summary will be heard b
the judgment.

Northern Ireland Assembly

Committee for Finance

[redacted]
Departmental Assembly Liaison Officer
Department of Finance
[redacted]

Our Ref: 2021:493

26 November 2021

Dear Andy,

Defamation Bill – Clause by Clause Scrutiny

At its meeting of 24 November 2021, the Committee noted a very helpful written response from officials in respect of the Defamation Bill. The Committee agreed that in order to conclude its scrutiny of the Bill in a timely manner it would greatly value a further oral and written briefing from officials on 15 December 2021 where the possible amendments to the Bill might be discussed.

The Committee agreed that it would provide the Department with the clause by clause table – which breaks down all written submissions into possible amendments - prior to this oral briefing. In the meantime, the Committee agreed to write to the Department to ask it to address the following related questions.

1. Some respondents to the Committee Stage have suggested that Clause 1 (Serious Harm) should be strengthened in order to incorporate a provision to enable parties to apply to the court at an early stage to have the action struck out if it is established that it is without merit and/or merely strategic litigation to censor free speech e.g. from NGOs etc. Can the Department advise if such a measure is necessary and beneficial?

2. Some respondents have suggested that Clause 1 (Serious Harm) in England and Wales introduced uncertainty for claimants/legal advisors and has significantly increased costs which has served to reduce access to justice for individuals who have been defamed. They also argue that the NI Rules of Court and Common Law already include provisions to allow claims without merit to be struck down. They argue that Clause 1 is therefore not required. Can the Department advise on the merits of this argument?

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3. Some respondents have suggested that Clause 1 (Serious Harm) should be further strengthened in order to include provisions which prevent companies or public authorities from bringing defamation actions. They argue that the protection of reputation is deemed necessary because it impacts on 'personal identity and psychological integrity' and that such a justification should not apply to any kind of company or public authority. Can the Department advise on the merits or otherwise of this proposition?

4. Can the Department advise if the Bill as currently drafted establishes a test for Serious Harm as a matter of fact rather than as a matter of inference? Does the Bill require amendment in order to make the Serious Harm test clearer?

5. Some respondents suggested that Clause 2 (Truth) should be amended in order to include a requirement for pre-trial hearings which would amend (Order 82 Rule 3A of) the Rules of the Court of Judicature (which presently allows for either party to take an application to determine whether the words complained of are capable of bearing the meanings pleaded) in order to require the judge to determine a single meaning for the words complained of. Can the Department advise if this might be a necessary and beneficial amendment?

6. Dr Scott has suggested that Clause 3 (Honest Opinion) should be amended in order to make clear that a defence of honest opinion can apply in respect of facts the defendant reasonably believed to exist at the time the statement complained of was published. Can the Department advise if this might be a necessary and beneficial amendment?

7. Some respondents have suggested that Clause 5 (Operators of Website) is unnecessary. They contend that operators of websites will gain an exemption (or very significant limitation) of liability as the term "operators of websites" is not defined and may be used by social networks who not only host content but also control/influence content alongside providing the platform/network which permits mass publication. Can the Department advise on this clause and the benefit of further amendment in respect of the clarification of the term "operators of websites"?

8. Can the Department advise if Clause 9 (Action against a person not domiciled in the UK or a MS) amounts to an additional and unnecessary hurdle for someone seeking to take defamation action against a person not domiciled in the UK or a Member State?

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9. Can the Department advise if Clause 10 (Action against the person who is not the author or editor etc.) needs to be amended in order to specify that authors or editors are not those who print and distribute materials in order to replace the Common Law defence of innocent dissemination?

10. Can the Department comment on Clause 11 (Trial to be without a jury) and the suggestion that this should be amended in order to reflect the findings of the 2017 Gillen Review of Civil Justice which suggested that judges should have discretionary powers to select trial by judge-only in the case of complex defamation matters and that judges should have discretionary powers to compel parties to defamation actions to undertake Alternative Dispute Resolution or face possible financial penalties.

11. Can the Department comment on the suggestion that the Defamation Bill should be amended in order to abolish 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 - the so-called bipartite proposal?

12. Can the Department comment as to whether the Defamation Bill should be amended in order to support and encourage the use of discursive remedies including prompt and fulsome retractions coupled with a jurisdictional bar to defamation actions in these cases?

The Committee has written in similar terms to the Bill Sponsor.

If you require further information or clarification, please do not hesitate to contact me.

A response on or before 10 December 2021 would be greatly appreciated.

Yours sincerely,

Peter McCallion

Peter McCallion
Clerk to the Committee for Finance

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