



## **NUJ observations to the Finance Committee of the Northern Ireland Assembly on Defamation Bill 2021 tabled by Mr Michael Nesbitt MLA**

*The National Union of Journalists is the voice for journalism and journalists in the UK and Ireland. It was founded in 1907 and has more than 30,000 members working in broadcasting, newspapers, news agencies, magazines, book publishing, public relations, photography, videography and digital media. In Northern Ireland our members are organised through two branches, Belfast and District and Derry and North West.*

### **Introduction**

The National Union of Journalists welcomes the Defamation Bill tabled by Mr Mike Nesbitt and commends the principles outlined by his pre-2<sup>nd</sup> stage briefing on September 8, 2021.

Our members include journalists engaged on a variety of contracts of service by media organisations, and freelancers, many of whom struggle to earn a living in an increasing precarious industry.

The NUJ welcomes reform of the existing law in Northern Ireland and Mr Nesbitt's Bill is a first step in that it would bring the law into line with the current defamation regime in England and Wales.

1. The reform of the English and Welsh law was a significant improvement, although the NUJ would have preferred further changes; there is no compelling reason why Northern Ireland citizens should be subjected to more draconian legislation which undermine freedom of expression.
2. The debate on the Defamation Bill affords a welcome opportunity for a wider discussion on the role of the media and takes place against the backdrop of threats to journalists across Northern Ireland. It is critical that journalists can and must be allowed to speak the truth without fear or sanction.
3. In this regard the NUJ acknowledges the cross-party support for the *Stand Up for Journalism* campaign of May 2020 in the wake of threats against journalists and newspapers across Northern Ireland. That initiative was a powerful endorsement of the role of journalism in a democratic society to function without fear or harm.

4. The Defamation Bill 2021 serves to focus attention on legal constraints to freedom of expression and the practice of journalism.
5. It should be noted that the high cost of defamation proceedings and the dubious distinction enjoyed by Northern Ireland as a destination for what has been termed libel tourism has grave implications for freedom of expression, for the healthy functioning of democracy and for employment within the media industry.
6. In his last address to media workers and film makers the Welsh academic and media commentator Raymond Williams stressed the vital role of a free press unhindered by threats. Williams declared that journalists “must become the arrow not the target”.
7. There is a need to reform the current law on defamation in Northern Ireland to give greater protection to journalists and media organisations to ensure that the correct balance is struck between the right of wronged parties to seek redress and the right to freedom of expression, which embraces the rights to public and to receive information.
8. **Principles.** The core principle underpinning this submission is the protection and promotion of the right of freedom of expression, both for our members and the public who are entitled to receive the information imparted through the media.
9. Experience of defamation actions shows that the disproportionate financial risks to which both defendants and plaintiffs are exposed in the context of defamation actions is having a chilling effect on freedom of expression and the rightful vindication of reputation where that is merited.
10. While acknowledging the importance of protecting a person’s good name and reputation, the balance between the private right to one’s good name should be weighed against the right of citizens to express freely their convictions and opinions.
11. That balancing has been evident for many years at the European Court of Human Rights, where the court tends to favour the public right to freedom of expression in Article 10 of the European Convention on Human Rights over more individual rights under Article 8.
12. **UK Defamation Act 2013.** The UK defamation Act 2013 was introduced after the Leveson Inquiry joined others in levelling serious criticisms against the then existing legislation that had several flaws, the most serious of which included poor available defences leading to many cases being brought against the media, particularly by the wealthy who were often able to scare off justified criticism.
13. Other flaws were the lack of a harm threshold and the ability to use London as a centre for libel for and against people outside the UK thanks to the global nature of the internet.
14. **Serious Harm test.** The NUJ has always supported the introduction of a ‘serious harm’ threshold that a plaintiff should be required to establish in a defamation action. Such a test would be similar to that as introduced by the Defamation Act 2013 in England and Wales and Mr Nesbitt’s bill would bring Northern Ireland into line.

15. The Act specifically introduced an obligation for a claimant to show that the publication resulted in *serious harm* in order to succeed in a defamation action. In 2015 Thompson Reuters published a review of Defamation claims taken in 2014 in the UK which demonstrated a significant decline in the number of claims taken which it attributes to this provision (27%). This, it is submitted, would not be onerous on a genuine claimant and would provide protection against; (a) the issue of defamation actions with little merit but issued on an *in terrorem* basis (ie to intimidate a publisher in an attempt to prevent future publication about an individual or a particular topic) and (b) the use of this jurisdiction as a haven for libel tourism
16. The other key changes in the UK Defamation Act 2013 which would be incorporated include:
- Extension of privilege for academics and scientists on statements relating to scientific and academic matters that have been reviewed by editors and by at least one peer reviewer. Malice removes this protection.
  - Restrictions on “libel tourism”; limits cases against those not living in the UK unless this is clearly the most appropriate place to go to court.
  - Trials without a jury possible.
  - End of single publication rule. This where a repeated publication could face a new libel claim – disastrous for the Web where each new viewing is a new publication.
17. **Defences.** The 2013 Act makes some significant changes in the defences available to those faced with a defamation action.
- A key change is the offer truth as a defence. Until the 2013 Act the defence was justification. Truth was not a defence – indeed, it was often said that the “greater the truth, the greater the libel”.
  - The Act adds the defence of honest opinion.
  - It also strengthens privilege as a defence. This includes a new defence for academics and scientists publishing in peer-reviewed journals with regard to statements relating to scientific and academic matters, provided they are reviewed by editors and by at least one peer reviewer and are made without malice in the public interest.
  - The public interest defence is vital to a free press and the 2013 Act strengthened this. Courts are now obliged to consider this where:
    - (a) The statement was on a matter of public interest; and
    - (b) The defendant reasonably believed that publishing the statement was in the public interest.

18. The court must have regard to all the circumstances of the case. In determining whether the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.
- the defence under this section may a statement of fact or a statement of opinion.
  - Rules for website operators changed providing much stronger protection, particularly over readers comments. Protection is offered where action is taken by the operator of the website within 48 hours. The Act also makes it a defence under section 5 of the 2013 Act for the operator to show they did not post the statement on the website.
- The 2013 Act also includes protection through an offer of amends or consent. A court will consider an offer of amends. Consent of course should protect journalists.
- 19. Publication on a Matter of Public Interest Defence.** The NUJ supports, in particular, a statutory defence clearly predicated on the public interest which recognises in a comprehensive and objective manner the crucial role of the media in a democratic society, imparting information in a responsible manner in the public interest.
20. **Use of Litigation.** Despite the significant improvements in England and Wales, the NUJ, in common with other organisations including Index on Censorship and PEN, have been campaigning against strategic use of legislation to silence journalists.
21. Strategic Lawsuits Against Public Participation (SLAPPs) - abusive lawsuits designed to silence speech through the litigation process pose a serious global threat to public interest journalism and the right to freedom of expression.
22. In Northern Ireland citizens are denied the use of the protections contained in the Defamation Act 2013 and the strategic use of legislation deemed not to be fit for purpose in England or Wales is having a chilling effect on journalism and on academic research.
23. The impact of defamation legislation is difficult to assess since the threat of defamation can be sufficient to prevent publication of stories. The prevalence of out of court settlements, with confidentiality clauses means that the actual cost is impossible to quantify.
24. The possibility of a legal action in Northern Ireland is, in some cases, enough to dissuade publication or broadcast, even if the information in question is in the public interest.

**The NUJ's Code of Conduct has set out the main principles of British and Irish journalism since 1936. The code is part of the rules and all journalists joining the union must sign that they will strive to adhere to it.**

Members of the National Union of Journalists are expected to abide by the following professional principles:

1. At all times upholds and defends the principle of media freedom, the right of freedom of expression and the right of the public to be informed.
2. Strives to ensure that information disseminated is honestly conveyed, accurate and fair.
3. Does her/his utmost to correct harmful inaccuracies.
4. Differentiates between fact and opinion.
5. Obtains material by honest, straightforward and open means, with the exception of investigations that are both overwhelmingly in the public interest and which involve evidence that cannot be obtained by straightforward means.
6. Does nothing to intrude into anybody's private life, grief or distress unless justified by overriding consideration of the public interest.
7. Protects the identity of sources who supply information in confidence and material gathered in the course of her/his work.
8. Resists threats or any other inducements to influence, distort or suppress information and takes no unfair personal advantage of information gained in the course of her/his duties before the information is public knowledge.
9. Produces no material likely to lead to hatred or discrimination on the grounds of a person's age, gender, race, colour, creed, legal status, disability, marital status, or sexual orientation.
10. Does not by way of statement, voice or appearance endorse by advertisement any commercial product or service save for the promotion of her/his own work or of the medium by which she/he is employed.
11. A journalist shall normally seek the consent of an appropriate adult when interviewing or photographing a child for a story about her/his welfare.
12. Avoids plagiarism.