Joint Response to the Committee For Finance in Relation to the Defamation Bill
Submitted by Index on Censorship and English PEN

Introduction

1. Index on Censorship is a non-profit organisation that campaigns for and defends free expression worldwide. Since 1971, it has promoted debate, monitored threats to free speech, and published work by censored writers and artists, including in its award-winning quarterly magazine.

2. English PEN is one of the world's oldest human rights organisations, championing the freedom to write and read. We are the founding centre of PEN International, a worldwide writers' association with 145 centres in more than 100 countries. With the support of our members – a community of readers, writers and activists – we protect freedom of expression whenever it is under attack, support writers facing persecution around the world, and celebrate contemporary international writing with literary prizes, grants, events, and our online magazine PEN Transmissions.

3. For the past 12 years English PEN and Index on Censorship have been working together to analyse the free speech implications of libel laws and campaign for needed reform. In 2009, the two organisations conducted a joint enquiry into libel legislation that led to the publication of a report, *Free Speech is Not for Sale*. In the same year, we launched the Libel Reform Campaign alongside Sense About Science to campaign for libel law reform. The result of this campaign was the Defamation Act 2013, which was granted Royal Assent on 25th April 2013.

4. Since the passage of the Defamation Act 2013, English PEN and Index on Censorship have continued to work together to monitor developments in the law. Since early 2021, the two organisations have co-chaired a new UK Working Group on Strategic Lawsuits Against Public Participation (SLAPPs)[1] - abusive lawsuits designed to silence speech through the litigation process. As part of this work, we have explored how libel laws continue to be used to impede free speech and shut down efforts to hold the powerful to account.

5. Since Northern Ireland and Scotland did not enact the Defamation Act 2013, many of the safeguards currently in place in England and Wales are absent in the rest of the UK. The fact that Northern Ireland's defamation legislation is not fit for purpose as a result is well-documented. "I have edited newspapers in every country of the United Kingdom and the time and money now

[1] See joint policy paper on SLAPPs: 'Countering Legal Intimidation and SLAPPs in the UK', August 2020, https://fpc.org.uk/wp-content/uploads/2021/07/Policy-Paper-Countering-legal-intimidation-and-SLAPPs-in-the-UK.pdf

needed to fight off vexatious legal claims against us here is the highest I have ever experienced," the then-editor of the Belfast Telegraph said in 2013.[2]

6. Just 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. In 2015, Sky Atlantic's plans to broadcast the award-winning film, *Going Clear,* about the Church of Scientology were shelved because of fears that the broadcaster could be exposed to libel claims in Northern Ireland from members of the church. They believed the film could have been broadcast in England and Wales without legal consequences but, because of the lack of suitable defences in Northern Ireland, the situation was less certain.[3] Because the broadcaster couldn't cut off its satellite transmission to Northern Ireland for a single broadcast, the film couldn't be broadcast. It was eventually shown 18 months later.[4]

7. According to research carried out by Dr Mark Hanna, only 17 of the 140 defamation claims issued in NI resulted in a judgment between 2014 and 2020.[5] In 2020, one senior reporter in Northern Ireland told Index on Censorship that the amount paid out in settlements every year is about the same as his salary. "It's probably on a par with what I earn every year so [...] to employ me as a journalist effectively costs them double I suppose," he said.[6]

8. In most defamation cases brought in NI, therefore, the merits are beside the point: the very act of filing a claim can be enough to force a publisher to settle, retract, and apologise. This indicates a fundamental lack of faith in the current system, most likely due to the insufficient public interest defence, the uncertainties inherent in a jury trial, and the lack of safeguards - such as a harm threshold - to filter out vexatious lawsuits. All contribute to a law which is all-too amenable to abuse.

9. In some cases, Northern Ireland's defamation laws are being used not to pursue a genuine grievance, but to bleed targets of time, money, and energy. Lawsuits are dragged out for as long as possible before being dropped before coming to court. These tactics are symptoms of Strategic Lawsuits Against Public Participation (SLAPPS), which are used to silence journalists, campaigners, academics, and others speaking out in the public interest. SLAPPs have a serious chilling effect on media freedom, and prevent power from being held to account as is crucial in a democracy.

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[2] As referenced by Viscount Colville of Culcross, June 2013, https://hansard.parliament.uk/Lords/2013-06-27/debates/13062786000273/DefamationAct2013NorthernIreland

[3] John Sweeney, Going Clear: the film Scientologists don't want you to see, The Guardian, April 2015, https://www.theguardian.com/film/2015/apr/28/going-clear-the-film-scientologists-dont-want-you-to-see

[4] Jasper Jackson, Scientology film Going Clear is Sky's most-watched documentary since 2012, The Guardian, October 2015, https://www.theguardian.com/media/2015/oct/02/scientology-film-going-clear-sky-documentary

[5] Based on Freedom of Information requests submitted by Dr Mark Hanna in 2021.

[6] Index on Censorship, interview with a journalist at a Northern Irish newspaper, April 2020

10. In 2018, Jeffery Donaldson issued legal proceedings against openDemocracy in response to their public interest reporting. "[They] dragged the ordeal out over two years, right up until May 2020 when their legal time limit to actually proceed the case finally ran out," openDemocracy wrote earlier this year. "Those two years cost us a lot. We spent months dealing with legal letters, burning through thousands of pounds and precious time that would otherwise have been spent on our journalism".[7]

11. Similarly, journalist Ed Moloney was sued for defamation after he asked (via Twitter) someone he was investigating to provide a comment on racketeering allegations. The legal action was ultimately dropped in June 2020, but it nonetheless succeeded in wasting valuable time, money, and energy.[8]

12. The Defamation Act 2013 has improved the situation in England and Wales, which had previously been condemned by the UN Committee on Human Rights as "serv[ing] to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to do their work".[9] It can and would do the same in Northern Ireland. The success of the Defamation Act 2013 is evidenced by the fact that amendments in other jurisdictions, namely in Australia, have been modelled on the 2013 Act.[10]

13. In February 2010 the House of Commons' Culture, Media and Sport Select Committee report into Press Standards, Privacy and Libel described the abuse of UK libel law by foreign actors as a "national humiliation" and recommended action in a number of areas. These included a new statutory public interest defence, a 'single-publication rule' to protect online publication and additional hurdles for companies wishing to sue using libel law. While Parliament has now addressed these issues for England and Wales, the problems they sought to address persist in Northern Ireland.

Serious Harm

14. With no statutory requirement for claimants to prove they have been seriously damaged by defamatory statements, Northern Irish defamation law currently provides no mechanism to filter out frivolous cases where actual reputational harm is minimal or unclear. Without a harm

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[7] Peter Geoghehan and Mary Fitzgerald, 'Jeffery Donaldson Sued Us. Here's Why We're Going Public', openDemocracy, May 2021, https://www.opendemocracy.net/en/opendemocracyuk/jeffrey-donaldson-sued-us-heres-why-were-going-public/

[8] Jessica Ní Mhainín, 'The UK and Media Freedom: An Urgent Need to Lead by Example', Foreign Policy Centre, December 2020, https://fpc.org.uk/the-uk-and-media-freedom-an-urgent-need-to-lead-by-example/

[9] 'United Nations Attacks UK Libel Law', 5RB, August 2008, https://www.5rb.com/news/united-nations-attacks-uk-libel-law/

[10] 'In the Public Interest? Changes to the Uniform Defamation Law', Ashurst, September 2020, https://www.ashurst.com/en/news-and-insights/legal-updates/in-the-public-interest-changes-to-the-uniform-defamation-law

threshold, the mere threat of a defamation action can chill freedom of speech - regardless of the impact of the challenged statement on the claimant.

15. The serious harm test built into section 1 of the Defamation Act 2013 has proven to be a considerable boost for free speech in England and Wales. It has not, however, proven an insurmountable hurdle for those with a localised reputation: in *Brett Wilson LLP vs Persons Unknown* [2015] EWHC 2628 (QB) the court made clear that the "serious harm" threshold was relative to the claimant, and found as a consequence that the claimant's reputation had been seriously harmed despite the small readership of the defendant's website.

16. Crucially, however, corporations and other for-profit bodies must show "serious financial loss" was caused by the statement in question. This recognises the need in a democratic society for greater latitude to be given in criticising companies which, in the words of the European Court of Human Rights (ECtHR), "inevitably and knowingly lay themselves open to close scrutiny of their acts"[11]. By requiring companies to show quantifiable harm caused, such a test prevents companies from exploiting the power imbalance that can otherwise force defendants into settlement - regardless of the merits of a claim.

17. As well as promoting free speech, such a harm threshold incentivises prompt correction. In the case of *Cooke v MGN Ltd* [2014] EWHC 2831 (QB) for example, a key reason why the serious harm test was deemed not to have been met was that the newspaper promptly published a correction to the news report and removed the online version.

Public Interest Defence

18. A public interest defence such as that found in section 4 of the Defamation Bill is a crucial safeguard for journalists, authors, and others publishing in the public interest. Without such a measure, the prospect of a financially crippling lawsuit can be enough to block efforts to hold the powerful to account. This is particularly important in the context of public interest journalism, with news in a social media age becoming an ever-more perishable commodity.

19. Without the statutory defence provided by the Defamation Act 2013, defendants must rely on the common law *Reynolds* defence[12]. Since the defence has now been abolished in England and Wales - and, since the passage earlier this year of the Defamation and Malicious Publication (Scotland) Act 2021, replaced in Scotland - this defence has developed little over the last 10 years. This is particularly problematic given that *Reynolds* was framed around responsible journalism, casting it beyond the reach of others (whether journalists, NGOs, consumer groups, online bloggers or digital activists) publishing in the public interest.

[11] McDonald's Corporation v Steel & Morris [1997] EWHC QB 366
[12] Reynolds v Times Newspapers Limited [2001] 2 AC 127

20. Given the uncertainty inherent in the common law defence, Court records show that defendants in Northern Ireland have little confidence in this defence[13]. During the debate over defamation reform in England and Wales, it was noted that many publishers prefer to settle or avoid publication altogether than face the legal uncertainty of mounting a *Reynolds* defence. This uncertainty led the House of Lords[14] and the Culture, Media & Sport Select Committee in the House of Lords[15] to call for a statutory public interest defence.

21. By providing this clear statutory defence, s4 of the proposed bill would provide publishers with the certainty they need to hold the powerful to account without fear of retaliatory lawsuits. It would also ensure the application of the defence to 21st Century publishers who are not covered by *Reynolds*, such as bloggers and NGOs.

Single Publication Rule

22. Under current legislation, each publication of defamatory material may give rise to a separate action which is subject to its own limitation period. Given that so much information is now disseminated online, and each download constitutes its own publication, this puts an undue burden on Northern Ireland publishers, and inevitably curtails the free flow of responsible and accurate information to the public.

23. The single publication rule introduced by Section 8 of the 2013 Act would prevent actions from being brought in relation to publication of the same material by the same publisher after a one-year limitation period from the date of the first publication.

Jurisdiction

24. Both e-commerce and bricks and mortar shops continue to be open to legal action in Northern Ireland because Section 10 of the 2013 Defamation Act is not in force. Section 10 provides that an action cannot be brought against persons who are involved in, but not primarily responsible for, publication unless "it is not reasonably practicable for an action to be brought against the author, editor or publisher". This means that booksellers in Northern Ireland may be more inclined to pre-emptively withdraw a book from sale out of fear of being sued. This risks depriving the public of receiving ideas without interference as is their right under Article 10 (ECHR).

Trial by jury

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[13] Mark Hanna, 'A New Moment for Defamation Law Reform in Northern Ireland', Foreign Policy Centre, May 2021, https://fpc.org.uk/a-new-moment-for-defamation-law-reform-in-northern-ireland/

[14] Jameel v Wall Street Journal [2006] UKHL 44

[15] Report on press standards, privacy and libel, available at: https://publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/36202.htm

25. In 2014, the Northern Ireland Law Commission warned that the presumption of jury trials increases the time and costs associated with defamation proceedings. “It seems clear that the prospect of a costly trial by judge and jury is an important factor weighing in defendant-publishers’ decisions as to whether to fight cases or to settle,” the Commission wrote at the time.[16]

26. Under current legislation, the judge is responsible for determining questions of law, while the jury must determine questions of fact. This approach has been shown to be problematic in the past due to juries’ tendency to conflate fact and opinion. For example, in 2007 a jury upheld a claim by the Italian restaurant, Goodfellas, that the Irish News's review was "defamatory, damaging and hurtful" and awarded the owner £25,000 in damages.[17] The case could have spelled the end of honest reviews in Northern Ireland, had the ruling not been overturned on appeal.[18]

Additional Needed Provisions

27. There are a number of areas where the NI Defamation Bill could build upon the success of the Defamation Act 2013 and address areas where the 2013 law fell short. In particular:

    a. ***Increased incentives for mediation:*** Given the high costs of defending a libel action, and the onerous burden of proof faced by the defendant at trial, the vast majority of defamation cases in Northern Ireland end in settlement - regardless of their merits[19]. At present, therefore, there is very little incentive for a claimant to seek mediation. Mandatory mediation services should therefore be considered, where the vast majority of cases can be dealt with quickly and effectively.

    b. Higher threshold for public bodies, including corporations: under the European Convention on Human Rights (ECHR), the right to a reputation is derived from the human right to a private and family life. The protection of reputation is deemed necessary because it impacts on ‘personal identity and psychological integrity’[20]. Such a justification cannot apply to for-profit companies. Even if corporations are able to sue for

[16] NILC, ‘Consultation Paper: Defamation Law in Northern Ireland’, 2014 http://www.nilawcommission.gov.uk/final_version_-_defamation_law_in_northern_ireland_consultation_paper_-_nilc_19__2014_.pdf
[17] Roy Greenslade, ‘Irish News Suffers from Disgraceful Libel Loss’, The Guardian, February 2007, https://www.theguardian.com/media/greenslade/2007/feb/12/irishnewssuffersfromdisgra
[18] Henry McDonald, ‘Judges overturn libel ruling on restaurant review,’ The Guardian, March 2008 https://www.theguardian.com/media/2008/mar/11/medialaw.pressandpublishing
[19] According to research carried out by Dr Mark Hanna via FOI requests, only 17 of the 140 defamation claims issued in NI resulted in a judgment between 2014 and 2020
[20] *Pfiefer vs Austria* ECHR 2007

defamation, however, they should be subject to a higher threshold of malicious intent by virtue of their status as public figures[21]. Public authorities, meanwhile, should be explicitly prohibited from bringing proceedings[22].

c. ***Summary disposal of abusive claims:*** given the costs associated with the civil litigation process, the very threat of expensive drawn-out litigation can be enough to chill speech. Ideally a filter mechanism would therefore be built into the law to ensure that meritless claims - or claims pursued with the improper purpose of silencing public interest journalism - are dismissed as quickly as possible.

[21] In its General Comment No. 34 on freedoms of opinion and expression, the UN Human Rights Committee states more generally that "all public figures . . . are legitimately subject to criticism and political opposition", adding that"with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice."

[22] A good model for this is section 2 of the Defamation and Malicious Publication (Scotland) Act 2021, "prohibition on public authorities bringing proceedings": https://www.legislation.gov.uk/asp/2021/10/part/1/enacted