MEDIAHUIS

Submission to the Northern Ireland Assembly Committee for Finance re Draft Defamation Bill - Mediahuis Ireland Group Limited

1 November 2021

Context of the Review

Mediahuis Ireland Group Limited ("Mediahuis"), is grateful to the Committee for Finance for the opportunity to provide a written response to the draft Defamation Bill.

The Defamation Bill was formally introduced to the Assembly on 7 June 2021 and has now been referred to the Committee for Finance for the Committee Stage.

As requested, this written response will address the clauses of the Bill that Mediahuis considers to be most relevant, as well as setting out where it believes amendments to the Bill are required.

By way of background, Mediahuis has been the proud owner of established and market leading newspaper publications in Northern Ireland since 2019. Mediahuis' publications include the Belfast Telegraph, Sunday Life and Sunday World Northern Ireland. The Irish Independent and Sunday Independent are also distributed in Northern Ireland, including online, and the Sunday Independent has recently launched a dedicated Northern Ireland edition.

The proposed reform of defamation law is of critical importance to the continued ability of all publishers and broadcasters to deliver public interest journalism.

The need for reform

One point that has been repeatedly raised in discussions relating to the reform of defamation law in Northern Ireland, but cannot be overemphasised, is the role of the media in holding the political system to account.

In both the Republic of Ireland and the United Kingdom, the legislature will be scrutinised by an official opposition, a second chamber and by the media. In Northern Ireland there is no official opposition. There is no second chamber. The role of the media is therefore integral to the effective scrutiny of the political establishment in Northern Ireland and any restrictions on the freedom of speech or freedom to publish must be viewed with that background.

The public debates in relation to the Defamation Bill to date have also repeatedly referred to the need for coherence with the defamation laws in Ireland and in England and Wales. Whilst coherence is desirable, it should not delay what is overdue and essential modernisation of the law of defamation in

Northern Ireland. To the extent that further updates are preferable following the mooted reform of the defamation laws in Ireland, or further reform in England and Wales, those updates should be addressed at a later date if required and should not prolong the continued existence of a set of defamation laws designed for the pre-internet era.

The debate to date has also focussed on whether there is a genuine chilling of free speech in Northern Ireland and, if so, how it can be evidenced. There are repeated calls for examples of the chilling effect in action through, for example, statistics on the number of defamation cases currently in existence. With respect, such calls ignore the reality of the day-to-day existence of a newspaper publisher in Northern Ireland. The 'chilling effect' is real.

The defamation landscape influences every Editor and every journalist's decision in which stories to commission and pursue. That is natural and necessary. However, the current defamation landscape has tipped the scales away from public interest journalism to the extent that, on a daily basis, it is unduly curtailed by fears of unjustified legal complaints and the complexities involved in defending publication in the public interest. The crippling costs of running a defamation case against an uncertain legal background, along with the risk of a disproportionately large jury award, mean that meritorious claims are settled rather than defended.

The ease with which legal correspondence can be issued in Northern Ireland, given the absence of a "serious harm" threshold, and the high cost of defending defamation claims, means that all but the most obviously spurious threats have to be given detailed consideration by both editorial and often internal and external legal resources.

Unavoidably therefore news publishers experience an unseen 'chilling effect', where such correspondence may prompt consideration of whether to, at best, delay publication, or one or more of having to (i) suspend articles pending investigation, (ii) abandon further articles on a subject matter and/or (iii) abandon lines of enquiry altogether. As is widely recognised, news is a perishable commodity, and the 'chilling effect' is most acutely felt where the news publisher is publishing, or intending to publish, material in the public interest and/or which concerns powerful and well-resourced individuals or organisations.

Such an imbalance is inherently unhealthy in any modern democracy but is especially so where the media is expected to supply the scrutiny normally provided by the checks and balances of an official opposition.

Reform in Northern Ireland is required now.

Clause 1 – Introduction of a "Serious Harm" test.

This introduction of a "serious harm" test is a common-sense argument.

The Scott Report notes the clear rationale for the introduction of such a rule:

> *"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…"*

For a case to be deserving of damages (not to mention use of the courts' limited resources) a "serious harm" test should therefore be applied, as is now successfully operating in England and Wales. These are not onerous requirements for a plaintiff to meet.

The Scott Report ultimately recommends the introduction of a "serious harm" test, albeit it notes that the argument for inclusion of this test when compared to the other modernising provisions contained in the 2013 Defamation Act are "*less compelling*".

Following the completion of the Scott Report in 2016, the "serious harm" test has been the subject of a number of cases in England & Wales, including a Supreme Court judgment, that has greatly assisted in clarifying the operation of the test. Given that additional clarity, the case for the introduction of a "serious harm" test is therefore now stronger than ever.

The Explanatory and Financial Memorandum to the Defamation Bill identifies that the proposed "serious harm" test builds on existing case law on the threshold for whether a statement is defamatory (in particular *Thornton* and *Jameel*). However, as recognised by the Supreme Court in *Lachaux v Independent Print Limited & Anor* [2019] UKSC 27, the "serious harm" test not only raises the threshold of harm which must be proved but also requires its application to be determined by reference to actual facts regarding the impact of the statement and not just to the meaning of the words used. This, in our view, is an entirely sensible extension that significantly reduces the likelihood of trivial claims being threatened or commenced as well as making it harder for the rich and influential to chill free speech (two of the Policies key objectives).

By way of illustration, the Supreme Court in *Lachaux* contemplated a scenario in which a grave allegation was published only to a small number of people, or to people who did not believe the allegation, or to people among whom the plaintiff had no reputation to be harmed. Under the common law (and therefore the existing law in Northern Ireland), those circumstantial factors would only be relevant to an assessment of damages whereas, under the "serious harm" test, they become part of the test of the defamatory character of the statement itself.

Whilst it is therefore acknowledged that a higher hurdle exists for plaintiffs when issuing a defamation claim, we are strongly of the view that the hurdle is well justified and that no legitimate and well-founded defamation claims would fall foul of the hurdle. Only those claims where the plaintiff is unable to show "serious harm" has occurred would be unable to proceed under the new Defamation Bill.

The introduction of the "serious harm" test also assists in determining the subsequent costs of any litigation. The absence of serious harm impacts the decision on whether a statement is defamatory in the first instance, rather than just being a factor that impacts the level of damages awarded. This is important because the costs of litigation are often apportioned on a 'loser pays' principle, meaning that even where damages are minimal, the defendant has still 'lost' the defamation claim as the statement is determined to be defamatory and is liable to pay for the costs of the litigation.

The costs of litigation are a significant determining factor when Mediahuis is determining how to respond to a claim for defamation and has undoubtedly resulted in otherwise meritiorous claims being settled. Knowing that the serious harm test will be applied when determining whether a statement is defamatory, as opposed to only in relation to the level of damages, means that publishers are better protected from the cost consequences of trivial defamation claims.

Clauses 2 and 3 – The defences of Truth and Honest Opinion

These sections largely codify the existing common law defences of justification and fair comment and as such are a welcome introduction. The codification of these defences should offer clarity to both plaintiffs and defendants.

As an additional proposed amendment, Clause 2 should be further developed to expressly refer to the possibility of a preliminary hearing to determine the meaning of the words complained of, similar to Practice Direction 53 which is in operation in England and Wales (see paragraph 6.2 of PD 53B – "*An application for a determination of meaning may be made at any time after the service of particulars of claim. Such an application should be made promptly*").

Order 82 Rule 3A of the Rules of the Court of Judicature presently allows for either party to take an application to determine whether the words complained of are capable of bearing the meanings pleaded. However, in contrast to the position in England and Wales, it does not allow for a judge to determine a single meaning at that stage, with the result that parties are required to prepare for trial on the basis of multiple potential meanings. The possibility of an application for a determination of meaning at an early stage would save litigants both time and cost as the parties will have a clear indication at that stage on the potential defamatory nature of the words complained of.

The proposed amendments to the "Honest Opinion" defence in the Defamation Act 2013 seem sensible and supportable.

Clause 4 – Publication on a matter of public interest

It is a matter of vital importance that a codified and coherent defence of fair and reasonable publication on a matter of public interest be introduced in Northern Ireland. Indeed, if political commentary about the importance of the media's role in society and the need to combat 'fake news' is to be taken

seriously then it is very hard to see any good reason not to introduce such a defence. The battle against 'fake news' is particularly pertinent at present in relation to conspiracy theories surrounding COVID-19. If the media are going to continue playing the vital role of 'fourth estate' then simplifying and streamlining this defence will benefit of all concerned, including those who might claim to have been defamed.

The current common law defence of *Reynolds* privilege is cumbersome can lead to complicated and costly litigation. The proposed codification of a statutory defence will enable media and the public alike to assess whether a statement should attract the benefit of a public interest defence.

Clause 5 – Operators of websites

The existing defamation legislation predates the internet and is presently not fit for purpose in an age where digital publishing is prominent.

We agree with the proposed provisions in respect of user generated content, and in particular the extension of a statutory defence to operators of all websites, not just those who otherwise meet the classification of intermediary service providers.

We welcome the proposed measures and look forward to engaging further on the relevant regulations that will be put in place regarding the obligation of operators to take down and remove content. Such regulations must strike a balance to ensure that they are clear enough to be workable without being so overly prescriptive that they might be used as means to shut down genuine online debate.

The Committee should also be mindful of what other steps may be necessary to ensure a level playing field of notice and takedown obligations. Intermediary service providers (ISPs) already face certain notice and take down obligations under the E Commerce Regulations 2002 but it is increasingly clear that those regulations are completely outdated and unfit for modern social media. The 2002 regulations have allowed corrosive and harmful content to be disseminated with impunity. ISPs such as Facebook and Google should not enjoy more favourable notice and take down obligations than traditional media publishers or any other form of website operator.

Clause 8 – Single Publication Rule

The absence of the single publication rule is perhaps the single greatest anomaly between the defamation law currently applicable in Northern Ireland and that applicable in England and Wales and in Ireland.

At the moment, the law in Northern Ireland is such that there is effectively no limitation period for defamation claims in relation to online articles. Each day an article is available and accessed online is a new date of publication under the existing defamation law, meaning that the one year limitation period effectively gets re-set each day.

The need for a limitation period for claims (and particularly for defamation claims) is obvious. This previous 'loophole' whereby a plaintiff's claim in relation to an online article would not be statute barred also has the unintended impact of attracting libel tourists to Northern Ireland, as a claim remains open to plaintiffs in this jurisdiction long after it has become statute barred in other jurisdictions.

The introduction of an identical clause in the Defamation Act 2013 does not appear to have caused any difficulty or injustice in England and Wales and the operation of such a limitation period in the Republic of Ireland has not led to any complaints that injured parties have been prejudiced in the vindication of their rights. On that basis we do not foresee any difficulties arising in the implementation of this provision in Northern Ireland.

Clause 11 – Trial to be without a jury

The continuing use of juries to decide defamation trials means that the process is seen by publishers as somewhat akin to a game of 'Russian roulette'. It is also out of line with most other civil law cases where juries are not used.

The mere fact that a jury can decide a defamation case and the unpredictability of this means that publishers are on the back foot when they receive legal complaints. This is a fundamental problem for the justice system and this has a chilling effect on the freedom of speech.

The unpredictability of decisions on liability and damages and the length of the process make legal costs unnecessarily punitive and prohibitive. A view is often taken to settle seemingly unmeritorious claims at an early stage to avoid substantial costs mounting. This has a cumulative effect of encouraging complainants to seek legal advice in the first instance, rather than seek alternative remedies.

The use of juries also means that defamation cases take longer to conclude, especially as often complex legal arguments have to be explained in detail, which would not always arise in cases heard by a judge alone. As noted in previous submissions, the *Reynolds* defence (proposed to be codified and refined in Clause 4 of the Defamation Bill) is particularly complex and difficult to explain to a jury and increases the uncertainty in relation to outcome. This leads in turn to an increasing degree of pre-publication self-censorship, particularly where the publisher may seek to rely on the defence of publication on a matter of public interest, which is arguably where the need for confidence and/or legal certainty is most acute, if freedom of expression, and the ability to inform the public is to be protected.

The argument that the jury reflects community values does not take into account the fact that a plaintiff who is genuinely concerned with vindicating his or her good name would be no less vindicated by a verdict from a judge than by a verdict from a jury. There are real concerns about the lack of transparency in a jury, often with very little legal experience, making a substantial award and not having to detail their decision-making process. This would be alleviated if the award was made by a judge and accompanied with a judgment explaining the judicial logic for the decision.

One strong and valid criticism of juries is the tendency to award damages at a level far higher than is required to compensate the plaintiff. As Price, Duodu and Cain pithily comment, "*Twelve ordinary*

people who for once in their lives have the opportunity to be bountiful on someone else's behalf tend to err on the side of generosity." It has been argued that this tendency can be overcome by suitable direction from a Judge, however recent experience in Ireland shows that even where a Judge has provided direction on the assessment of damages, the Jury can still grossly overcompensate a plaintiff (see the recent case of *Higgins v Irish Aviation Authority* where the Judge provided a textbook direction to the Jury but they still awarded €387,000. This was subsequently described as "*so unreasonable as to be disproportionate to the injury sustained*" by the Court of Appeal and reduced by 80% to €76,500). A publisher is then faced with incurring further costs of appealing a high jury award in order to reduce the level of damages payable. In addition, there is no credible suggestion that awards by a Judge alone do not sufficiently compensate a plaintiff or are in any way prejudicial to them. Indeed, in a very recent Judge determination in Northern Ireland, a plaintiff was awarded the significant sum of £125,000 (*Foster v Jessen*).

Mediahuis firmly believes that defamation trials by jury should be abolished in favour of a hearing before a judge. Whilst Clause 11 does not go this far, the interpretation of the same provision in England and Wales in *Yeo v Times Newspapers* [2014] EWHC 2853 (QB) showed the limited circumstances in which a trial before a Jury would be appropriate. For that reason, we are content that the proposed Clause 11 will address most of the concerns harboured about the negative impact of jury decisions and support its implementation.