

[] October 2021

Dear Mr McCallion

Defamation Bill (Northern Ireland)

Thank you for your invitation to submit a written response on the Defamation Bill introduced to the National Assembly by Mike Nesbitt MLA.

I am writing in my capacity as Chair of the News Media Association's Legal, Policy and Regulatory Affairs Committee. The NMA's members include the publishers of daily and weekly newspaper titles circulating in Northern Ireland. These include the Belfast Telegraph, Irish News (Belfast), Ballymena & Antrim Times, Coleraine Times, Derry Journal, Londonderry Sentinel, Lurgan Mail and the Impartial Reporter.

The NMA, the Media Lawyers Association and the Society of Editors all made submissions to the Northern Ireland Law Commission's 2015 consultation on Defamation Law. We strongly supported the extension of the Defamation Act 2013 in full to the Northern Irish jurisdiction, as well as adherence to the Pre-action Protocol for Defamation contained in the Civil Procedure Rules.

- **We agree with the UN Human Rights Committee that the current law of libel in Northern Ireland fails to protect freedom of expression adequately.**

The chilling effect of libel actions is well documented. In Northern Ireland plaintiffs can rely on the common law's presumption of falsity and presumption of damage to establish a prima facie claim which can prove extremely difficult to strike out before trial because of the presumptive right to jury trial. Plaintiffs often have little incentive to settle claims before trial, and defendants often choose to settle libel claims irrespective of the merits, partly because that can give a better financial result and partly because of the uncertainty which results from a determination of libel trials by jury. The financial pressures facing small media outlets across the country make them especially vulnerable to bullying or vexatious litigants.

A pluralistic, lively and investigative press helps democracy to flourish, but this is inhibited by the region's antiquated libel laws. The Defamation Act 2013, by contrast, strikes the right balance between the right to reputation and the right to freedom of expression.

- **In our view, wholesale adoption of the Act will lead to the earlier determination of defamation claims, while providing greater certainty in the long term which will benefit both plaintiffs and defendants.**

Among other things, the Act provides remedies for plaintiffs to achieve prominent vindication of their reputation. It sets out a clear allocation of responsibility between original posters of defamatory publications and intermediaries. It codifies and enhances the defences of truth, honest opinion and responsible publication on a matter of public interest. It introduces a threshold test for whether a publication is defamatory which focuses on the actual extent of harm done to reputation. It introduces a single limitation period for publications, bringing the law of limitation up to date with internet publishing. Importantly, the Act also abolishes the presumptive right to trial by jury, with its inherent uncertainty of outcome.

- **If the Defamation Act is not implemented in Northern Ireland there will be further divergence of common law principles between the different jurisdictions.** This will contribute to an uncertainty of principle and outcome which is ultimately unfavourable to both plaintiffs and defendants and which will serve only to promote rather than reduce legal disputes. There are no other torts where Northern Ireland has allowed for marked differences with the English common law in terms of interpretation or application – and it is important to bear in mind that the trans-jurisdictional nature of publishing is liable to create actionable torts in multiple jurisdictions simultaneously.

Provisions of the Bill

The Bill effectively adopts the Defamation Act 2013 in its entirety, and this has our unequivocal support. The Act provides a cumulative and coherent policy framework, and it would be a mistake to ‘fillet’ the statute for implementation in Northern Ireland.

In brief, the NMA’s views on the central provisions of the Bill are as follows:

- Section 1 - the “serious harm” test acts as an important counterweight to the automatic presumption of falsity and damage in the common law. Failure to implement this provision will make Northern Ireland an attractive destination for libel plaintiffs who are pursuing claims against British publishers and will inhibit publishers’ willingness to publish in the region. There can be no good reason, whether in policy or in law, why a libel claim should be permitted to proceed to trial with all the attendant costs and use of resources if there is no realistic prospect of establishing serious damage to reputation.
- Section 2 - the defence of “truth” will codify the common law defence of justification and achieve consistency between the jurisdictions.
- Section 3 - the defence of “honest opinion” is of critical importance for all types of publisher. Any divergence between jurisdictions would be inimical to the important Article 10 ECHR values protected by this defence.
- Section 4 - the defence of “publication on a matter of public interest” highlights the importance of public-spirited journalism in a democratic society. It has proved to be a positive and workable measure. If this defence is not adopted then Northern Ireland risks being viewed as a jurisdiction which disincentivises and discourages the publication of matters of public interest.
- Section 5 - the defence for website operators updates the law for the 21st century, placing responsibility and liability for a publication on the originator of the allegations. Failure to introduce this provision would make Northern Ireland a destination for libel claims against online publishers, who would have a complete defence under the Act in England and Wales.
- Section 6 - qualified privilege for statements in peer-reviewed scientific or academic journals is important to counteract the chilling effect of the unreformed regime both upon academic and scientific research and debate and upon any wider coverage given to the subject matter and such debate upon it.
- Section 7 - reports protected by privilege. If this section is not extended to Northern Ireland the benefit of the privilege appertaining to England, Wales and Scotland will effectively be removed from national publishers. They will be unable to risk publishing privileged material where that privilege does not extend to Northern Ireland. All defences of privilege are particularly important to the day to day reporting work of the local and regional press and the communities that they serve.
- Section 8 - the ‘single publication’ rule is a vital update of defamation law, necessary for adaptation to new communications technologies and to the policy objective of prompt vindication of reputation, without detriment to the claimant.
- Section 9 - the rule on ‘libel tourism’ is an important reform. If this rule is not implemented in Northern Ireland it will accentuate any differences of approach between the jurisdictions and make Northern Ireland even more attractive to foreign plaintiffs suing foreign defendants in Belfast. It is the threat of such actions which is ultimately so harmful to freedom of expression.

- Section 10 - the defence for secondary publishers is a proper allocation of liability for libel claims which encourages personal responsibility for publishing information. It is also the most appropriate approach for securing suitable injunctive relief and vindictory damages.
- Section 11 - crucially, this removes the anomalous presumptive right to trial by jury. All other causes of action which protect an individual's autonomy and their personal information (such as negligent misstatement, malicious falsehood, breach of confidence, harassment and data protection claims) are dealt with by judges sitting alone. The current framework operates in favour of plaintiffs, who often have little incentive to settle claims before trial. Abolishing the presumption facilitates the early determination of key issues in libel claims, such as the meaning of a publication, whether the words complained of constitute fact or comment and the viability of any defences. This is of benefit to both plaintiffs and defendants, since trial by jury serves either to delay the rightful vindication of a plaintiff's reputation or to inhibit freedom of expression. It will lead to significant cost and time savings for all parties, as well as for the court system.

The Defamation Act 2013 was born out of considerable discussion and consultation, ensuring consideration of all perspectives. Achieving consistency and certainty in the law within the United Kingdom is of central importance, both for regional and national publishers. It is also of benefit to potential plaintiffs. If Northern Ireland does not keep pace with reform and evolution in libel law there is a real risk that this will have a highly detrimental impact upon media plurality and freedom of expression in the region.

I would be very happy to facilitate meetings with media organisations and their publishers, editors and legal advisers which could help to explain the problems created by the current laws and the need for reform.

Yours faithfully

Lord Black of Brentwood