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Dear Peter:

Further to your correspondence addressed to me and dated 17 September 2021 I provide my observations below:

1. **Background**

The Defamation Bill was formally introduced to the Northern Ireland Assembly on 7 June 2021 and, following its second reading on 14 September 2021, was referred to the Committee for Finance for the Committee Stage. In order to inform its deliberations on the Bill, the Committee has launched a call for evidence and you should make a written response prior to **12noon on Monday 1 November 2021**addressing those clauses of the Bill which you consider to be relevant and setting out where you believe amendments to the Bill are required.

The Bill sponsor indicated that the Bill has twelve policy objectives which were given as:

1) Make it easier and less expensive to take legal action when you have been defamed;

2) Make it harder for the rich and influential to chill free speech;

3) Introduce measure to exclude trivial claims;

4) Protect the rights of scientists and academics to engage in robust debate;

5) Protect the right of journalists to conduct responsible and necessary investigations;

6) Protect the work of Non-Governmental Organisations;

7) Take better account of the impact of the internet;

8) Require claimants to show that they have suffered serious harm before suing for defamation;

9) Remove the current presumption in favour of jury trial;

10) Introduce a defence of "responsible publication on matters of public interest";

11) Provide increased protection to operators of websites that host user-generated content, providing they comply with the procedure to enable the complainant to resolve disputes directly with the author of the material concerned; and

12) Introduce new statutory defences of truth and honest opinion to replace the common law defences of justification and fair comment.

2. Context

The NIA declined to adopt the E&W Defamation Act 2013. The law in Northern Ireland is determined by the Defamation Acts 1955 and 1996.

The Defamation Act 2013 codified the existing law as it applied to Northern Ireland and England and Wales, and it provided a solution to the modern law lacuna's by providing statutory modern law solutions.

- Section 1 **introduces a new concept of** "serious harm" test that will serve as threshold test to the bringing of a claim. The current law in Northern Ireland is a *de minimus* test and abuse of process as developed by the common law. For example, *Jameel (Yousef) v Do Jones & Co. Inc. [2005] EWCA Civ 75*, the English Court of Appeal which is persuasive in Northern Ireland clarified the law was summarised as follows:

> "*If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal.* ***The cost of the exercise will have been out of all proportion to what has been achieved.*** *The*

game will not merely not have been worth the candle, it will not have been worth the wick." (emphasis added)

I also believe that section 1 should 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 the action being brought is without merit and merely strategic litigation to censor free speech. Journalists and other free speech defenders play a crucial role in feeding information into the public debate that underpins a healthy and vibrant democracy. The *Democracy Action Plan* issued by the European Commission in December 2020 highlighted the importance of Media freedom and media pluralism for our democracies. Free and pluralistic media are crucial in holding power to account and to help citizens make informed decisions. By providing the public with reliable information, independent media play an important role in countering disinformation and the manipulation of democratic debate. A vibrant civil society is also a fundamental component of healthy democracies. It is a fact that journalists increasingly face threats and other attacks, not least smear campaigns and abusive lawsuits to censor free speech, responsible and truth finding journalism. In Northern Ireland journalists reporting about paramilitaries, gangsters and serious criminality frequently face death threats and threats to their personal safety. Jim McDowell was attacked and subjected to numerous death threats, Martin O'Hagan was murdered, Lyra McKee was murdered, Veronica Guerin was murdered and many other journalists have received police messages communicating serious death threats as a direct result of their reporting in the public interest. More recently, there is an increase in the strategic litigation in order to censor lawful reporting. See for example: *Fulton v Sunday Newspapers Limited* [2017] NICA 45; *McAuley v Sunday Newspapers Limited* [2015] NIQB; *Arthurs v Sunday Newspapers Limited* [2017] NICA 70; *Duffy, McCrory and Fitzsimmons v Sunday Newspapers Limited* [2017] NICA and countless other legal proceedings that were resolved extra judicially but only after substantial legal costs were incurred unnecessarily.

Recently, the unprecedented health crisis triggered in 2020 reminded us of the importance of accessing reliable information. Tackling COVID-19 disinformation ("Getting the facts right, COVID-19 pandemic, and the accompanying 'infodemic' a flood of misinformation and disinformation') highlighted vulnerabilities and the need to remain vigilant in order to stop undue interference with responsible fact bearers.

SLAPPs, i.e. 'Strategic lawsuits against public participation' have become an issue of particular concern in this context. Strategic lawsuits against public participation (SLAPPs) are a particular form of harassment increasingly used against journalists and others involved in protecting the public interest. They are groundless or exaggerated lawsuits initiated by state organs, business corporations or powerful individuals against weaker parties who express criticism or communicate messages that are uncomfortable to the litigants, on a matter of public interest. Their purpose is to censor, intimidate and silence critics by burdening them with the cost of (lengthy) legal proceedings in order to prompt

them to abandon criticism or opposition. The related threat of having to face severe consequences, for instance in the form of high damages payments (or possibly imprisonment), should the complaint be successful reinforces the effect on the defendant/journalist. Given the imbalance in power and resources between the plaintiff and defendant often observed in SLAPP cases, they can have a very important impact on the victims' financial resources and produce 'chilling effects' on the victims and other actors in the broader community of journalists, NGOs and civil society, dissuading or preventing them from pursuing their work in the public interest.

Both civil society actors and journalists are vulnerable to such initiatives, while the nature of journalists' work exposes them to a greater extent.

SLAPPs are of such serious concern that for example in the USA that there is express legal provision enabling an early application to be brought to dismiss or strike a case out if it satisfied the elements of a SLAPP action. In Europe, the European Commission announced in the European Democracy Action Plan adopted on 3 December an initiative against SLAPP. A recent study sketched out the main issues at stake, the impacts of SLAPP and highlighted the additional complexities of SLAPP which have a cross border dimension.[1]

- Section 2 codifies the existing Northern Ireland justification defence under the label of "truth", but essentially codifies the current Northern Ireland law of justification. The codification provides more clarity and de-mystifies the law. Interestingly, this is similar to the Republic of Ireland defence of "truth" pursuant to s.16 of the Irish Defamation Act 2009.

- Section 3 codifies the existing Northern Ireland law and restates the fair comment / honest comment defence as "honest opinion". Arguably section 3 codifies what the common law position in Northern Ireland. In essence Northern Ireland's honest comment defence is in fact the honest opinion defence, following the UKSC decision of *Spiller v Joseph and others [2010] UKSC 53*. This Supreme Court decision is binding in Northern Ireland and it pre-dates the 2013 Act. The Supreme Court's judgment presented a helpful simplification of the principle of the law of fair / honest comment.

  Indeed, the English Court of Appeal recognised the complexities and problems that arose with the defence of fair comment / honest comment defence in *BCA v Singh [2010] EWCA Civ 350 [35-36]* remaking that:

> *35. In an area of law concerned with sometimes conflicting issues of great sensitivity involving both the protection of good reputation*

[1] ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf (europa.eu)

and the maintenance of the principles of free expression, it is somewhat alarming to read in the standard textbook on the Law of Libel and Slander (Gatley, 11th edition) in relation to the defence of fair comment, which is said to be a "bulwark of free speech", that "…the law here is dogged by misleading terminology… 'Comment' or 'honest comment' or 'honest opinion' would be a better name, but the traditional terminology is so well established in England that it is adhered to here".

36. We question why this should be so. The law of defamation surely requires that language should not be used which obscures the true import of a defence to an action for damages. Recent legislation in a number of common law jurisdictions – New Zealand, Australia, and the Republic of Ireland - now describes the defence of fair comment as "honest opinion". It is not open to us to alter or add to or indeed for that matter reduce the essential elements of this defence, but to describe the defence for what it is would lend greater emphasis to its importance as an essential ingredient of the right to free expression. Fair comment may have come to "decay with …imprecision". 'Honest opinion' better reflects the realities.

- Section 4 **replaces** what is the existing Northern Ireland law of *Reynolds privilege* with a new recasted version of this defence called "publication on a matter of public interest". Interestingly, this is similar to the Republic of Ireland defence of "*fair and reasonable publication on a matter of public interest*" pursuant to s.26 of the Irish Defamation Act 2009. In *Meegan v Times Newspapers Ltd [2016] IECA 327* Hogan J for the Irish Court of Appeal explained that this defence is designed to provide a defence for publishers who show that they acted bona fide and that the publication was fair and reasonable having regard to the statutory provisions of s.26. the English 2013 Act introducing this similar defence and by doing so provides clarity on the law in respect of what is an extremely complex defence in Northern Ireland.

  The common law defence of Reynolds is arguably outdated and riddled with complex issues that are often determined through extremely length court hearings and incurring substantial legal costs in order to understand this common law defence as it applies in Northern Ireland. A codification of this defence by introducing the same s.4 Defamation Act 2013 provisions (or indeed s.26 of the Irish Act) would provide the public with clarity and avoid substantial legal costs having to be incurred in interim interlocutory inter parties hearings. To codify the Reynolds defence in the same was as England & Wales or as Ireland, would not only assist the public in understanding this defence and demystifying the law but would also aid legal practitioners who often have to engage in extremely adversarial correspondence and pleadings, incurring substantial legal costs.

- Section 4(3) essentially codified the existing law in Northern Ireland pertaining to the reportage variant of the Reynolds defence. This codification would provide clarity and reduce the parties in a libel dispute from having to engage in aggressive and extremely expensive interim interlocutory hearings to determine what a reportage defence is. The lack of clarity on the common law defences in Northern Ireland can often result in injustices to complainants who may ultimately lose their case, but only after prolonged court proceedings to determine the meaning of reportage and of course defendants are forced to do incur substantial legal costs in order to obtain that clarity. An example of a lengthy determination of the reportage defence is the case of *Coulter v Sunday Newspapers Limited* [2017] NICA 10, whereby the defendant was ultimately successful at Court of Appeal stage in defending the case on the basis of reportage but the Plaintiff incurred substantial legal costs in order to get such clarity on this defence. A codification of the Reynolds defence by implementing the statutory s.4(3) defence could only benefit everyone. The Court of Appeal remarked upon the complexities of deciphering the common law defence and of the risks of legal costs to parties on ensuring the legal application of this defence is correctly applied:

> *[56] This is certainly an issue that required to be addressed by the learned trial judge. Was this "reportage" and if so had the newspaper article crossed the line between reportage and the newspaper adopting the reports of what the various employees had said? At paragraph [86] of the judgment the learned trial judge criticised not only the failure to contact witnesses to confirm the information provided but also that the newspaper should have investigated the value of some Christmas bookings prior to the administration. Arguably this smacked of placing a burden on the journalist to establish the truth of the impugned article without addressing the question as to whether this was necessary if the article amounted to reportage. This might well therefore have amounted to a sustainable ground of appeal had it been necessary for us to so determine."*

- Section 5 provides a **new defence** for the operators of websites. Clearly we live in an internet connected society and the law in Northern Ireland is desperately in need of modernisation in this particular sphere of defamation law. The principle behind this is that a dispute about defamatory user generated content ought to be resolved between the complainant and the person who posted the material. In other words, the website operator should not be in the line of fire simply because it hosted the words complained of, which aligns with the current law in Northern Ireland pursuant to the E-Commerce Regulations 2002 Notice and Take down procedure. The Northern Ireland Court of Appeal explained in *CG v Facebook Ireland Limited and McCloskey [2016] NICA 54*, that

an internet service provider is not liable for damages unless it has actual knowledge of the unlawfulness of the publication or knowledge of facts and circumstances which make the unlawfulness transparent.

The internet has dramatically changed in recent years and usage of online resources has risen exponentially. In 2021 Ofcom published a report that recorded Northern Ireland consumers sourcing news from BBC One 69%, UTV 59% and Facebook 44% and Northern Ireland based news websites 15% including print and website / app as 13%. Most broadcasters and newspapers have social media pages to assist them in reaching younger audiences and to pursue their aim of bearing facts and truth to the public in a responsible and responsible way. The pandemic has shone the spotlight on the importance of the mainstream media being able to fact check and provide reliable information to the public.

Due to the rapidly increasing use of steaming and online sources for consumer consumption for news and facts, it is imperative that the law develops in line with modern society's needs. The s.5 defence would enable broadcast and print websites to avail of the same defence provided to social media platforms and provide a level legal playing field in the provision of online content. In the same way an ISP is not liable until put on actual notice of the unlawful content, all website operators can equally avail of the same defence.

The purpose of the Defamation Act 2013 in England and Wales was to rebalance the law on defamation to provide more effective protection for freedom of speech while at the same time ensuring that people who have been defamed are able to protect their reputation. In accordance with this aim, Section 5 of the Act creates a new defence to an action for defamation brought against the operator of a website hosting user-generated content where the action is brought in respect of a statement posted on the website. Section 5 only relates to the operators of websites hosting user-generated content and does not affect other internet services such as search engines, services that simply transmit information or services that provide access to a communications network.

- Sections 6 and 7 codify aspects of the existing Northern Ireland law on privilege, but also **introduces new** and extremely important provisions of a qualified privilege for statements made in peer-reviewed scientific or academic journals.

- Section 6 creates **a new defence** of qualified privilege relating to peer-reviewed material in scientific or academic journals (whether published in electronic form or otherwise). The term "scientific journal" would include medical and engineering journals. There have been many instances in Northern Ireland when academics writing about the Troubles which often involves polarised views and different truths. This has led to may academics facing the threat of defamation actions and their academic free speech being compromised.

In addition, authors writing on controversial subjects such as international sex trade and abortion have faced legal threats and serious risks of legal costs from defamation actions.

- Section 7 amends the existing law in Northern Ireland as determined by the provisions contained in the 1996 Defamation Act relating to the defences of absolute and qualified privilege to extend the circumstances in which these defences can be used.

- Section 8 **introduces a new** single publication rule. This section introduces a single publication rule to prevent an action 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 of that material to the public or a section of the public. This replaces the Northern Ireland legal principle that each publication of defamatory material gives rise to a separate cause of action which is subject to its own limitation period (the "multiple publication rule").

  In an increasingly online connected World where each download constitutes a new publication it is an extremely onerous result and is arguably outdated. The chilling effect of the current Northern Ireland multiple publication rule makes it impossible for online content providers to operate without fear of serious financial and reputational loss, and thereby results in an extremely cautious approach to online publications in Northern Ireland and restricts the free flow of responsible and accurate information to the Northern Irish public. Many organisations in Ireland or the rest of the UK and the World often geo-block content so that it cannot be accessed by the Northern Irish public so as to avoid the financially crippling risk of a multiple publication rule.

- Section 9 in essence codifies the general law in Northern Ireland and is intended to address the phenomenon of "libel tourism" and compels the court to refuse jurisdiction unless it is satisfied that England and Wales is 'clearly the most appropriate place' for the action to be brought. For example Order 11 of the Rules of the Supreme Court require leave of the court before serving proceedings outside of the jurisdiction and this involves a judicial analysis of the gateway principles before proceedings are permitted to be served out. For example, *YZ v Google Inc and ors* [2015] NIQB 103. Where a Plaintiff issues proceedings in Northern Ireland but resides out of the jurisdiction, an application can be advanced for security for costs and if the Plaintiff has no reputation to protect in Northern Ireland an application could be advanced for abuse of process much like the section 1 threshold proposed above. In my experience I have never encountered a libel tourism case.

- 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'.

- Section 11 **is new** and provides that defamation cases should be heard by judge alone. In Northern Ireland defamation trials are as of right hard before a jury unless this presumption is rebutted. The threat of a jury trial which is extremely expensive and lengthy, much more so than by a judge alone, is sufficient to compel parties to settle rather than exercise their right to a court hearing. The chill factor is that parties often settle even if they have a prima facie good case. Whilst Northern Ireland does have specific nuances due to its political history which often justifies jury trials there is also merit in judge alone determinations.

- Section 12 and 13 **provide new** summary judgement remedies and compels take downs of publications, which provides early resolution mechanisms enabling parties to avoid lengthy and costly court cases and enables remedies to be obtained at much earlier stages in a case. The costs saving and the avoidance of wasting court time is a positive outworking of the England & Wales remedies provisions and provides enhanced access to justice for the public.

3. The proposed Bill

The enactment of the Defamation Act 2013 would provide consistency across the UK in the application of defamation law and by virtue of consistency it would provide transparency on the legal principles that could be applied uniformly across the UK. This would result in increased access to justice for the public, more content being disseminated in this region and a level playing field for mainstream media providers with social media platforms.

Mike Nesbitt MLA has said he believes that Northern Ireland should replicate the 2013 Act and that England and Wales have already provided clarity on the application of the Act that the Northern Ireland courts could avail of and would provide consistency across the UK.

The defamation law in Northern Ireland is urgently in need of reform. In particular, sections 1-10 and 12 and 13 should be enacted in Northern Ireland.

Please do not hesitate to contact me if you require any additional clarification.

Yours sincerely,

Olivia O'Kane