3rd November 2021

Dear Sir/Madam,

Please find below our response to the consultation on the draft Defamation bill.

If you have any further queries please do not hesitate to contact me,

Yours faithfully,

Simon Clemion
Head of News and Programmes, UTV.

Context of the Review

UTV Limited ("UTV"), has been invited by the Committee for Finance to provide a written response to the draft Defamation bill. By way of background UTV is the Channel 3 public service broadcast licence for Northern Ireland. Based in Belfast, UTV is by far the most watched channel in Northern Ireland - delivering high quality, popular home-produced programmes, backed up by the best of ITV programming. UTV first went on air in 1959 as part of the ITV Network and has held the Channel 3 public service broadcasting licence ever since. UTV was also the first commercial television operator on the island of Ireland. It became part of ITV in 2016. UTV is regulated by the Office of Communications (OFCOM).
The law in Northern Ireland is determined by the Defamation Acts 1955 and 1996. The proposed reform of defamation law is of huge importance to the continued ability of broadcasters and publishers in Northern Ireland to deliver Northern Ireland audiences with responsible, credible and public interest journalism and content.

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

The changes proposed by the Bill

Clause 1 – Serious Harm test

Section 1 of the 2013 Act introduced a new concept of "serious harm" test. The current law in Northern Ireland is a *de minimis* test and abuse of process as developed by the common law. For example, in *Jameel (Yousef) v Dow 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)

Furthermore, the Supreme Court recognised in *Lachaux v Independent Print Limited & Anor* [2019] UKSC 27, that the serious harm test not only raises the threshold of harm which must be proved. It also requires determination by reference to the actual facts regarding the impact that the content complained of has upon the plaintiff and not just a consideration to the meaning of the words used. This is a pragmatic and realistic position. It reduces trivial claims and makes it harder for litigation to be abused by advancing being unmeritorious claims brought by the rich or persons with no reputation who have paramilitary links for example and are merely trying to censor free speech.

We also believe that clause 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. 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 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, threats to their personal safety and harassment. 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 (strategic lawsuits against public participation) are recognised in law in the USA and part of the EU Democracy Plan involves the European Commission's work into how or whether European member states should implement anti-SLAPP actions. The proposed clause 1 serious harm threshold would align with a global objective of permitting parties to apply to the court at an early stage to strike out unmeritorious and trivial claims, particularly strategic lawsuits where the sole objective is to censor lawful reporting about matters of serious public interest.

We also consider that where a proposed defendant has offered a plaintiff a sufficient apology at an early stage of the complaint this should constitute a bar to the issuance of proceedings.

The costs of litigation are a central factor for UTV when determining how to respond to complaints and even whether unmeritorious complaints should be settled.

Clause 2 and 3: Truth and Honest Opinion

Clause 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 demystifies the law. Interestingly, this is similar to the Republic of Ireland defence of "truth" pursuant to s.16 of the Irish Defamation Act 2009. Pursuant to Order 82 Rule 3A, parties have the ability to ask a judge sitting alone to determine whether the content complained of is capable of a defamatory imputation. This has the result of refining the legal meaning of the content complained of at a preliminary stage and often assists parties in deciding whether the case should proceed to trial or not. Accordingly, clauses 2 and 3 would incorporate the status quo in some respects.

Clause 3 also arguably codifies the existing Northern Ireland law and restates the fair comment / honest comment defence as "honest opinion". Following the UKSC decision of *Spiller v Joseph and others [2010] UKSC 53,* many practitioners refer to this defence in Northern Ireland as honest comment / honest opinion. Supreme Court decisions are binding in Northern Ireland and it pre-dates the 2013 Act.

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 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".*
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> *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.*

Clause 4 – publication on a matter of public interest

Clause 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 introduced 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 lengthy 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 partes hearings. To codify the *Reynolds* defence in the same way 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.

Codification of the reportage variant 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 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."*

Clause 5 – Operators of websites

The existing law is not fit for purpose. It is outdated and fails to recognise the reality of online news.

Clause 5 provides a new defence for the operators of websites. 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 proposed new defence is that a dispute about defamatory user generated content ought to be resolved between the complainant and the person who posted the material.[1] 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 streaming 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

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1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/269139/defamation-faqs.pdf

ISP is not liable until put on actual notice of the unlawful content, all website operators can equally avail of the same defence.

We consider that clause 5 is a sensible rebalance of 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. It 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.

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

Simon Clemison | Head of News & Programmes, **UTV** | company director | senior leader **ITV plc**
City Quays II | Belfast | BT1 3YD | Mob: 07872 412823 | simon.clemison@itv.com