*This Memorandum refers to the Defamation Bill as introduced in the Northern Ireland Assembly on 7 June 2021 (Bill 25/17-22)*

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# DEFAMATION BILL

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## EXPLANATORY AND FINANCIAL MEMORANDUM

### INTRODUCTION

1. This Explanatory and Financial Memorandum has been prepared in order to assist the reader of the Bill and to help inform the debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

2. The Memorandum should be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill, and where a clause or part of a clause does not seem to require any explanation or comment, none is given.

### BACKGROUND AND POLICY OBJECTIVES

3. The aim of the Bill is to reform the law of defamation to ensure that a fair balance is struck between the right to freedom of expression and the protection of reputation. The Bill makes a number of substantive changes to the law of defamation, but is not designed to codify the law into a single statute.

4. Policy Objectives
   - Make it easier and less expensive to take legal action when you have been defamed;
   - Make it harder for the rich and influential to chill free speech;
   - Introduce measures to exclude trivial claims;
   - Protect the rights of scientists and academics to engage in robust debate;
   - Protect the right of journalists to conduct responsible and necessary investigations;
   - Protect the work of Non-Governmental Organisations;
   - Take better account of the impact of the Internet;
   - Require claimants to show that they have suffered serious harm before suing for defamation;
   - Remove the current presumption in favour of a jury trial;
   - Introduce a defence of "responsible publication on matters of public interest";
   - 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;
   - Introduce new statutory defences of truth and honest opinion to replace the common law defences of justification and fair comment.

## CONSULTATION

5. In June 2016, Dr (now Professor) Andrew Scott of the London School of Economics, working on a commission from the Law Commission of Northern Ireland, published his report, Reform of Defamation Law in Northern Ireland, containing recommendations to the Department of Finance. This is available at: https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/report-on-defamation-law_0.pdf

6. The consultation responses to Professor's Scott report is available here:https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/review-of-defamation-law-summary-of-consultation-responses%20Defamation%20Law%20in%20NI.pdf

## OPTIONS CONSIDERED

7. The options considered were maintaining the status quo and reform largely in line with the provisions of the Defamation Act 2013 as it applies in England and Wales. The latter option was chosen. The fact that Northern Ireland's defamation laws pre-date the invention of the World Wide Web makes a compelling case for review. Dr Scott's consultation and Report make the case for reform.

## OVERVIEW

8. The Bill is designed to ensure Northern Ireland is not disadvantaged by having less favourable defamation laws than other parts of the United Kingdom.

## COMMENTARY ON CLAUSES

9. [Based on https://www.legislation.gov.uk/ukpga/2013/26/pdfs/ukpgaen_20130026_en.pdf]

**Clause 1: Serious harm**

*Subsection (1)* of this clause provides that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. The provision extends to situations where publication is likely to cause serious harm in order to cover situations where the harm has not yet occurred at the time the action for defamation is commenced. *Subsection (2)* indicates that for the purposes of the Clause, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.

The clause builds on the consideration given by the courts in a series of cases to the question of what is sufficient to establish that a statement is defamatory. A recent

example is *Thornton v Telegraph Media Group Ltd*[1] in which a decision of the House of Lords in *Sim v Stretch*[2] was identified as authority for the existence of a "threshold of seriousness" in what is defamatory. There is also currently potential for trivial cases to be struck out on the basis that they are an abuse of process because so little is at stake. In *Jameel v Dow Jones & Co*[3] it was established that there needs to be a real and substantial tort. The clause raises the bar for bringing a claim so that only cases involving serious harm to the claimant's reputation can be brought.

*Subsection (2)* reflects the fact that bodies trading for profit are already prevented from claiming damages for certain types of harm such as injury to feelings, and are in practice likely to have to show actual or likely financial loss. The requirement that this be serious is consistent with the new serious harm test in *subsection (1).*

**Clause 2: Truth**

This clause replaces the common law defence of justification with a new statutory defence of truth. The clause is intended broadly to reflect the current law while simplifying and clarifying certain elements.

*Subsection (1)* provides for the new defence to apply where the defendant can show that the imputation conveyed by the statement complained of is substantially true. This subsection reflects the current law as established in the case of *Chase v News Group Newspapers Ltd*[4], where the Court of Appeal indicated that in order for the defence of justification to be available "the defendant does not have to prove that every word he or she published was true. He or she has to establish the "essential" or "substantial" truth of the sting of the libel".

There is a long-standing common law rule that it is no defence to an action for defamation for the defendant to prove that he or she was only repeating what someone else had said (known as the "repetition rule"). *Subsection (1)* focuses on the imputation conveyed by the statement in order to incorporate this rule.

In any case where the defence of truth is raised, there will be two issues: i) what imputation (or imputations) are actually conveyed by the statement; and ii) whether the imputation (or imputations) conveyed are substantially true. The defence will apply where the imputation is one of fact.

*Subsections (2) and (3)* replace section 5 of the 1955 Act (the only significant element of the defence of justification which is currently in statute). Their effect is that where the statement complained of contains two or more distinct imputations, the defence

[1] [2010] EWHC 1414.
[2] [1936] 2 All ER 1237.
3 [2005] EWCA Civ 75.
[4] [2005] EWCA Civ 75.

does not fail if, having regard to the imputations which are shown to be substantially true, those which are not shown to be substantially true do not seriously harm the claimant's reputation. These provisions are intended to have the same effect as those in section 5 of the 1955 Act, but are expressed in more modern terminology. The phrase "materially injure" used in the 1955 Act is replaced by "seriously harm" to ensure consistency with the test in section 1 of this Act. *Subsection (4)* abolishes the common law defence of justification and repeals section 5 of the 1955 Act. This means that where a defendant wishes to rely on the new statutory defence the court would be required to apply the words used in the statute, not the current case law. In cases where uncertainty arises the current case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied.

**Clause 3: Honest opinion**

This clause replaces the common law defence of fair comment[5] with a new defence of honest opinion. The clause broadly reflects the current law while simplifying and clarifying certain elements, but does not include the current requirement for the opinion to be on a matter of public interest.

*Subsections (1) to (4)* provide for the defence to apply where the defendant can show that three conditions are met. These are condition 1: that the statement complained of was a statement of opinion; condition 2: that the statement complained of indicated, whether in general or specific terms, the basis of the opinion; and condition 3: that an honest person could have held the opinion on the basis of any fact which existed at the time the statement complained of was published or anything asserted to be a fact in a privileged statement published before the statement complained of.

Condition 1 (in *subsection (2)*) is intended to reflect the current law and embraces the requirement established in *Cheng v Tse Wai Chun Paul*[6] that the statement must be recognisable as comment as distinct from an imputation of fact. It is implicit in condition 1 that the assessment is on the basis of how the ordinary person would understand it. As an inference of fact is a form of opinion, this would be encompassed by the defence.

Condition 2 (in *subsection (3)*), reflects the test approved by the Supreme Court in *Joseph v Spiller*[7] that "the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based". Condition 2 and Condition 3 (in *subsection (4)*) aim to simplify the law by providing a clear and straightforward test. This is intended to retain the broad principles of the current common law defence as to the necessary basis for the opinion expressed but avoid the complexities which have

[5] The Supreme Court in Spiller v Joseph [2010] UKSC 53 referred to this as honest comment.
[6] (2000) 10 BHRC 525.
[7] [2010] UKSC 53 (at para 105).

arisen in case law, in particular over the extent to which the opinion must be based on facts which are sufficiently true and as to the extent to which the statement must explicitly or implicitly indicate the facts on which the opinion is based. These are areas where the common law has become increasingly complicated and technical, and where case law has sometimes struggled to articulate with clarity how the law should apply in particular circumstances. For example, the facts that may need to be demonstrated in relation to an article expressing an opinion on a political issue, comments made on a social network, a view about a contractual dispute, or a review of a restaurant or play will differ substantially.

Condition 3 is an objective test and consists of two elements. It is enough for one to be satisfied. The first is whether an honest person could have held the opinion on the basis of any fact which existed at the time the statement was published (in *subsection (4)(a)*). The subsection refers to "any fact" so that any relevant fact or facts will be enough. The existing case law on the sufficiency of the factual basis is covered by the requirement that "an honest person" must have been able to hold the opinion. If the fact was not a sufficient basis for the opinion, an honest person would not have been able to hold it.

The second element of condition 3 (in *subsection (4)(b)*) is whether an honest person could have formed the opinion on the basis of anything asserted to be a fact in a "privileged statement" which was published before the statement complained of. For this purpose, a statement is a "privileged statement" if the person responsible for its publication would have one of the defences listed in *subsection (7)* of the clause if an action was brought in respect of that statement. The defences listed are the defence of absolute privilege under section 14 of the 1996 Act; the defence of qualified privilege under section 15 of that Act; and the defences in sections 4 and 6 of the Act relating to publication on a matter of public interest and peer-reviewed statements in a scientific or academic journal.

*Subsection (5)* provides for the defence to be defeated if the claimant shows that the defendant did not hold the opinion. This is a subjective test. This reflects the current law whereby the defence of fair comment will fail if the claimant can show that the statement was actuated by malice.

*Subsection (6)* makes provision for situations where the defendant is not the author of the statement (for example where an action is brought against a newspaper editor in respect of a comment piece rather than against the person who wrote it). In these circumstances the defence is defeated if the claimant can show that the defendant knew or ought to have known that the author did not hold the opinion.

*Subsection (8)* abolishes the common law defence of fair comment. Although this means that the defendant can no longer rely on the common law defence, in cases where

uncertainty arises in the interpretation of clause 3, case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied.

*Subsection (8)* also repeals section 6 of the 1955 Act. Section 6 provides that in an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved. This provision is no longer necessary in light of the new approach set out in *subsection (4)*. A defendant will be able to show that conditions 1, 2 and 3 are met without needing to prove the truth of every single allegation of fact relevant to the statement complained of.

**Clause 4: Publication on matter of public interest**

This clause creates a new defence to an action for defamation of publication on a matter of public interest. It is based on the existing common law defence established in *Reynolds v Times Newspapers*[8] and is intended to reflect the principles established in that case and in subsequent case law. *Subsection (1)* provides for the defence to be available in circumstances where the defendant can show that the statement complained of was, or formed part of, a statement on a matter of public interest and that he reasonably believed that publishing the statement complained of was in the public interest. The intention in this provision is to reflect the existing common law as most recently set out in *Flood v Times Newspapers*[9]. It reflects the fact that the common law test contained both a subjective element – what the defendant believed was in the public interest at the time of publication – and an objective element – whether the belief was a reasonable one for the defendant to hold in all the circumstances.

In relation to the first limb of this test, the clause does not attempt to define what is meant by "the public interest". However, this is a concept which is well-established in the common law. It is made clear that the defence applies if the statement complained of "was, or formed part of, a statement on a matter of public interest" to ensure that either the words complained of may be on a matter of public interest, or that a holistic view may be taken of the statement in the wider context of the document, article etc in which it is contained in order to decide if overall this is on a matter of public interest.

*Subsection (2)* requires the court, subject to subsections (3) and (4), to have regard to all the circumstances of the case in determining whether the defendant has shown the matters set out in *subsection (1)*.

[8] [2001] 2 AC 127.
[9] [2012] UKSC 11. See, for example, the judgement of Lord Brown at 113.

*Subsection (3)* is intended to encapsulate the core of the common law doctrine of "reportage" (which has been described by the courts as "a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper"[10]. In instances where this doctrine applies, the defendant does not need to have verified the information reported before publication because the way that the report is presented gives a balanced picture. In determining whether for the purposes of the clause it was reasonable for the defendant to believe that publishing the statement was in the public interest, the court should disregard any failure on the part of a defendant to take steps to verify the truth of the imputation conveyed by the publication (which would include any failure of the defendant to seek the claimant's views on the statement). This means that a defendant newspaper for example would not be prejudiced for a failure to verify where *subsection (3)* applies.

*Subsection (4)* requires the court, in considering whether the defendant's belief was reasonable, to make such allowance for editorial judgement as it considers appropriate. This expressly recognises the discretion given to editors in judgments such as that of Flood, but is not limited to editors in the media context.

*Subsection (5)* makes clear for the avoidance of doubt that the defence provided by this clause may be relied on irrespective of whether the statement complained of is one of fact or opinion.

*Subsection (6)* abolishes the common law defence known as the Reynolds defence. This is because the statutory defence is intended essentially to codify the common law defence. While abolishing the common law defence means that the courts would be required to apply the words used in the statute, the current case law would constitute a helpful (albeit not binding) guide to interpreting how the new statutory defence should be applied. It is expected the courts would take the existing case law into consideration where appropriate.

**Clause 5: Operators of websites**

This clause creates a new defence for the operators of websites where a defamation action is brought against them in respect of a statement posted on the website.

*Subsection (2)* provides for the defence to apply if the operator can show that they did not post the statement on the website. *Subsection (3)* provides for the defence to be defeated if the claimant can show that it was not possible for him or her to identify the person who posted the statement; that they gave the operator a notice of complaint in relation to the statement; and that the operator failed to respond to that notice in accordance with provision contained in regulations to be made by the Department of Finance. *Subsection (4)* interprets *subsection (3)(a)* and explains that it is possible for

[10] Per Simon Brown in Al-Fagih [2001] EWCA Civ 1634.

a claimant to "identify" a person for the purposes of that subsection only if the claimant has sufficient information to bring proceedings against the person.

*Subsection (5)* provides details of provision that may be included in regulations. This includes provision as to the action which an operator must take in response to a notice (which in particular may include action relating to the identity or contact details of the person who posted the statement and action relating to the removal of the post); provision specifying a time limit for the taking of any such action and for conferring a discretion on the court to treat action taken after the expiry of a time limit as having been taken before that expiry. This would allow for provision to be made enabling a court to waive or retrospectively extend a time limit as appropriate. The subsection also permits regulations to make any other provision for the purposes of this clause.

*Subsection (6)* sets out certain specific information which must be included in a notice of complaint. The notice must specify the complainant's name, set out the statement concerned and where on the website the statement was posted and explain why it is defamatory of the complainant. Regulations may specify what other information must be included in a notice of complaint.

*Subsection (7)* permits regulations to make provision about the circumstances in which a notice which is not a notice of complaint is to be treated as a notice of complaint for the purpose of the clause or any provision made under it.

*Subsection (8)* permits regulations under this clause to make different provision for different circumstances.

*Subsection (11)* provides for the defence to be defeated if the claimant shows that the website operator has acted with malice in relation to the posting of the statement concerned. This might arise where, for example, the website operator had incited the poster to make the posting or had otherwise colluded with the poster.

*Subsection (12)* explains that the defence available to a website operator is not defeated by reason only of the fact that the operator moderates the statements posted on it by others

**Clause 6: Peer-reviewed statement in scientific or academic journal etc**

This clause 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.

*Subsections (1) to (3)* provide for the defence to apply where two conditions are met. These are condition 1: that the statement relates to a scientific or academic matter; and condition 2: that before the statement was published in the journal an independent

review of the statement's scientific or academic merit was carried out by the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned. The requirements in condition 2 are intended to reflect the core aspects of a responsible peer-review process. *Subsection (8)* provides that the reference to "the editor of the journal" is to be read, in the case of a journal with more than one editor, as a reference to the editor or editors who were responsible for deciding to publish the statement concerned. This may be relevant where a board of editors is responsible for decision-making.

*Subsection (4)* extends the protection offered by the defence to publications in the same journal of any assessment of the scientific or academic merit of a peer-reviewed statement, provided the assessment was written by one or more of the persons who carried out the independent review of the statement, and the assessment was written in the course of that review. This is intended to ensure that the privilege is available not only to the author of the peer-reviewed statement, but also to those who have conducted the independent review who will need to assess, for example, the papers originally submitted by the author and may need to comment.

*Subsection (5)* provides that the privilege given by the clause to peer-reviewed statements and related assessments also extends to the publication of a fair and accurate copy of, extract from or summary of the statement or assessment concerned.

By *subsection (6)* the privilege given by the clause is lost if the publication is shown to be made with malice. This reflects the condition attaching to other forms of qualified privilege. *Subsection (7)(b)* has been included to ensure that the new clause is not read as preventing a person who publishes a statement in a scientific or academic journal from relying on other forms of privilege, such as the privilege conferred under clause 7(9) to fair and accurate reports etc of proceedings at a scientific or academic conference.

**Clause 7: Reports etc protected by privilege**

This clause amends the provisions contained in the 1996 Act relating to the defences of absolute and qualified privilege to extend the circumstances in which these defences can be used.

*Subsection (1)* replaces subsection (3) of section 14 of the 1996 Act, which concerns the absolute privilege applying to fair and accurate contemporaneous reports of court proceedings. Subsection (3) of section 14 currently provides for absolute privilege to apply to fair and accurate reports of proceedings in public before any court in the UK; the European Court of Justice or any court attached to that court; the European Court of Human Rights; and any international criminal tribunal established by the Security Council of the United Nations or by an international agreement to which the UK is a party. *Subsection (1)* replaces this with a new subsection, which extends the scope of

the defence so that it also covers proceedings in any court established under the law of a country or territory outside the United Kingdom, and any international court or tribunal established by the Security Council of the United Nations or by an international agreement.

*Subsection (2)* amends section 15(3) of the 1996 Act by substituting the phrase "public interest" for "public concern", so that the subsection reads "This section does not apply to the publication to the public, or a section of the public, of matter which is not of public interest and the publication of which is not for the public benefit". This is intended to prevent any confusion arising from the use of two different terms with equivalent meaning in this Act and in the 1996 Act. *Subsection (6)(b)* makes the same amendment to paragraph 12(2) of Schedule 1 to the 1996 Act in relation to the privilege extended to fair and accurate reports etc of public meetings.

*Subsections (3) to (10)* make amendments to Part 2 of Schedule 1 to the 1996 Act in a number of areas so as to extend the circumstances in which the defence of qualified privilege is available. Section 15 of and Schedule 1 to the 1996 Act currently provide for qualified privilege to apply to various types of report or statement, provided the report or statement is fair and accurate, on a matter of public concern, and that publication is for the public benefit and made without malice. Part 1 of Schedule 1 sets out categories of publication which attract qualified privilege without explanation or contradiction. These include fair and accurate reports of proceedings in public, anywhere in the world, of legislatures (both national and local), courts, public inquiries, and international organisations or conferences, and documents, notices and other matter published by these bodies.

Part 2 of Schedule 1 sets out categories of publication which have the protection of qualified privilege unless the publisher refuses or neglects to publish, in a suitable manner, a reasonable letter or statement by way of explanation or correction when requested to do so. These include copies of or extracts from information for the public published by government or authorities performing governmental functions (such as the police) or by courts; reports of proceedings at a range of public meetings (e.g. of local authorities) general meetings of UK public companies; and reports of findings or decisions by a range of associations formed in the UK or the European Union (such as associations relating to art, science, religion or learning, trade associations, sports associations and charitable associations).

In addition to the protection already offered to fair and accurate copies of or extracts from the different types of publication to which the defence is extended, amendments are made by *subsections (4), (7)(b) and (10)* of the clause to extend the scope of qualified privilege to cover fair and accurate summaries of the material. For example, *subsection (4)* extends the defence to summaries of notices or other matter issued for

the information of the public by a number of governmental bodies, and to summaries of documents made available by the courts.

Currently qualified privilege under Part 1 of Schedule 1 extends to fair and accurate reports of proceedings in public of a legislature; before a court; and in a number of other forums anywhere in the world. However, qualified privilege under Part 2 only applies to publications arising in the UK and EU member states. *Subsections (4), (6)(a), (7),* and *(8)* extend the scope of the defence to cover the different types of publication to which the defence extends anywhere in the world. For example, *subsection (6)* does this for reports of proceedings at public meetings, and *subsection (8)* for reports of certain kinds of associations.

*Subsection (5)* provides for qualified privilege to extend to a fair and accurate report of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest. Under the current law as articulated in the case of *McCartan Turkington Breen v Times Newspapers Ltd*[11], it appears that a press conference would fall within the scope of a "public meeting" under paragraph 12 of Schedule 1 to the 1996 Act. This provision has been included in the Act to clarify the position.

Currently Part 2 qualified privilege extends only to fair and accurate reports of proceedings at general meetings and documents circulated by UK public companies (paragraph 13). *Subsection (7)* of the clause extends this to reports relating to public companies elsewhere in the world. It achieves this by extending the provision to "listed companies" within the meaning of Part 12 of the Corporation Tax Act 2009 with a view to ensuring that broadly the same types of companies are covered by the provision in the UK and abroad. It also extends a provision in the 1996 Act (which provides for qualified privilege to be available in respect of a fair and accurate copy etc of material circulated to members of a listed company relating to the appointment, resignation, retirement or dismissal of directors of the company) to such material relating to the company's auditors.

*Subsection (9)* inserts a new paragraph into Schedule 1 to the 1996 Act to extend Part 2 qualified privilege to fair and accurate reports of proceedings of a scientific or academic conference, and to copies, extracts and summaries of matter published by such conferences. It is possible in certain circumstances that Part 2 qualified privilege may already apply to academic and scientific conferences (either where they fall within the description of a public meeting in paragraph 12, or where findings or decisions are published by a scientific or academic association (paragraph 14)). The amendments made by *subsection (9)* will however ensure that there is not a gap.

[11] [2001] 2 AC 277.

*Subsection (10)* substitutes new general provisions in Schedule 1 to reflect the changes that have been made to the substance of the Schedule. The provision relating to paragraph 13(5) no longer has any application in the light of the amendments made to that paragraph by *subsection (7)*, while the power in relation to paragraph 11(3) has never been exercised and the amendment leaves the provision to take its natural meaning.

**Clause 8: Single publication rule**

This clause 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 longstanding 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").

*Subsection (1)* indicates that the provisions apply where a person publishes a statement to the public (defined in *subsection (2)* as including publication to a section of the public), and subsequently publishes that statement or a statement which is substantially the same. The aim is to ensure that the provisions catch publications which have the same content or content which has changed very little so that the essence of the defamatory statement is not substantially different from that contained in the earlier publication. Publication to the public has been selected as the trigger point because it is from this point on that problems are generally encountered with internet publications and in order to stop the new provision catching limited publications leading up to publication to the public at large. The definition in *subsection (2)* is intended to ensure that publications to a limited number of people are covered (for example where a blog has a small group of subscribers or followers).

*Subsection (3)* has the effect of ensuring that the limitation period in relation to any cause of action brought in respect of a subsequent publication within scope of the clause is treated as having started to run on the date of the first publication.

*Subsection (4)* provides that the single publication rule does not apply where the manner of the subsequent publication of the statement is "materially different" from the manner of the first publication. *Subsection (5)* provides that in deciding this issue the matters to which the court may have regard include the level of prominence given to the statement and the extent of the subsequent publication. A possible example of this could be where a story has first appeared relatively obscurely in a section of a website where several clicks need to be gone through to access it, but has subsequently been promoted to a position where it can be directly accessed from the home page of the site, thereby increasing considerably the number of hits it receives.

*Subsection (6*) confirms that the clause does not affect the court's discretion under Article 51 of the Limitation (Northern Ireland) Order 1989 to allow a defamation action to proceed outside the one year limitation period where it is equitable to do so. It also ensures that the reference in paragraph (a) of Article 51 to the operation of Article 6 of the 1989 Order. Article 6 concerns the time limit applicable for defamation actions) is interpreted as a reference to the operation of Article 6 together with clause 8. Article 51 provides a broad discretion which requires the court to have regard to all the circumstances of the case, and it is envisaged that this will provide a safeguard against injustice in relation to the application of any limitation issue arising under this clause.

**Clause 9: Action against a person not domiciled in the UK or a Member State etc**

This clause aims to address the issue of "libel tourism" (a term which is used to apply where cases with a tenuous link to Northern Ireland are brought in this jurisdiction). *Subsection (1)* focuses the provision on cases where an action is brought against a person who is not domiciled in the UK, an EU Member State or a state which is a party to the Lugano Convention. This is in order to avoid conflict with European jurisdictional rules (in particular the Brussels Regulation on jurisdictional matters[12]).

*Subsection (2)* provides that a court does not have jurisdiction to hear and determine an action to which the clause applies unless it is satisfied that, of all the places in which the statement complained of has been published, Northern Ireland is clearly the most appropriate place in which to bring an action in respect of the statement. This means that in cases where a statement has been published in this jurisdiction and also abroad the court will be required to consider the overall global picture to consider where it would be most appropriate for a claim to be heard. It is intended that this will overcome the problem of courts readily accepting jurisdiction simply because a claimant frames their claim so as to focus on damage which has occurred in this jurisdiction only. This would mean that, for example, if a statement was published 100,000 times in Australia and only 5,000 times in Northern Ireland that would be a good basis on which to conclude that the most appropriate jurisdiction in which to bring an action in respect of the statement was Australia rather than Northern Ireland. There will however be a range of factors which the court may wish to take into account including, for example, the amount of damage to the claimant's reputation in this jurisdiction compared to elsewhere, the extent to which the publication was targeted at a readership in this jurisdiction compared to elsewhere, and whether there is reason to think that the claimant would not receive a fair hearing elsewhere.

*Subsection (3)* provides that the references in *subsection (2)* to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of. This addresses the

[12] Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

situation where a statement is published in a number of countries but is not exactly the same in all of them, and will ensure that a court is not impeded in deciding whether Northern Ireland is the most appropriate place to bring the claim by arguments that statements elsewhere should be regarded as different publications even when they are substantially the same. It is the intention that this new rule will be capable of being applied within the existing procedural framework for defamation claims.

**Clause 10: Action against a person who was not the author, editor etc**

This clause limits the circumstances in which an action for defamation can be brought against someone who is not the primary publisher of an allegedly defamatory statement.

*Subsection (1)* provides that a court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless it is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.

*Subsection (2)* confirms that the terms "author", "editor" and "publisher" are to have the same meaning as in section 1 of the 1996 Act. By subsection (2) of that Act, "author" means the originator of the statement, but does not include a person who did not intend that his statement be published at all; "editor" means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and "publisher" means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business. Examples of persons who are not to be considered the author, editor or publisher are contained in subsection (3) of section 1 of the 1996 Act.

**Clause 11: Trial to be without a jury**

This clause removes the presumption in favour of jury trial in defamation cases.

Currently section 62 (1) of the Judicature (Northern Ireland) Act 1978 provides for a right to trial with a jury in certain civil proceedings (namely libel, slander, malicious prosecution, and false imprisonment) on the application of any party unless the court considers that the trial requires any "protracted examination of documents or accounts or any technical, scientific or local investigation which cannot conveniently be made with a jury".

Clause 11 removes libel and slander from the list of proceedings where a right to jury trial exists. The result will be that defamation cases will be tried without a jury unless a court orders otherwise.

**Clause 12: Power of court to order a summary of its judgment to be published**

In summary disposal proceedings under section 8 of the 1996 Act the court has power to order an unsuccessful defendant to publish a summary of its judgment where the parties cannot agree the content of any correction or apology. The clause gives the court power to order a summary of its judgment to be published in defamation proceedings more generally.

*Subsection (1)* enables the court when giving judgment for the claimant in a defamation action to order the defendant to publish a summary of the judgment. *Subsection (2)* provides that the wording of any summary and the time, manner, form and place of its publication are matters for the parties to agree. Where the parties are unable to agree, *subsections (3) and (4)* respectively provide for the court to settle the wording, and enable it to give such directions in relation to the time, manner, form or place of publication as it considers reasonable and practicable. *Subsection (5)* disapplies the clause where the court gives judgment for the claimant under section 8(3) of the 1996 Act. The summary disposal procedure is a separate procedure which can continue to be used where this is appropriate.

**Clause 13: Order to remove statement or cease distribution etc**

This clause relates to situations where an author may not always be in a position to remove or prevent further dissemination of material which has been found to be defamatory. *Subsection (1)* provides that where a court gives judgment for the claimant in an action for defamation, it may order the operator of a website on which a defamatory statement is posted to remove the statement, or require any person who was not the author, editor or publisher of the statement but is distributing, selling or exhibiting the material to cease disseminating it. This will enable an order for removal of the material to be made during or shortly after the conclusion of proceedings.

*Subsection (3)* ensures that the provision does not have any wider effect on the jurisdiction of the court to grant injunctive relief.

**Clause 14: Actions for slander: special damage**

This clause repeals the Slander of Women Act 1891 and overturns a common law rule relating to special damage.

In relation to slander, some special damage must be proved to flow from the statement complained of unless the publication falls into certain specific categories. These include a provision in the 1891 Act which provides that "words spoken and published… which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable". *Subsection (1)* repeals the Act, so that these circumstances are not exempted from the requirement for special damage.

*Subsection (2)* abolishes the common law rule which provides an exemption from the requirement for special damage where the imputation conveyed by the statement complained of is that the claimant has a contagious or infectious disease. In case law dating from the nineteenth century and earlier, the exemption has been held to apply in the case of imputations of leprosy, venereal disease and the plague.

**Clause 15: Meaning of "publish" and "statement"**

This clause sets out definitions of the terms "publish", "publication" and "statement" for the purposes of the Act. Broad definitions are used to ensure that the provisions of the Act cover a wide range of publications in any medium, reflecting the current law.

**Clause 16: Consequential amendments and savings etc**

*Subsections (1) to (3)* make consequential amendments to Article 9 of the Rehabilitation of Offenders (Northern Ireland) Order 1978 to reflect the new defences of truth and honest opinion. Article 9 of the 1978 Order applies to actions for libel or slander brought by a rehabilitated person based on statements made about offences which were the subject of a spent conviction.

*Subsections (4) to (8)* contain savings and interpretative provisions.

**Clause 17: Regulations and orders**

This clause makes provision on the making of regulations and orders under the Act, the types of resolutions necessary in the Assembly and the Department's powers. The Department in this instance is the Department of Finance.

**Clause 18: Commencement**

The savings related provisions in *subsections (4) to (8)* of clause 16 and clause 19 (Short title) come into operation on the day after the day the Act receives Royal assent. Otherwise, the Bill will come into operation on such day or days as the Department of Finance may appoint by order.

**Clause 19: Short title**

This cites the Bill as the Defamation Act (Northern Ireland) 2021.

**FINANCIAL EFFECTS OF THE BILL**

10. Implementation of the Bill is not expected to increase significantly any public expenditure or make any significant change in the workload of any Northern Ireland Executive department or agency.

## LEGISLATIVE COMPETENCE

11. At introduction, the sponsor of the Bill, Mr Mike Nesbitt, had made the following statement under Standing Order 30:

"*In my view the Defamation Bill would be within the legislative competence of the Northern Ireland Assembly*."

## SECRETARY OF STATE CONSENT

12. The Secretary of State has consented under section 8 of the Northern Ireland Act 1998 to the Assembly considering the Bill.




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