

Consultation Paper

Defamation Law in Northern Ireland

CONSULTATION PAPER

DEFAMATION LAW IN NORTHERN IRELAND

NILC 19 (2014)

Northern Ireland Law Commission
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NORTHERN IRELAND LAW COMMISSION

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BACKGROUND

The Northern Ireland Law Commission ('the Commission') was established in 2007 following the recommendations of the Criminal Justice Review Group (2000). Its purpose is to keep the law of Northern Ireland under review and make recommendations for its systematic development and reform.

The Commission was established under the Justice (Northern Ireland) Act 2002. The Act (as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010) requires the Commission to consider any proposals for the reform of the law of Northern Ireland that are referred to it. The Commission must also submit to the Department of Justice programmes for the examination of different branches of law with a view to reform. The Department of Justice must consult with the Attorney General for Northern Ireland before approving any programme submitted by the Commission. If the programme includes the examination of any branch of law or the consolidation or repeal of any legislation which relates in whole or in part to a reserved or excepted matter, the Department of Justice must consult the Secretary of State for Northern Ireland before approving the programme.

RESPONSES TO THE CONSULTATION

This consultation seeks views on the proposed reform of the law relating to defamation in Northern Ireland.

Interested parties are invited to comment on the questions raised in this consultation paper. As well as being available in hard copy, this consultation paper is available on the Commission's website: www.nilawcommission.gov.uk.

If the format of this document is not suitable please contact us to discuss how we can best provide a copy that meets your needs.

The closing date for responses to this consultation paper is Friday 20th February 2015.

Responses should be sent to

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CONSULTATION PROCESS

1. Consultation criteria

This consultation is being conducted in line with the following seven consultation principles contained in the 'Code of Practice on Consultation' which has been adopted across government:

- Formal consultation should take place at a stage when there is scope to influence the policy outcome.
- Consultations should normally last for at least twelve weeks with consideration given to longer timescales where feasible and sensible.
- Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposal.
- Consultation documents should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- Keeping the burden of consultation to the minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- Officials running the consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Further information on these consultation criteria is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/100807/file47158.pdf

If you have any queries about the manner in which this consultation has been carried out, please contact the Commission at the address shown on previous page.

2. Consultation responses: confidentiality and Freedom of Information

Freedom of Information Act 2000

The Freedom of Information Act 2000 gives the public a right of access to any information held by a public authority: in this case, the Commission. The right of access to information includes information provided in response to a consultation. The Commission will treat all responses as public documents in accordance with the Freedom of Information Act 2000 and may attribute comments and include a list of all respondents' names in any final report.

If you wish to submit a confidential response, you should clearly mark your submission as 'confidential'. The Commission cannot automatically consider as confidential information supplied to it by you in response to a consultation.

Please note that the Commission will disregard automatic confidentiality statements generated by an IT system.

NORTHERN IRELAND LAW COMMISSION

DEFAMATION LAW IN NORTHERN IRELAND

Consultation Paper

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NI LAW COMMISSION: DEFAMATION LAW IN NORTHERN IRELAND

CONSULTATION PAPER – EXECUTIVE SUMMARY

1. This consultation paper is one aspect of an investigation being conducted by the Northern Ireland Law Commission into the desirability of reform in the area of defamation law in Northern Ireland. The Commission received a request from the Minister for Finance and Personnel to carry out such a review in September 2013. The Department of Justice granted formal approval of the project in January 2014.

Purpose of the consultation paper

2. The primary purpose of the paper is to consider the Defamation Act 2013 in England and Wales, and to consult on the question of whether the reforms reflected in the Act should be extended to Northern Ireland, either in part or wholesale. Whether any element of the 2013 Act that is to be recommended for adoption into Northern Irish law should first be revised in minor or more significant ways is also considered.
3. In light of the view of the Northern Ireland Law Commission on the nature of the problems in this area of law (see below), a second purpose of the paper is to consult on the desirability of a further reform option. This option is intended to provide adequate redress for people who consider that their reputations have been sullied by false statements made by others, while reducing significantly the “chilling effect” of potential claims on those who wish to unearth and publicise corruption and malpractice and to criticise the powerful. It comprises two inter-related reforms: first, the withdrawal of the “single meaning rule”, and secondly, the introduction of a bar to the bringing of claims where a publisher has made a correction or retraction promptly and prominently.
4. At this point in the project, the Northern Ireland Law Commission is not committed to any particular recommendations for reform. Nevertheless, where there are reservations regarding particular options these are made clear in the text.

Key problems in the area of defamation law

5. Defamation is the generic label for two torts: libel and slander. Libel is the written or permanent form of defamation, whereas slander is the spoken or transient form. The essential purpose of defamation law is to protect an individual’s reputation from harm caused by the publication of false statements. The award of damages by a court is said to

vindicate that reputation by highlighting publicly the falsity of what had been published. This is important not only for those individuals and organisations who have suffered libels, but also for society as a whole. Damages also compensate for the reputational harm caused. If the law is to serve these purposes, it must not be so expensive to access that it is beyond the financial reach of the average person.

6. The consultation paper identifies the over-complication of publication disputes as they move from the public sphere into the legal context and the attendant cost of (prospective) embroilment in legal proceedings as the root problem with defamation law. This problem is shown to “cut both ways”. From the defendant-publisher perspective, the potential cost and complexity of legal proceedings can introduce a real dilemma between speaking out on a matter of public importance and facing expensive legal action, or staying quiet and thereby allowing problems to perpetuate. From the perspective of the plaintiff (the person aggrieved at the publication of a perceived libel), cost and complexity can engender an “access to justice” problem. The result can be that harms to reputation are left unremedied and the public is left misinformed.
7. On the basis of research undertaken to date, the Northern Ireland Law Commission takes the view that these problems do apply – and with some force – in Northern Ireland. It is the view of the Northern Ireland Law Commission that there is good reason to believe that defamation law as it is currently structured does not best serve either the interests of the immediate parties to publication disputes, or the interests of the wider public in the circulation of accurate information on matters of importance.
8. This is not to suggest that the “chilling effect” of defamation law is as powerful in this jurisdiction as it has been demonstrated to be in England and Wales. There are notable “environmental” differences. For instance, the different legal costs regime applicable in Northern Ireland may lessen somewhat the impact of the law on freedom of expression. At the same time, it may intensify the access to justice problem for many plaintiffs. It is also noteworthy that - notwithstanding a recent fall in the number of claims being brought to the High Court in Northern Ireland - it would appear that the number of claims per capita is relatively high in this jurisdiction.

The rights context

9. Consideration of the reform of defamation law takes place in the “rights context” provided by the passing of the Human Rights Act 1998 and the wider international obligations of the United Kingdom. Most obviously, defamation law can generate constraints on the freedom

of individuals and others to publish. As such, it can impinge upon the exercise of Article 10 ECHR rights to freedom of expression. It must also be recognised, however, that the “right to reputation” falls within the Article 8 ECHR right to respect for one’s private and family life. Access to justice, protected by the right to a fair and impartial tribunal in Article 6 ECHR, is necessary for all parties whose rights may have been infringed. Hence, defamation law must reflect an appropriate and effective balance between the Convention rights to express one-self and to maintain an accurate reputation.

10. As suggested above, and despite the emphasis often placed on the harm posed to free speech by defamation law, the view of the Northern Ireland Law Commission is that the key imbalance in this area is arguably not that in favour of reputation over free speech or vice versa. Rather, it is that between litigants who can afford to defend their publications or to vindicate their reputations, and those who cannot. This problem is exacerbated, to the benefit of the relatively more powerful party, by a surfeit of technicality in the law of defamation.
11. For this reason, the Northern Ireland Law Commission does not share the view propounded by other interested parties that international or domestic human rights law compels the introduction of reforms equivalent to those set out in the Defamation Act 2013. The existing law of defamation in Northern Ireland comprises a legally tenable balance between the competing rights and interests.
12. This is not at all to suggest that Northern Irish defamation law as it currently exists necessarily strikes a perfect balance between freedom of expression, the protection of reputation, and access to justice. Rather, it is to affirm that within the parameters set by the obligation to balance rights, the decision over the appropriate design of that regime is for Northern Irish institutions. Wholesale adoption of the reforms set out in the Defamation Act 2013 is one, but only one, of a number of options moving forward.

Pre-consultation stage

13. Prior to the publication of this consultation paper, the Northern Ireland Law Commission has sought to understand the concerns regarding the law of defamation through a number of means. This has included a review of the materials generated by the very substantial consultative and evaluative exercise undertaken by the UK Ministry of Justice, MPs, Peers and others regarding the operation of the law prior to the Defamation Act 2013 and the options for reform; the consideration of a range of important judgments handed down by the courts in England and Wales and in Northern Ireland applying both the pre-existing law

and – recently – the provisions of the 2013 Act, and an assessment of the scholarly and practitioner literature on the law of defamation generally, on the provisions of the 2013 Act, and on the emerging jurisprudence under the Act.

14. In addition, the Northern Ireland Law Commission has hosted a series of pre-consultation meetings with persons who were identified as being able to offer particular insight on the themes of the study; conducted a survey of the views and experiences of faculty members of most departments of Queen's University Belfast and the University of Ulster, and tested emerging ideas at a number of academic workshops. Close attention has also been paid to the ongoing public debate on the desirability of reform of defamation law in Northern Ireland.

Structure and summary of the consultation paper

15. The first two chapters of the consultation paper explain the origins of the project and provide background context to the discussion of reform options presented in the later chapters. These introductory chapters posit a series of general consultation questions; offer an overview of defamation law and its purposes, and of the reforms introduced to the law in England and Wales by the Defamation Act 2013, and introduce the individual and societal interests in reputation and free speech that influence the design of defamation law. Embedded in this discussion is particular consideration of the Northern Irish context and of the value of consistency with the law of England and Wales, given that such themes may influence perceptions of the appropriate future shape of defamation law in this jurisdiction.
16. Chapters 3 and 4 of the paper consider different elements of the reforms introduced by the Defamation Act 2013. In general terms, Chapter 3 is focused on reforms introduced to the substantive law, whereas Chapter 4 considers reforms that possess a procedural or jurisdictional tenor. Both chapters posit specific consultation questions regarding the desirability of adoption of the relevant provisions of the 2013 Act in Northern Ireland and in some places set up revised or alternative options.
17. Chapter 5 is focused primarily on the alternative or additional reforms mooted above that are oriented towards narrowing the range of legal questions left to the court and thereby simplifying and reducing the cost of defamation. Specifically, the chapter explains the option of removing the single meaning rule in combination with the introduction of a series of discursive remedies – corrections and retractions – the use of which may serve to bar the further pursuit of claims. The chapter also notes a range of further remedial options of which some were set out in the Defamation Act 2013.

18. Chapter 6 concerns the equality screening of the reform options required under section 75 of the Northern Ireland Act 1998.

Consideration of the reforms reflected in the Defamation Act 2013

19. In light of the very substantial effort that was devoted to the review of defamation law undertaken in the lead up to the passing of the Defamation Act 2013, the initial consultation questions ask for broad brush perspectives on the desirability of the adoption of the reforms equivalent to those reflected in the Defamation Act 2013 in Northern Ireland. The focused discussion of each element of the 2013 Act is then to be found mainly in Chapters 3 and 4, but also the last part of Chapter 5. Where appropriate, this discussion also raises questions over whether any adopted provisions should first be revised in minor or more significant ways.
20. The Defamation Act 2013 comprises seventeen sections, consisting of a mixture of codifying, revising and general provisions. It has revised the law of defamation in England and Wales in a range of ways. Section 1 introduces a “serious harm” test that will serve as threshold test to the bringing of a claim. Sections 2 to 7 concern defences. The main common law defences are abolished and replaced. Section 2 restates the justification defence under the label of “truth”, section 3 recasts the honest comment defence as “honest opinion”, and section 4 replaces *Reynolds* privilege with a new defence of “publication on a matter of public interest”. Section 4(3) restates the reportage variant of the defence. Section 5 provides a new defence for the operators of websites. Sections 6 and 7 deal with aspects of privilege, including the provision of a qualified privilege for statements made in peer-reviewed scientific or academic journals.
21. The latter part of the statute concerns publication, jurisdiction, the trial process and remedies. In a revision of particular importance to online publishers, section 8 introduces a “single publication rule” that will see the limitation period for claims run from the date of “first publication”. Section 9 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. 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 signals the end of the presumption of trial by jury in defamation actions; jury trials will now occur only where ordered by the court. Sections 12 and 13 address the question of remedies. They provide

the court with power to order publication of summaries of judgments and to compel the “take-down” of impugned publications. The final substantive provision, section 14, concerns aspects of the law of slander.

22. From the generality of the discussion in Chapters 3 and 4, some particular points are especially noteworthy. This selection is not intended to downgrade the importance of other issues considered in equal depth in Chapters 3 and 4.
23. As regards the revision of the honest comment defence in section 3 of the 2013 Act, it is mooted whether reform might sensibly go further in two respects with the aim of making the defence clearly more valuable to the average person who comments on facts that he or she reasonably believes to be true. The first question raised is whether it should be confirmed that the defence applies to inferences of verifiable fact. This would remove one level of complexity in the deployment of the defence. The second question raised is whether the basis for comment should extend also to include facts that the defendant-publisher “reasonably believed to be true” at the time of publication. That is, whether the defence should be available when the factual basis for opinion expressed was either true, privileged, or reasonably believed to be true. These mooted extensions might be of especial utility to those commenting on social media.
24. As regards the new defence of publication on a matter of public interest in section 4 of the 2013 Act, the possible interpretations of the new defence are noted but it is suggested that the defence will almost certainly be interpreted in keeping with the common law *Reynolds* privilege. One significant divergence is emphasised however: the extension of the new defence to cover opinions as well as statements of fact. The conceptual awkwardness of this approach is noted, and an alternative approach based on revisions to the statutory honest opinion defence mooted above is suggested.
25. The introduction of a new privilege applicable to statements published in peer-reviewed in scientific or academic journals in section 6 of the 2013 Act can be criticised for having done both too little and too much. Plainly, much scientific and academic speech is highly important and its suppression due to the unwarranted defamation chill is a pressing social problem. There is great merit in the goal of facilitating free speech in this context. Yet, extending qualified privilege to statements in peer-reviewed publications may amount to little more than a “sticking plaster” approach. Contributions to academic or scientific discourse might be thought, quintessentially, to be of such a nature as to attract the defences of honest comment/honest opinion or justification. A preferable way forward may be to ensure that such primary defences are so readily usable as to deter attempts to bully

through the threat of legal action. Failing that, adoption of even this partial solution to the problem of the chilling effect on scientific speech must be seen as a positive step.

26. The reversal of the presumption that defamation claims will be heard by a jury in section 11 of the 2013 Act proved controversial in our pre-consultation meetings as it had during the debates on reform that culminated in the 2013 Act. The discussion on this point notes both the arguments of principle in favour of retention of the jury, and the advantages of following the 2013 Act in terms of the facilitation of procedural efficiency and the associated reduction in cost. It is also noted that should the scheme outlined in Chapter 5 be adopted, the rationale for the presumption against a jury trial is correspondingly weakened to the extent that the process of determination of meaning would become redundant, and disputes would focus immediately on core errors of factual uncertainty.
27. The desirability or otherwise of introducing the section 1 serious harm test into Northern Irish law was the most contentious issue addressed during our pre-consultation discussions. We heard that such a rule will reduce the likelihood that unmeritorious and trivial cases will be brought in future. Conversely, concerns were expressed regarding the design and the likely operation of the test. In particular, practical difficulties were envisaged in terms of the need to collate evidence of harm for presentation to the court at an early stage in proceedings. The increased cost to litigants involved in presenting evidence of harm was thought likely to make it more difficult for all but very wealthy plaintiffs to justify the potential expense of bringing claims for defamation. This was perceived to be a likely outcome even in cases where the plaintiff had a wholly justified complaint. That is, the impediment to claims being brought would apply to all cases, not only trivial claims. On this view, it may be simpler, and hence better, to continue with the already effective common law approach. Concerns regarding the uncertainty of the rule would appear to have been borne out in the first case decided in England and Wales under section 1 of the 2013 Act.
28. Separate to the consideration of the section 1 serious harm test, the desirability of a particular rule focused on bodies that trade for profit (especially corporations) is mooted. Again, there are clear arguments either way on this point. In addition, the option of adopting a rule barring defamation claims by companies employing more than ten persons as has been done in Australian jurisdictions is opened to consultation.

The additional reform option

29. The additional reform proposal on which this paper consults is discussed in full in Chapter 5, but the basic thinking can be briefly stated. The proposal comprises two elements: first, the removal of the “single meaning rule”, and secondly the introduction of a bar on claims where prompt and prominent corrections or retractions of complained of meanings have been made. It may be possible to ensure access to justice, while yet minimising the role of law, lawyers, and the courts in many cases.
30. The single meaning rule has long been part of defamation law, but has been explicitly rejected by the Court of Appeal as part of the related tort of malicious falsehood and by domestic and European courts as part of the closely analogous law of trade marks. The rule is intended to simplify the task that must be undertaken by the court when determining defamation claims. It requires a court to extract a singular meaning from often ambiguous publications on which to base its application of the law. This is plainly counterfactual. Moreover, it may be that the practical effect of the rule is to see defamation claims often become highly technical, protracted and costly exercises as the parties vie to have their interpretations of the publication selected by the court. Yet, merely removing the single meaning rule would indeed entail that the task for the court would become unmanageably complicated.
31. The prompt correction of falsehoods as a means of vindicating reputation is often the primary goal pursued by most bona fide plaintiffs. Provision for such “discursive remedies” is commonplace in European legal regimes. Indeed, the law of Northern Ireland – and that of England and Wales – is comparatively unusual in not providing discursive remedies for defamation as standard. Almost all mainstream Northern Irish (and UK) publishers are committed, in principle, to correcting significant inaccuracies when they are identified. As a matter of practice, however, this commitment is sometimes more honoured in the breach.
32. Incentivised reliance on appropriate “discursive remedies” might provide an attractive “way out” of publication disputes for defendants. The law might recognise, applaud and promote the tendency of publishers to provide a discursive solution to disputes generated by publication. The introduction of a bar on claims where corrections or retractions have been made may change the incentives involved when complaints arise. Defendant-publishers might begin to publish corrections or retractions automatically when complained of meanings can be seen to be plausible but were unintended. They might also become more willing and able to defend actions in court if they are convinced of the truth of what has been published. With the contested meanings determined in advance, the cost of

proceedings would fall dramatically. The jettisoning of the single meaning rule and the introduction of discursive remedies together could take all but the most pointed disputes on specific contested meanings out of the legal forum altogether.

33. A diagrammatic representation of this scheme is included as Chart 1 on page 88.

Full list of consultation questions

Q 1: Should the Defamation Act 2013 be extended in its application, in full, to the Northern Irish jurisdiction? (See chs.3-4)

Q 2: If the Defamation Act 2013 should not be extended to Northern Ireland in full, should any specific provisions contained within the Act be extended in their application to Northern Ireland? (See chs.3-4)

Q 3: If the Defamation Act 2013 should be extended in its application to Northern Ireland in whole or in part, should any provisions to be adopted be revised in any manner prior to their adoption? (See chs.3-4)

Q 4: Irrespective of whether the 2013 Act is adopted in whole or in part, would it be desirable to introduce into Northern Irish law a measure withdrawing the “single meaning rule” in combination with the introduction of a bar on claims where a publisher has made a prompt and prominent correction or retraction? (See ch.5)

Q 5: Are there other desirable reforms of defamation law in Northern Ireland?

Q 6: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 2 of the Act, the “defence of truth”, to be introduced into Northern Irish law? (See [3.05]-[3.13])

Q 7: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 3 of the Act, the “defence of honest opinion”, to be introduced into Northern Irish law? Would it instead be preferable to continue with the common law approach as restated in *Spiller v Joseph*? (See [3.14]-[3.39])

Q 8: Should it be confirmed that the defence of honest comment/honest opinion extends to encompass inferences of verifiable fact from underpinning facts? (See [3.20]-[3.23])

Q 9: Should it be possible for a defendant-publisher to rely on the defence of honest comment / honest opinion where he or she held a “reasonable belief” in the truth of the underpinning facts on which a defamatory comment was made? (See [3.24]-[3.28])

Q 10: If it is desirable for a rule equivalent to section 3 of the 2013 Act to be introduced into Northern Irish law, would it be desirable for the provision to be amended so as to allow opinions published contemporaneously with privileged statements to benefit from the defence? (See [3.34]-[3.37])

Q 11: If it is desirable for a rule equivalent to section 3 of the 2013 Act to be introduced into Northern Irish law, would it be desirable for the definition of “privileged statements” in section 3(7) to exclude reference to section 4, and instead to include in section 3(4) reference to ‘any fact that he or she reasonably believed to be true at the time the statement complained of was published’? (See [3.38]-[3.39], and [3.54]-[3.58])

Q 12: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 4 of the Act, the “defence of publication on a matter of public interest”, to be introduced into Northern Irish law? Would it instead be preferable to continue with the common law approach as restated in *Jameel v Wall Street Journal Europe* and *Flood v Times Newspapers Ltd*? (See [3.40]-[3.58])

Q 13: If it is desirable for a rule equivalent to section 4 of the 2013 Act to be introduced into Northern Irish law, would it be desirable for the extension of the defence to opinions in section 4(5) to be excised? (See [3.54]-[3.58])

Q 14: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 6 of the Act, the qualified privilege for statements in peer-reviewed scientific or academic journals, to be introduced into Northern Irish law? (See [3.59]-[3.63] and [3.64]-[3.70])

Q 15: If the 2013 Act is not adopted in its entirety, would it be desirable for the extension and clarification of various privileges set out in section 7 of the Act to be introduced into Northern Irish law? (See [3.59]-[3.63] and [3.71]-[3.72])

Q 16: If the 2013 Act is not adopted in its entirety, would it be desirable for the new defence for website operators set out in section 5 of the Act to be introduced into Northern Irish law? If so, should this include an obligation for website operators to append a notice of complaint alongside statements that are not taken down? (See [3.73]-[3.81])

Q 17: If the 2013 Act is not adopted in its entirety, would it be desirable for the new defence for secondary publishers set out in section 10 of the Act to be introduced into Northern Irish law? (See [3.73]-[3.81])

Q 18: If the 2013 Act is not adopted in its entirety, would it be desirable for the changes made to the law of slander by section 14 of the Act to be introduced into Northern Irish law? (See [3.82])

Q 19: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 11 of the Act which reverses the presumption that defamation claims will be heard by a jury to be introduced into Northern Irish law? (See [4.03]-[4.10])

Q 20: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 1(1) of the Act, the “serious harm” test, to be introduced into Northern Irish law? Would it instead be preferable to rephrase the statutory test so as better to reflect the stated intention of the authors of the Act? Would it instead be preferable to continue with the common law approach reflected in *Jameel v Dow Jones*? (See [4.11]-[4.25])

Q 21: If the 2013 Act is not adopted in its entirety, and irrespective of whether the standard “serious harm” test is adopted, would it be desirable to introduce into Northern Irish law a rule that ‘bodies that trade for profit’ must show ‘serious financial loss’ if they are to bring a claim in defamation? Would it instead be preferable to introduce a bar on corporate claims equivalent to that introduced under the Australian Uniform Defamation Acts? (See [4.26]-[4.34])

Q 22: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 8 of the Act, the single publication rule, to be introduced into Northern Irish law? Would it be preferable instead to retain the multiple publication rule, or to introduce an alternative defence requiring the attaching of a notice of complaint? (See [4.35]-[4.41])

Q 23: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 9 of the Act, the rule on “libel tourism”, to be introduced into Northern Irish law? (See [4.42]-[4.45])

Q 24: Irrespective of whether the 2013 Act is adopted in whole or in part, would it be desirable for remedial powers of court equivalent to those set out in sections 12 and 13 of the Act to be introduced into Northern Irish law? (See [5.41]-[5.43])

Q 25: Would it be desirable for any other “discursive remedies” to be introduced into Northern Irish law? (See [5.44]-[5.48])

CHAPTER 1: INTRODUCTION

1.01 This consultation paper is one aspect of an investigation being conducted by the Northern Ireland Law Commission into the desirability of reform in the area of defamation law in Northern Ireland. The Commission received a request from the Minister for Finance and Personnel to carry out such a review in September 2013. The Department of Justice granted formal approval of the project in January 2014. The primary purpose of the paper is to consider the Defamation Act 2013 in England and Wales, and to consult on the question of whether the Act should be introduced in Northern Ireland, either in part or wholesale.¹ This exercise includes consideration of whether any element of the 2013 Act that is to be recommended for adoption into Northern Irish law should first be revised in minor or more significant ways.² At the outset, therefore, and in light of the very substantial effort that was devoted to the review of defamation law undertaken in the lead up to the passing of the Defamation Act 2013, it is possible to posit a series of general consultation questions:

Q 1: Should the Defamation Act 2013 be extended in its application, in full, to the Northern Irish jurisdiction?

Q 2: If the Defamation Act 2013 should not be extended to Northern Ireland in full, should any specific provisions contained within the Act be extended in their application to Northern Ireland?

Q 3: If the Defamation Act 2013 should be extended in its application to Northern Ireland in whole or in part, should any provisions that may be adopted be revised in any manner prior to their adoption?

1.02 If the scope of the paper was limited in the manner described, however, then the consultation may represent an opportunity missed. The Defamation Act 2013 has been criticised as being ‘unlikely to address the core problem with libel law: the juridification and over-complication of public sphere disputes, and the attendant cost of embroilment in legal proceedings’.³

1.03 The problem of legal costs cuts both ways. Speaking from the defendant-publisher perspective at the Committee stage on the Defamation Bill in the House of Lords, eminent scientist

¹ The full text of the 2013 Act is included as Appendix 1.

² Detailed discussion of the disparate elements of the 2013 Act and possible revisions thereto are set out alongside further, more specific consultation questions, in chapters 3 and 4. If the Defamation Act 2013 were to be adopted wholesale, then the Defamation (Northern Ireland) Bill prepared by Mike Nesbitt MLA commends itself.

³ See, generally, Mullis and Scott, ‘Tilting at Windmills: the Defamation Act 2013’ (2014) *Modern Law Review*, 77(1), 87-109; Phillips on, ‘The “Global Pariah”, the Defamation Bill and the Human Rights Act’ (2012) *Northern Ireland Legal Quarterly*, 63(1), 149-186.

Lord May narrated his own painful experience of being confronted with a threatening legal letter. He described powerfully the real dilemma between speaking out on a matter of public importance and facing legal action, or staying quiet and thereby allowing problems to perpetuate.⁴ Libel reform campaigners have performed an admirable service in highlighting a range of similar stories.⁵ From the other perspective, one prominent Northern Irish defamation lawyer has repeatedly emphasised that the average prospective plaintiff also faces an “access to justice” problem caused by legal costs.⁶ Often this entails that harms to reputation are left unremedied. Despite the emphasis often placed on the harm posed to free speech by defamation law, the key imbalance in this area is arguably not that in favour of reputation over free speech or vice versa. Rather, it is that between litigants who can afford to defend their publications or to vindicate their reputations, and those who cannot. It may be that notwithstanding the passing of the Defamation Act 2013, Parliament has yet to provide a regime for the resolution of disputes that might adequately triangulate the individual and social interests in reputation and free speech.

1.04 This may simply be an intractable problem. It can also be viewed as an issue confronting civil law proceedings generally. If an area of law is unnecessarily technical, however, and if it therefore pushes practitioners into highly complicated and expensive manoeuvres, then reconsideration seems apt. During debate on the Defamation Bill, Lord May perhaps pointed the way when warning about the danger of focusing only on the minutiae of the law when contemplating possible reforms. He advised that:

as we look at this, we should not look... through a purely legalistic prism. We should try to see a way forward to have sensible legislation that means that if you criticise on valid scientific grounds the chimerical claims of someone... you will not be confronted with the dilemma of principle that people are being confronted with now... the issues raised by the legalistic arguments that are not sensitive to the underlying facts are substantial and difficult to solve but need to be confronted.

Later in the debate on elements of the Bill he remarked that ‘what is being described...[is] not easily going to be translated into anything that is not almost as expensive as what is currently being used as a weapon...[when most disputes] could have been settled by a judge in half an hour’.⁷

⁴ 741 HL Deb GC420, 17 December 2012.

⁵ See, for example, the Libel Reform Campaign documents (2009) *Free Speech is Not For Sale*; (2011) *Reforming Libel: what should a defamation bill contain?* Parliamentary debates on the Defamation Bills proposed by the Government and by Lord Lester were also replete with anecdote regarding reputedly unmeritorious threats of legal action and the “chilling effect” of the law.

⁶ See, for example, Tweed, ‘Defamation law: the little man is under threat in war of words’, *Belfast Telegraph*, 31 July 2013; Archer, ‘New laws would have thwarted Michaela lawsuit’, *Irish News*, 9 August 2013.

⁷ 741 HL Deb GC429, 17 December 2012. He was referring specifically to the rule in clause 1 of the Bill (the “serious harm” test), but might easily have been speaking more generally.

1.05 Alongside reflection on the 2013 Act, a further aim of this consultation paper is to set out reform options that may achieve Lord May’s goal of “sensible” regime design. It may be possible to ensure access to justice, while yet minimising the role of law, lawyers, and the courts in many cases. In particular, this paper suggests that a combination of two alternative or additional reforms may do much to provide adequate redress for people who consider that their reputations have been sullied by false statements made by others, while reducing significantly the “chilling effect” of potential claims on those who wish to unearth and publicise corruption and malpractice and to criticise the powerful. These two reforms are, first and perhaps counter intuitively, the withdrawal of the “single meaning rule”, and secondly, the introduction of a bar to the bringing of claims where a publisher has made a correction or retraction promptly and prominently.

1.06 These themes are discussed at length in Chapter 5, but the basic thinking can be briefly stated. The single meaning rule is intended to simplify the task that must be undertaken by the court when determining defamation claims. It may be, however, that its practical effect is to see defamation claims often become highly technical, protracted and costly exercises. It is the prospect of becoming embroiled in such a costly legal dispute that encapsulates the problem of defamation law. Meanwhile, the primary goal pursued by most bona fide plaintiffs is a prompt correction of falsehoods to vindicate their reputations. Moreover, many publishers are committed, in principle, to correcting inaccuracies when they are identified.⁸ Removal of the single meaning rule – allied with introduction of a bar on claims where corrections have been made – may change the incentives involved when complaints arise. Defendant-publishers might begin to publish corrections or retractions whenever appropriate, and become willing and able to defend actions in court if they are convinced of the truth of what has been published.

1.07 Finally, a further purpose of this consultation is to allow consultees to propose additional reform options. Hence, two further general consultation questions can be posited at the outset:

Q 4: Irrespective of whether the 2013 Act is adopted in whole or in part, would it be desirable to introduce into Northern Irish law a measure withdrawing the “single meaning rule” in combination with the introduction of a bar on claims where a publisher has made a prompt and prominent correction or retraction?

Q 5: Are there other desirable reforms to defamation law in Northern Ireland?

1.08 Ultimately, the goal of any reform initiative must be to ensure that Northern Ireland possesses a law that provides access to justice, protection for reputation, and freedom of

⁸ Such a commitment is found, for example, in Clause 1 of the *Editors’ Code* that is to be applied by the new Independent Press Standards Organisation (IPSO), the successor to the Press Complaints Commission (PCC).

expression – all rights underpinned by the European Convention on Human Rights – for all citizens. If that can be achieved, then - far from becoming an ‘international pariah’,⁹ or suffering ‘a stain on [its] reputation...[by] replac[ing] London as the libel tourist capital [and] clinging to archaic, unbalanced and uncertain common law’¹⁰ – Northern Ireland might stand in future as an exemplar in this respect for the common law world.

Origins of the Project

1.09 The debate on the need for the reform of the law of defamation that culminated in the Defamation Act 2013 slowly gained momentum over the course of a decade or more. It was given significant impetus in 2008-2009 by international disquiet at the perceived phenomenon of “libel tourism”, an inquiry undertaken by a committee of the House of Commons, and the launch of a civil society reform campaign. Further parliamentary investigation and Government consultation culminated in the passing of the Defamation Act 2013. This Act did not automatically extend to Northern Ireland, and was not adopted by the Northern Ireland Executive.

Civil society campaign for reform of defamation law

1.10 A series of defamation cases involving non-governmental organisations (NGOs), scientists, academics, and online commentators and platforms galvanised civil society activists into the launch a campaign for legislative reform.¹¹ A perception that the law was being exploited to constrain criticism of the abuse of power by well-placed individuals married with more long-standing concern regarding the impact of defamation law on mainstream journalism.

1.11 This groundswell of opinion was fortified by alarm at the decisions of a number of state legislatures, and ultimately the Federal Congress, in the United States to introduce measures preventing the enforcement of British court decisions by American judges.¹² The principal concern of American legislatures was so-called “libel tourism”: forum-shopping for plaintiff-friendly

⁹ Rutherford, ‘Defamation laws decision could make Northern Ireland an “international pariah”’, *Belfast Telegraph*, 20 September 2013 (citing Lord Black).

¹⁰ 746 HL Deb GC334, 27 June 2013 (per Lord Lester).

¹¹ Among the *cause célèbres* cases have been those involving mathematician and popular science writer Simon Singh, doctor and author Ben Goldacre, doctor and researcher Peter Wilmshurst, Sikh writer Hardeep Singh, and American author Rachel Ehrenfeld.

¹² See, for example, the Libel Terrorism Prevention Act 2008 (New York), and the Securing the Protection of our Enduring and Established Constitutional Heritage Act 2010 (US - SPEECH Act). Following the decision of the US Supreme Court in *New York Times v Sullivan* 376 US 254 (1964), US libel law prescribes a very high – malice-based – standard that must be met by plaintiffs to succeed in cases involving public figures. This is an outlier in international terms. In Europe, reputation is protected by the right to respect for private and family life and hence cannot be simply downgraded relative to freedom of expression.

jurisdictions.¹³ Responding to US denunciation, the UN Human Rights Committee criticised the British legal costs regime for defamation cases and called for an alternative form of public interest defence.¹⁴

1.12 During its inquiry into “Press Standards, Privacy and Libel” conducted in 2009, the Culture, Media and Sport Committee of the House of Commons noted particular concern regarding libel tourism, but also heard criticism of the law of defamation more generally. In its report, which was delayed until February 2010, it expressed the view that ‘it is more than an embarrassment to our system that legislators in the US should feel the need to take retaliatory steps’.¹⁵ In addition, it asked the Government to undertake further consideration of a range of issues including the determination of meaning, the burden of proof, the issue of honest comment in academic peer-reviewed publications, and corporate defamation.¹⁶ In the first of these respects, it emphasised that ‘any measures to provide more certainty at an earlier stage, and which cut the enormous costs of libel cases in the UK, should be pursued more vigorously’, and urged the Government to pay attention to this facet of procedure.¹⁷

1.13 During this period, the movement for reform coalesced around two civil society organisations – English PEN and Index on Censorship – which issued a report, entitled *Free Speech is Not for Sale* in November 2009. These bodies were joined by other organisations – notably, Sense About Science – in the “Libel Reform Campaign”, and gained the support of a wide array of civil society bodies, prominent lawyers, and other individuals. The 2009 report made far-reaching recommendations for reform, and attracted considerable support from the mainstream media. It highlighted a range of concerns regarding the detrimental effects of the law on freedom of expression, particularly in relation to academic and scientific debate, the work of non-governmental organisations and investigative journalism. It too contended that the UK jurisdiction has become a magnet for libel plaintiffs. Counterpoint in the public debate was minimal and unorganised, tending to be offered by individual academics and lawyers.¹⁸

¹³ In Northern Ireland, persons bringing a claim are referred to as “plaintiffs”. For the sake of consistency, and other than in direct quotations, this nomenclature is used throughout this paper when referring to “claimants” in England and Wales.

¹⁴ Campbell, ‘British libel laws violate human rights, says UN’, *Guardian*, 14 August 2008.

¹⁵ [2009-10] *Second Report: Press Standards, Privacy and Libel* (HC362), at [205].

¹⁶ Throughout this paper, we adopt the nomenclature of “honest comment” in preference to “fair comment” when referring to the common law version of the defence. The traditional name for the defence – fair comment – has been gradually superseded; in *Spiller v Joseph* [2010] UKSC 53, at [117], the Supreme Court preferred ‘honest comment’.

¹⁷ [2009-10] *Second Report: Press Standards, Privacy and Libel* (HC362), at [125]-[129].

¹⁸ In a notable speech, Lord Hoffmann criticised the empirical basis for claims made by the libel reform campaign – see ‘Lord Hoffmann and Libel Tourism’, *Inform*, 7 February 2010. A co-authored academic paper suggested that the emphasis of any reforms should be placed on costs and process rather than on reform of the substantive law – see Mullis and Scott, ‘Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour of Reform of Defamation’ (2009) *Communications Law*, 14(6), 173-183.

Political commitment to reforming the law

1.14 From 2009 onwards, there was a growing political commitment to address perceived inadequacies in the law of defamation. Following the launch of a consultation on *Defamation and the Internet* conducted in late 2009, the Lord Chancellor appointed a working group on libel reform. This focused on four key issues – the multiple publication rule, libel tourism, a “public interest” defence, and some issues of process and case management – and reported in March 2010. At that stage, the Government expressed a commitment to reform the multiple publication rule.

1.15 In the lead-up to the general election of May 2010, the three main UK political parties each committed themselves to wider reform of defamation law. Accordingly, the Coalition Agreement formalised in May 2010 between the Conservative and Liberal Democrat parties indicated that measures to reverse the erosion of civil liberties and to rollback state intrusion would include ‘the review of libel laws to protect freedom of speech’.

1.16 In July 2010, a Defamation Bill was introduced by Lord Lester and received a Second Reading in the House of Lords.¹⁹ That Bill was withdrawn when the Government undertook to introduce its own Bill. A draft version of the Government Bill was duly published in March 2011 for consultation, alongside a series of further consultation issues. The Bill and consultation took into account Lord Lester’s Bill, the earlier consultation, and the report of the Culture, Media and Sport Committee, and proposed a mix of codification and reform. In April 2011, a parliamentary Joint Committee on the Draft Defamation Bill was established under the chairmanship of Lord Mawhinney to take evidence on the Bill and to produce a report. That Committee, which included in its membership the eminent Northern Irish historian Lord Bew, reported in October 2011.²⁰ It welcomed the provisions of the Bill, but described them as modest and urged more significant reform in some areas.

1.17 The Government responded to the Joint Committee and the other respondents to its consultation paper,²¹ and the Defamation Bill was introduced in May 2012. The Bill reflected many of the points raised. The Bill was drafted to extend to England and Wales, and to Scotland in respect of Sections 6 and 7(9).²² It did not extend to Northern Ireland. It received the Royal Assent in April 2013, and - as the Defamation Act 2013 - became effective in England and Wales

¹⁹ 720 HLDeb 423-483, 9 July 2010.

²⁰ [2010-12] *First Report: Draft Defamation Bill* (HL Paper 203/HC 930).

²¹ Ministry of Justice, *The Government’s Response to the Report of the Joint Committee on the Draft Defamation Bill* (Cm 8295, London: Stationery Office, 2012).

²² This was achieved by way of amendment to the provisions on territorial scope (s.17), and followed the passing of a legislative consent motion by the Scottish Parliament – see [WWW] <http://www.scottish.parliament.uk/LegislativeConsentMemoranda/DefamationBill-lcm.pdf> (accessed September 2014).

from the beginning of 2014 in relation to publication occurring after that date. The first judgments in cases brought under the Act were handed down in the summer of 2014.

Decision not to extend 2013 Act to Northern Ireland

1.18 In accordance with the devolution of powers under the Northern Ireland Act 1999, the decision as to whether the reform of defamation law reflected in the Defamation Act 2013 should extend to Northern Ireland is for the Northern Ireland Executive and Assembly. The Act could have been extended to Northern Ireland under a legislative consent motion, but this did not happen.²³

1.19 One response to this decision was the statement of an intention by Mike Nesbitt MLA to introduce a private member's Bill that would emulate the provisions of the Defamation Act 2013 in Northern Irish law.²⁴ As a first stage, in 2013 Mr Nesbitt undertook a public consultation on the desirability of such reform.²⁵ Further progress in this regard was forestalled, however, by the reference of the issue to the Commission, and Mr Nesbitt's associated agreement to postpone the introduction of a Bill.²⁶

Reference to the NI Law Commission

1.20 In September 2013, the Northern Ireland Law Commission received a request from the Department of Finance and Personnel to carry out a review of the desirability of the adoption of the provisions of the Defamation Act 2013 in Northern Ireland. The Department of Justice granted formal approval of this project in January 2014. The project is included in the Commission's Second Programme of Law Reform.

1.21 In correspondence with the Minister for Finance and Personnel, Simon Hamilton MLA, the Commission was invited to assess and focus on the 2013 Defamation Act and determine whether any corresponding provision should be introduced in Northern Ireland, acknowledging that this assessment would be framed within the wider principled debate about the right balance between protection of freedom of speech and protection of reputation. Hence, the objectives of the project are, first, to examine the recent changes in England and Wales brought about by the Defamation Act 2013 and to assess the desirability of their adoption in Northern Ireland, and secondly to consider whether any other changes to defamation law and practice in Northern Ireland are necessary or desirable.

²³ McBride, 'Stormont Executive blocks free speech law', *Belfast Newsletter*, 13 March 2013.

²⁴ Nesbitt, 'Why Belfast must never become a town called sue', *Belfast Telegraph*, 23 July 2013.

²⁵ 'Libel laws: Nesbitt claims "overwhelming support" for NI reform', *BBC Online*, 29 January 2014.

²⁶ McAdam, 'Mike Nesbitt's libel law reform plan for Northern Ireland hit by delay', *Belfast Telegraph*, 29 November 2013.

Pre-consultation Stage

1.22 The law of defamation in Northern Ireland has always been largely consistent with that in England and Wales. As noted above, in the lead-up to the passage of the Defamation Act 2013, the Ministry of Justice and others engaged in a substantial consultative and evaluative exercise regarding the operation of the existing law and options for reform. This process generated a very substantial body of evidence upon which, given the concurrence of the law in the two jurisdictions, it has been possible for the Northern Ireland Law Commission to draw. Significant further information and insight has been made available to the Commission by interested parties during the preparation of this consultation paper. This has made the task of producing the paper immeasurably easier, and – we hope – the product all the stronger in consequence.

Prior review of the law

1.23 The prior reviews of the substance and operation of the law that informed the passing of the Defamation Act 2013 involved a significant engagement with affected parties, leading legal practitioners, campaigning organisations, journalists, representatives of mainstream and new media, academics and many others. The record of evidence created has been of immeasurable value in the preparation of this consultation paper. This includes, in particular, the report of the Libel Working Group established by the Lord Chancellor,²⁷ the 2010 report of the Culture, Media and Sport Committee,²⁸ the Ministry of Justice’s consultation and Draft Defamation Bill,²⁹ the 2011 report of the Joint Committee on the Draft Defamation Bill,³⁰ the Government’s response to that report,³¹ and the parliamentary debates on the Bill itself and on the earlier Bill introduced by Lord Lester.

1.24 The scholarly and practitioner literature on the law of defamation generally, on the provisions of the 2013 Act, and on the emerging jurisprudence under the Act has also proven highly informative. In particular, we have been able to draw upon two recent, high quality commentaries: that specifically on the 2013 Act edited by James Price QC and Felicity McMahon,³² and the recent 12th edition of the leading general text *Gatley on Libel and Slander*.³³ In addition, the “Informm” blog edited by Hugh Tomlinson QC has also proved highly valuable as it provides a

²⁷ Ministry of Justice, *Report of the Libel Working Group* (London: MOJ, 2010).

²⁸ [2009-10] *Second Report: Press Standards, Privacy and Libel* (HC362).

²⁹ Ministry of Justice, *Draft Defamation Bill: Consultation Paper CP3/11* (Cm 8020, Norwich: TSO).

³⁰ [2010-12] *First Report: Draft Defamation Bill* (HL Paper 203/HC 930).

³¹ Ministry of Justice, *The Government’s Response to the Report of the Joint Committee on the Draft Defamation Bill* (Cm 8295, London: Stationery Office, 2012).

³² Price and McMahon (eds), *Blackstone’s Guide to the Defamation Act 2013* (Oxford University Press, 2013).

³³ Parkes and Mullis (eds), *Gatley on Libel and Slander* (12th edn, London: Sweet & Maxwell, 2013).

platform for legal practitioners, academics, campaigners and others to comment on developments in defamation law.³⁴

Judicial decisions

1.25 The courts in England and Wales and in Northern Ireland have delivered a range of important judgments in recent years dealing with elements of defamation law and discussing the underpinning objectives of the law. Such judgments have provided significant insights that have informed the development of this paper, and have been drawn upon where appropriate. Importantly, English judgments have recently begun to see judges grapple with disparate elements of the 2013 Act.³⁵

Pre-consultation meetings

1.26 In the period prior to the publication of this paper, the project team met with a number of “pre-consultees” who were identified as being able to offer particular insight in the development of this paper. These meetings were conducted on a “Chatham House” basis, and hence no attribution of views advanced or arguments made is included in this paper. We would like to take the opportunity, however, to express our gratitude to those who took the time to meet with us, and who helped us to form and to test some of the themes that appear in the body of this paper. A list of pre-consultees is included in Appendix A.

1.27 In particular, we wish to acknowledge the assistance afforded to the project team by Mike Nesbitt MLA. Mr Nesbitt postponed his own plans to undertake consultations with stakeholders in the development of his own proposals for legislative reform of Northern Irish defamation law in favour of the Commission. He also made available to the team the results of his initial public consultation conducted in the latter part of 2013. These results, while not scientifically valid or reliable – they were not presented to us as such – did allow us some insights into popular opinion on the desirability of legal reform in this area.

Survey conducted among faculty of Queen’s University Belfast and University of Ulster

1.28 A recurring theme in the debate on libel reform leading up to the 2013 Act, and that regarding the potential repercussions of the non-adoption of those reforms in Northern Ireland, concerned the real and prospective impact of the law on scientific discourse. Allied to this concern has been the fear that the state of the law may deter leading scholars from considering

³⁴ Available at [WWW] <http://www.inform.wordpress.com> (accessed September 2014).

³⁵ See, for example, *Cooke v MGN* [2014] EWHC 2831 (QB); *Yeo v Times Newspapers* [2014] EWHC 2853 (QB).

employment opportunities at the Northern Irish universities or attending conference proceedings in the Province. A number of signal cases that motivated the libel reform movement involved scientific critique, but evidence on actual experience or potential ramifications of the law in Northern Ireland was relatively scant.

1.29 In light of this, the project team conducted a survey of members of faculty of most Departments of the University of Ulster and of Queen's University Belfast. This included all science, engineering, and social science departments (broadly understood). The questions posed in this survey are included at Appendix B. We are grateful to all those who took the time to reply to this survey. Given the constraints imposed by the project timescale on the design and development of this survey, we cannot claim scientific rigour for it. While the responses received were in large measure, and necessarily, impressionistic, they provided significant assistance and insight to the project team.

Public debate concerning defamation law in NI

1.30 During the course of the development of this paper, the project team has remained conscious of the ongoing public debate regarding the perceived need for reform of defamation law in Northern Ireland. In particular, we have been able to draw upon perspectives aired in Parliamentary and Assembly committees and debates, and in the local media.

1.31 One facet of this public debate has been the suggestion – raised by the Northern Ireland Human Rights Commission and others – that by failing to adopt the Defamation Act 2013, the Northern Ireland Executive and Assembly has left the UK potentially in breach of its international human rights obligations.³⁶ A similar argument was deployed by Lord Lester in the House of Lords in order to press the UK government to compel the extension of the Defamation Act 2013 to Northern Ireland under section 26(2) of the Northern Ireland Act 1999.³⁷ This argument is premised on the assumption that Northern Irish defamation law is in breach of international human rights law in some unspecified manner. Outside of that scenario, such action would be in breach of the distribution of functions under the Northern Ireland Act 1999. This request was rejected by the UK Government. We cannot agree that international or domestic human rights law compels the reform of defamation law in Northern Ireland.

1.32 The fact is that many aspects of the existing defamation law in Northern Ireland have been assessed for their compatibility with human rights standards by the European Court of Human Rights. None have been found by the court to be in breach of Article 10 ECHR. While the UN

³⁶ Evidence submitted to the Finance and Personnel Committee by the Northern Ireland Human Rights Commission, 3 May 2013 and 3 July 2013.

³⁷ 746 HL Deb GC330, 27 June 2013.

Human Rights Committee criticised UK defamation law, that criticism was in large part focused on aspects of the costs regime which do not apply in Northern Ireland.³⁸ The UN Committee suggested that attention might be given to changing the style of public interest defence in English law, but that defence has been effectively reiterated in the Defamation Act 2013. As the human rights and media law expert, Professor Gavin Phillipson has noted:

*the often-invoked criticisms by the UN Human Rights Committee of English libel law relate partly to procedure and costs and not substantive law. Insofar as they relate to the law, they make very little sense: if the UK were to follow their (tentative) proposals, it would probably place itself in breach of Article 8 ECHR – scarcely a desirable outcome in human rights terms.*³⁹

This is not to suggest that Northern Irish defamation law as it currently exists necessarily strikes a perfect balance between freedom of expression, the protection of reputation, and access to justice. Rather, it affirms that within the parameters set by the obligation to balance rights, the decision over the appropriate design of that regime is for Northern Irish institutions. Adoption of the reforms set out in the Defamation Act 2013 is only one of a number of options moving forward.

Academic workshops

1.33 The final element of the pre-consultation stage of this project comprised presentation and testing of some of the consultation themes at academic workshops. In particular, we would like to thank the participants in workshops held at the University of Melbourne and at the University of Edinburgh for their insights.

Structure and Summary of the Consultation Paper

1.34 At the beginning of this chapter, a series of general consultation questions were proffered. The following chapters provide contextual information and an analysis of options that may assist consultees with their consideration of the general and the more specific questions on which the Northern Ireland Law Commission seeks to consult.

1.35 Chapter 2 is intended to provide background context to the discussion of reform options presented in the later chapters. First, it offers an overview of defamation law and its purposes, and of the reforms introduced to the law in England and Wales by the Defamation Act 2013. Thereafter

³⁸ Concluding observations of the Human Rights Committee on sixth periodic report submitted by the United Kingdom CCPR/C/GBR/CO/6 30 July 2008.

³⁹ *Memorandum to the Joint Committee on Human Rights: the Defamation Bill 2012*, at [3] (available at [WWW] <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/> (accessed September 2014)).

it introduces the individual and societal interests in reputation and free speech that influence the design of defamation law. Embedded in this discussion is particular consideration of the Northern Irish context; such context may influence the appropriate future shape of defamation law in this jurisdiction.

1.36 Chapters 3 and 4 consider different elements of the reforms introduced by the Defamation Act 2013. While a perfect division of themes is not possible, in general terms Chapter 3 is focused on reforms introduced to the substantive law, whereas Chapter 4 considers reforms that possess a procedural or jurisdictional tenor. Both chapters posit specific consultation questions regarding the desirability of adoption of the relevant provisions of the 2013 Act in Northern Ireland and in some places set up revised or alternative options.

1.37 Chapter 5 is focused on the alternative or additional reforms mooted above that are oriented towards narrowing the range of legal questions left to the court and thereby simplifying and reducing the cost of defamation. Specifically, the chapter explains the option of removing the single meaning rule in combination with the introduction of a series of discursive remedies – corrections and retractions – the use of which may serve to bar the further pursuit of claims. The chapter also notes the option of introducing a cap on damages in cases where the defendant-publisher has allowed a right of reply to the plaintiff.

1.38 Chapter 6 concerns the equality screening of the reform options required under section 5 of the Northern Ireland Act 1998.

1.39 In short, the paper invites responses on consultation questions that envisage five alternative options for the reform of Northern Irish defamation law:

- (1) the full adoption of reforms equivalent to those instituted for England and Wales by the Defamation Act 2013;
- (2) the selective adoption of reforms equivalent to some of those instituted for England and Wales by the Defamation Act 2013;
- (3) the full or selective adoption of reforms equivalent to those instituted for England and Wales by the Defamation Act 2013, subject to the revision of some of the provisions concerned;
- (4) the withdrawal of the single meaning rule in combination with the introduction of a bar on claims where a publisher has made a prompt and prominent correction or retraction (either independently or in combination with option (1), (2) or (3)), and
- (5) retention of the status quo regarding defamation law in Northern Ireland.

Full list of consultation questions

Q 1: Should the Defamation Act 2013 be extended in its application, in full, to the Northern Irish jurisdiction?

Q 2: If the Defamation Act 2013 should not be extended to Northern Ireland in full, should any specific provisions contained within the Act be extended in their application to Northern Ireland?

Q 3: If the Defamation Act 2013 should be extended in its application to Northern Ireland in whole or in part, should any provisions to be adopted be revised in any manner prior to their adoption?

Q 4: Irrespective of whether the 2013 Act is adopted in whole or in part, would it be desirable to introduce into Northern Irish law a measure withdrawing the “single meaning rule” in combination with the introduction of a bar on claims where a publisher has made a prompt and prominent correction or retraction?

Q 5: Are there other desirable reforms of defamation law in Northern Ireland?

Q 6: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 2 of the Act, the “defence of truth”, to be introduced into Northern Irish law?

Q 7: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 3 of the Act, the “defence of honest opinion”, to be introduced into Northern Irish law? Would it instead be preferable to continue with the common law approach as restated in *Spiller v Joseph*?

Q 8: Should it be confirmed that the defence of honest comment/honest opinion extends to encompass inferences of verifiable fact from underpinning facts?

Q 9: Should it be possible for a defendant-publisher to rely on the defence of honest comment/honest opinion where he or she held a “reasonable belief” in the truth of the underpinning facts on which a defamatory comment was made?

Q 10: If it is desirable for a rule equivalent to section 3 of the 2013 Act to be introduced into Northern Irish law, would it be desirable for the provision to be amended so as to allow

opinions published contemporaneously with privileged statements to benefit from the defence?

Q 11: If it is desirable for a rule equivalent to section 3 of the 2013 Act to be introduced into Northern Irish law, would it be desirable for the definition of “privileged statements” in section 3(7) to exclude reference to section 4, and instead to include in section 3(4) reference to ‘any fact that he or she reasonably believed to be true at the time the statement complained of was published’?

Q 12: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 4 of the Act, the “defence of publication on a matter of public interest”, to be introduced into Northern Irish law? Would it instead be preferable to continue with the common law approach as restated in *Jameel v Wall Street Journal Europe* and *Flood v Times Newspapers Ltd*?

Q 13: If it is desirable for a rule equivalent to section 4 of the 2013 Act to be introduced into Northern Irish law, would it be desirable for the extension of the defence to opinions in section 4(5) to be excised?

Q 14: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 6 of the Act, the qualified privilege for statements in peer-reviewed scientific or academic journals, to be introduced into Northern Irish law?

Q 15: If the 2013 Act is not adopted in its entirety, would it be desirable for the extension and clarification of various privileges set out in section 7 of the Act to be introduced into Northern Irish law?

Q 16: If the 2013 Act is not adopted in its entirety, would it be desirable for the new defence for website operators set out in section 5 of the Act to be introduced into Northern Irish law? If so, should this include an obligation for website operators to append a notice of complaint alongside statements that are not taken down?

Q 17: If the 2013 Act is not adopted in its entirety, would it be desirable for the new defence for secondary publishers set out in section 10 of the Act to be introduced into Northern Irish law?

Q 18: If the 2013 Act is not adopted in its entirety, would it be desirable for the changes made to the law of slander by section 14 of the Act to be introduced into Northern Irish law?

Q 19: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 11 of the Act which reverses the presumption that defamation claims will be heard by a jury to be introduced into Northern Irish law?

Q 20: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 1(1) of the Act, the “serious harm” test, to be introduced into Northern Irish law? Would it instead be preferable to rephrase the statutory test so as better to reflect the stated intention of the authors of the Act? Would it instead be preferable to continue with the common law approach reflected in *Jameel v Dow Jones*?

Q 21: If the 2013 Act is not adopted in its entirety, and irrespective of whether the standard “serious harm” test is adopted, would it be desirable to introduce into Northern Irish law a rule that ‘bodies that trade for profit’ must show ‘serious financial loss’ if they are to bring a claim in defamation? Would it instead be preferable to introduce a bar on corporate claims equivalent to that introduced under the Australian Uniform Defamation Acts?

Q 22: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 8 of the Act, the single publication rule, to be introduced into Northern Irish law? Would it be preferable instead to retain the multiple publication rule, or to introduce an alternative defence requiring the attaching of a notice of complaint?

Q 23: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 9 of the Act, the rule on “libel tourism”, to be introduced into Northern Irish law?

Q 24: Irrespective of whether the 2013 Act is adopted in whole or in part, would it be desirable for remedial powers of court equivalent to those set out in sections 12 and 13 of the Act to be introduced into Northern Irish law?

Q 25: Would it be desirable for any other “discursive remedies” to be introduced into Northern Irish law?

CHAPTER 2: DEFAMATION LAW AND THE NORTHERN IRISH CONTEXT

2.01 The normative foundations of any coherent defamation regime must comprise an appropriate valuation of both the individual and the social importance of freedom of expression, of reputation, and of access to justice. These principles will sometimes be in tension. Nonetheless, they must shape the design of any defamation regime, and provide for the determination of particular disputes in which they may come into conflict.

2.02 The essential purpose of defamation law is to protect an individual's reputation from harm caused by the publication of false statements. The award of damages by a court is said to vindicate that reputation by highlighting publicly the falsity of what had been published. This is important not only for those individuals and organisations who have suffered libels, but also for society as a whole. Damages also compensate for the reputational harm caused. If the law is to serve these purposes, it must not be so expensive to access that it is beyond the financial reach of the average person.

2.03 Conversely, defamation law has long been a contentious area in all common law jurisdictions given its capacity to constrain freedom of expression, and freedom of the press in particular. It has been widely recognised that the law can assist individuals and corporations in attempts to deter and to penalise public criticism of their conduct.⁴⁰ This propensity has generated a discernible "chilling effect" on freedom of expression as publishers censor themselves in order to avoid legal risks.⁴¹ This can be the case even when a publisher is convinced of the accuracy of what would otherwise have been published. For many publishers, the cost of becoming involved in legal proceedings is such that they balk at the prospect, and choose instead to remain quiet or to comment only on less controversial matters.

2.04 In the discussion of defamation law, there is always a risk that concerns about the impact of the law on freedom of speech – because they are sometimes obvious and occasionally scandalous – come to predominate. As a matter of law and of principle, that is a mistake. Defamation law must ensure adequate recognition of all underpinning values and interests. Both freedom of speech and reputation are protected by Convention rights in Article 10 ECHR and Article 8 ECHR respectively. Access to justice is necessary for all parties whose rights may have been infringed.

⁴⁰ Perhaps most notorious in the former this respect were Robert Maxwell and - more recently - Jimmy Savile. In the latter respect, a case often-cited during Parliamentary debate was that involving McDonalds Corp and two environmental campaigners that ultimately reached the European Court of Human Rights – *Steel and Morris v UK* (2005) 41 EHRR 22. See generally, Hooper, *Reputations Under Fire: Winners and Losers in the Libel Business* (London: Sphere, 2008).

⁴¹ Barendt et al, *Libel and the Media: The Chilling Effect* (Oxford University Press, 1997).

2.05 The following paragraphs provide, first, a brief overview of the law of defamation in Northern Ireland and a note on the changes introduced in the equivalent law in England and Wales by the Defamation Act 2013. The chapter then considers, the individual and social importance of reputation, of freedom of speech, and – implicitly – of access to justice. In doing so, particularities of the Northern Irish context are noted insofar as they may influence the consideration of the appropriate future design of defamation law in this jurisdiction. The chapter then offers a brief note on the perceived importance of consistency between the law of Northern Ireland and that of England and Wales. The chapter concludes with a general note on the legal obligation on Northern Irish legislators (under the European Convention on Human Rights and the Northern Ireland Act 1999) and courts (under the Human Rights Act 1998) to develop the law in a manner consistent with human rights standards. In the context of defamation, wherein both Article 10 ECHR protection for freedom of expression and Article 8 ECHR protection for reputation can be relevant, this will entail a need to balance the competing rights and interests.

Overview of defamation law

2.06 Defamation is the generic label for two torts: libel and slander. Libel is the written or permanent form of defamation, whereas slander is the spoken or transient form. In this regard, it should be noted that broadcast defamation is treated as libel rather than slander.⁴² Defamation need not take the form of words at all, but may – for example – be conveyed in visual forms such as artwork or sculpture. As media organisations are in the business of publication, defamation law is often understood as a major component of “media law”. The law is applicable, however, to publication by any person. Whereas in the past this point may have been largely incidental, the advent of social media has made publication by the average person often both universally accessible and more permanent in form. Hence, the law has begun to bite on the everyday behaviour of the average person in a manner that was not formerly the case.⁴³

2.07 It is difficult to gain a full picture of the number of defamation claims that have been launched in Northern Ireland in recent years. Many complaints never reach the stage of the initiation of proceedings, having been settled quickly to the mutual satisfaction of the parties or simply never progressed beyond initial contact. Unconfirmed figures have been published for the period 2008-2013.⁴⁴ These suggest that in each of the past three years, around thirty claims have been progressed to the High Court. Of these, fewer than five resulted in court determinations in favour of one or other party. In addition, a very small number of cases were

⁴² s.166, Broadcasting Act 1990 (which replaced s.1, Defamation (Northern Ireland) Act 1955).

⁴³ This propensity can be seen in the actions brought against various “tweeters” by Lord McAlpine following his erroneous identification as a paedophile. See also, *AB Ltd v Facebook and others* [2013] NIQB 14.

⁴⁴ O’Kane, ‘Northern Ireland: defamation claims in 2013, numbers stabilise’, *Inform*, 21 March 2014.

received by the County Court each year.⁴⁵ Prior to 2011, the annual figure for cases received was consistently closer to fifty.

2.08 The reasons explaining the apparent drop-off in numbers of claims since 2010 are not clear. It may be that Northern Irish lawyers have become less willing to initiate claims on account of a more rigorous approach to case management adopted by the courts in recent years.⁴⁶ It may be that an effect of the negative publicity afforded to the use of defamation law through the activity of the Libel Reform Campaign has been such as to deter some potential plaintiffs. It may also be that financial pressures have pushed media organisations into seeking the early resolution of disputes.⁴⁷

2.09 Notwithstanding the recent fall in the number of claims being brought to the High Court in Northern Ireland, it would appear that the number of claims per capita is relatively high in this jurisdiction. In England and Wales, with a population of just over 56 million, there were 186 claims issued before the High Court in London (the overwhelming majority of claims) in 2012.⁴⁸ This amounts to 0.332 claims per 100,000 inhabitants. The comparable figure for Northern Ireland – population circa 1.8 million - in 2012 was 1.722.

Elements of the claim

2.10 In order to bring a claim for defamation, a person who feels that his or her reputation has been sullied must prove three things. The first requirement is that “publication” to a third party has taken place. The particular form that publication takes is unimportant. For example, it may be in a newspaper or magazine article, a broadcast, a letter or an email, or a blog-posting or a tweet.⁴⁹ Secondly, the plaintiff must prove that the publication “identifies” him or her in such a way that it would be understood by reasonable readers, listeners or watchers acquainted with the plaintiff to refer to the plaintiff.⁵⁰ The third element of any claim is that the impact of the

⁴⁵ Under the County Courts (Financial Limits) Order (Northern Ireland) 2013 SR 2013/18, (as amended by), the general civil jurisdiction of county courts specified in Article 10(1) of the County Courts (Northern Ireland) Order 1980 was increased from £15,000 to £30,000. Thus, as a general rule claims for misuse of private information are heard by the county court. The jurisdiction of the county court in defamation claims, however, is limited to actions in which damages claimed do not exceed £3,000 (Art.10(2)).

⁴⁶ See below, [2.27].

⁴⁷ O’Kane, ‘Northern Ireland defamation cases, numbers decline’, *Inform*, 17 December 2012.

⁴⁸ ‘Judicial statistics – defamation claims increased by 13%’, *Inform*, 2 March 2014. The average number of claims issued over the ten years from 2003-2012 was 216. A similar drop in the number of claims witnessed in Northern Ireland can be seen in England and Wales after 2009.

⁴⁹ It is sometimes suggested that more ephemeral online publication should be treated as slander rather than libel.

⁵⁰ The rules on identification help to explain the practice of publishers of fictional works sometimes to include riders in the preface to books or in the title sequence of films and television dramas to the effect that ‘all characters in this work are entirely fictitious and any similarity to persons living or dead is entirely coincidental’. It also helps to explain why newspapers often include additional, seemingly superfluous, factors such as their age or profession in the presentation of news. Referring to a subject as, for example, ‘John Smith, 27, of Newnham Street, Belfast’ or ‘Tom Baker, the former Dr Who’ can narrow the potential for costly errors of identification to be made.

publication must be shown to be “defamatory”.⁵¹ A precursor to this assessment is that the court must determine the “meaning” to be ascribed to the words. This is a very much more convoluted exercise than it may seem at first glance.⁵² Only once meaning is determined can it be assessed whether that meaning is defamatory. A single publication may, of course, include more than one allegedly defamatory imputation or meaning. In that case, one or all of the contested meanings can provide the basis of a claim.

2.11 As defamation is an aspect of civil and not criminal law,⁵³ the standard of proof is that of the “balance of probabilities”. Any of these three aspects of the claim can be contested by the defendant. Importantly, the plaintiff need not prove that the publication was false, nor that any particular harm has been caused. The starting point in every case is the presumption that the statement complained of is false, and that it has caused harm to reputation. In recent times, plaintiffs have been required to show that the claim is sufficiently serious to warrant the dedication of court time and resources to its determination.⁵⁴

2.12 Two further points can be made at this point regarding “publication” in order better to inform the discussion in subsequent chapters of this paper. First, publication occurs at the time and in each place where the communication is received. Radio and television broadcasts are published where and when they are seen and/or heard; printed material where and when it is read, and online content where and when it is accessed. This is the so-called “multiple publication rule”.⁵⁵ In principle, each such publication gives rise to a distinct cause of action against the defendant. The second further point is that the ‘repetition rule’ provides that a fresh libel occurs whenever a defamation statement is repeated by a recipient of the message, such that if person A communicates a libel concerning person B to person C, and person C repeats the libel to person D, then an action can be brought against either or both A and C. The originator of a libel – in this case person A — is liable not only for his or her own publication of the libel, but also for harms caused by “reasonably foreseeable” repetitions of the statement.

2.13 As regards questions of standing to bring a claim, the general rule is that a claim for libel can be brought by any natural or legal person, whether they are a company, a public figure or a private person. A company can sue only in respect of libels that impact on its trading or

⁵¹ There is no single legal test on the issue of whether a statement is defamatory – see the review conducted by Tugendhat J in *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB). The essential rule is that the imputation has had or has the tendency to have an adverse effect on the plaintiff’s reputation. The court makes no attempt to ascertain whether the publication *in fact* affected the perception of the plaintiff in the estimation of the audience. The court makes the assessment from the perspective of right-thinking members of society.

⁵² See below, ch. 5

⁵³ The criminal law of libel in Northern Ireland was abolished by s.73 of the Coroners and Justice Act 2009.

⁵⁴ This development began in the case of *Jameel v Dow Jones* [2005] EWCA Civ 75– see below, [4.13].

⁵⁵ See further below, [4.35] et seq.

business reputation, which will encompass the ability to attract investment, customers or employees.⁵⁶

2.14 Certain types of person or organisation, for example government entities or political parties, are not able to sue at all. Similar exclusions may apply to state-owned companies, to private companies that perform ‘public functions’ under contract, and to trade unions. Importantly, such exclusions do not affect the rights of any individual – for example, a councillor, an MLA, an MP, a Minister, or a public employee – to sue if the criticism of the governmental or political body could be read as referring also to that individual. Unincorporated associations cannot sue for defamation on account of their lack of legal personality. Neither can a claim be brought on behalf of a person who is deceased.⁵⁷

Possible defences

2.15 Once a plaintiff has established the three elements of a claim, it is left to the defendant-publisher to prove a defence. There are three main common law defences in defamation, and then a further category of defence that encompasses a range of “privileged” forms of speech.

2.16 The three main defences are justification, honest comment, and responsible publication on a matter of public interest (*Reynolds* privilege). The essence of the defence of justification is that the statement complained of is proven to be “substantially true”. While this is easy to state, in practice proving truth even on the balance of probabilities is not always straightforward. As Lord Keith noted in *Derbyshire County Council v Times Newspapers Ltd*, ‘quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available’.⁵⁸

2.17 The defence of honest comment is perhaps the least understood of the main defences. Potentially, it could provide great succour to freedom of expression. It applies where the statement complained of comprises a comment or the expression of an opinion, and not a direct or independent assertion of fact. The essence of the defence is that reasonable members of the audience for the publication can appreciate that what has been published is “merely” the view of the publisher. It applies where a publisher-defendant has drawn a defamatory inference from underpinning facts known to him or her. It entails that no liability arises where (a) the underpinning facts are true, (b) the underpinning facts were alluded to in the publication, (c) the

⁵⁶ See below, [4.26] et seq.

⁵⁷ This is possible in Scotland. As a deceased person’s reputation can be damaged, the Faulks Committee on Defamation (1975) recommended that it should be possible for the estate of a deceased person to sue for libel for a period of time after the death occurred. A bid to amend English law to allow such actions was defeated during the Committee Stage in the House of Commons on the Bill that became the Defamation Act 2013.

⁵⁸ [1993] AC 534, at 548.

issue discussed is a matter of public interest, (d) the inference is one that could have been drawn by an honest person (objective dimension), and (e) the opinion was not published maliciously (that is, it was genuinely held by the publisher – subjective dimension). Distinguishing statements of fact from comments or opinions has proven difficult for the courts,⁵⁹ and the requirements of the defence have arguably been interpreted in an overly technical fashion. In the recent case of *Spiller v Joseph*, the Supreme Court restated the features of the defence and offered a clear explanation of its origins, its rationale and its purpose.⁶⁰

2.18 Of the three main defences, that of responsible publication on a matter of public interest (*Reynolds* privilege) is of most recent vintage. It was developed by an essentially unanimous House of Lords from common law qualified privilege in the case of *Reynolds v Times Newspapers Ltd*.⁶¹ It recognised that, in the democratic polity, it is important to accept that despite best endeavours, false statements of fact – or at least statements that cannot be proven to be true – may sometimes be published. The defence provides that where the subject matter of the publication is a matter of public interest, and the publisher has acted responsibly in preparing the publication no liability in defamation will ensue. Giving the leading speech in *Reynolds*, Lord Nicholls set out a non-exhaustive list of ten factors relevant to the assessment of whether publication had been responsible.

2.19 Three further points can be made regarding *Reynolds* privilege. First, the defence is available to any publisher, although it might be expected to be utilised most often by journalists who have acted responsibly and checked stories in accordance with journalistic ethics. Secondly, its use places a heavy burden on the defendant-publisher to demonstrate the steps that were taken prior to publication to meet the standard of responsibility. Finally, when deployed successfully, the plaintiff who has been libelled will nevertheless not be afforded redress by the court. The outcome of the case would appear to be a “win” for the publisher, whereas the impugned publication will not have been demonstrated to be true, and the plaintiff is left without vindication of reputation. Whether such continuing misinformation is in the public interest can be reasonably questioned.⁶²

2.20 The fourth category of defence is that of “privilege”. Privilege applies where a person has published a statement on a privileged occasion. It can be “absolute”, such as when a person gives evidence in court or speaks during Parliamentary debate, or “qualified”. Qualified privilege

⁵⁹ Compare the treatment of the publication involved by the High Court and the Court of Appeal in *Convery v Irish News* unreported NIQB, 8 February 2007 and [2008] NICA 14, and *British Chiropractic Association v Singh* [2009] EWHC 1101 (QB) and [2010] EWCA Civ 350.

⁶⁰ [2010] UKSC 53.

⁶¹ [2001] 2 AC 127.

⁶² Coad, ‘Reynolds and public interest: what about truth and human rights?’ (2007) *Entertainment Law Review*, 18(3), 75-85.

can be defeated by proof of “malice”, meaning that the publisher did not themselves believe the facts stated or was motivated by ill-will. Variants of qualified privilege have been introduced by statute over time, while others are derived from the common law. Common law privilege rests upon a reciprocal duty on the publisher and an interest held by the recipient of the publication. Among a wide range of covered communications are the provision of employment references, responses to inquiries about crime, and responses to inquiries as to credit.⁶³ A wide range of further reports are protected by a number of statutes, and in particular by Schedule 1 to the Defamation Act 1996. Some variants of qualified privilege require that the defendant-publisher is willing to publish a statement by way of explanation or contradiction.

2.21 Each of these defences, and the changes wrought to them in the law of England and Wales by the Defamation Act 2013, is discussed further in Chapter 3. Other statutory mechanisms have been introduced over time in the attempt to limit the exposure of defendant-publishers. Most notable of these is the “offer of amends” procedure that was introduced by sections 2-4 of the Defamation Act 1996, and has been in force in Northern Ireland since 2010.⁶⁴ The offer of amends is not a defence per se, but rather is a statutorily prescribed means of encouraging the settlement of a claim.⁶⁵

Remedies

2.22 The standard remedy in the law of defamation is that of monetary damages. Damages are intended to compensate for the inconvenience and distress caused to the plaintiff by the publication of the statement, for the harm to his or her reputation, and to signal falsity and thereby to vindicate the plaintiff’s reputation. For some time, an effective cap on the level of damages of just over £200,000 has been deployed by the courts. The limit parallels the maximum awards for non-pecuniary loss in personal injury cases. The highest award made by the Northern Irish courts in recent years was the £80,000 figure awarded in *Gormley v Sinn Féin*.⁶⁶ In addition, if the plaintiff is able to prove that he or she has suffered specific financial harm – or “special loss” – then damages can also serve to compensate for that harm.

⁶³ See generally, Parkes and Mullis (eds), *Gatley on Libel and Slander* (12th edn, London: Sweet & Maxwell, 2013), ch.14.

⁶⁴ Defamation Act 1996 (Commencement No. 4) Order 2009 SI2858/2009.

⁶⁵ The procedure provides a basis for a defendant-publisher to offer to pay costs and damages and to make an apology where he or she has unintentionally made statements which are acknowledged as untrue. If the offer is not accepted, the plaintiff can recover damages through the courts only on proof of malice. The Act does not specify a time limit within which a plaintiff must respond to an offer of amends, but in *Tesco Stores Ltd v Guardian News & Media Ltd* [2008] EWHC (QB), Eady J held that an offer must be accepted or rejected within a “reasonable” time, and could not be kept open by the plaintiff indefinitely simply in order to gain a tactical advantage in the litigation.

⁶⁶ Unreported, NIQB, 14 December 2012.

2.23 The law of Northern Ireland – and that of England and Wales – is comparatively unusual in not providing discursive remedies for defamation as standard.⁶⁷ There is no general power for the court to order a correction or a declaration that the statement complained of was false. In contrast, most European, and many non-European, states have right of reply and correction provisions that apply in defamation claims.⁶⁸ Some provision for such remedies has been made in limited or specific circumstances. For instance, there is a power for the court to make a declaration of falsity and to order that the defendant publish a suitable correction and apology under the summary procedure provided by sections 8-10 of the Defamation Act 1996.⁶⁹ Similarly, if the defendant wishes to take advantage of the offer of amends procedure under the 1996 Act he or she must offer a suitable correction and apology, while the availability of qualified privilege for certain reports under section 15 of the Defamation Act 1996 depends on the defendant-publisher being willing to publish a reasonable statement from the plaintiff by way of explanation or contradiction. Should the parties to a dispute agree to settle, this can be accompanied by a statement in open court.⁷⁰

2.24 It is possible for a plaintiff to obtain an interim injunction in order to forestall a prospective defamatory publication, but such orders are very rarely made. The practice in defamation differs from that applicable to most other torts. Not only must there be strong prima facie evidence that the statement is defamatory and untrue, but – as provided by “the rule in *Bonnard v Perryman*” – an order will be refused if the defendant proposes to plead a defence of justification, privilege or honest comment.

Mode of trial and case management

2.25 Unusually for civil law proceedings, in both England and Wales and in Northern Ireland the standard approach to defamation claims has been trial by a judge with a jury.⁷¹ The judge is responsible for determining questions of law, while the jury must determine questions of fact. In some aspects of the law this can produce a somewhat cumbersome and uncertain interplay.⁷² In addition, as was accepted by Lord Neuberger MR in *Fiddes v Channel Four Television*, ‘jury trial will almost always take longer, and cost more, than trial by judge alone’.⁷³ One explanation

⁶⁷ See further, chapter 5.

⁶⁸ For a survey of international and national discursive remedies, see Youm, ‘Rights of Reply and Freedom of the Press: An International and Comparative Perspective’ (2007–2008) *George Washington Law Review*, 6, 1017; Fleming, ‘Retraction and Reply: Alternative Remedies for Defamation’ (1978) *University of British Columbia Law Review* 12, 15-31; Milo, *Defamation and Freedom of Speech* (Oxford University Press, 2008), ch.8.

⁶⁹ If the parties cannot agree on the content of the apology or correction, however, all the court can then do is to order the defendant to publish a summary of its judgment. This procedure came into force in Northern Ireland in January 2010 under the Defamation Act 1996 (Commencement No. 4) Order 2009 SI2858/2009.

⁷⁰ In Northern Ireland, in contrast to England and Wales, this cannot be done before the issuing of proceedings.

⁷¹ In Northern Ireland, defamation juries comprise seven members.

⁷² See below, [4.04].

⁷³ [2010] EWCA Civ 730, at [18].

for this is that there is a tendency for witnesses in jury trials to be asked to give evidence in person. This is not to say that the importance of the right to jury trial does not justify the increased cost.

2.26 In practice, very few cases ever reach a full trial,⁷⁴ and in recent years an increasingly high proportion of those that do are tried by judge alone on grounds of complexity. Nevertheless, given the costs attendant on that process, it seems clear that the prospect of a costly trial by judge and jury is an important factor weighing in defendant-publishers' decisions as to whether to fight cases or to settle. This suggestion was accepted by all of the lawyers with whom it was discussed during our pre-consultation meetings; there was less agreement on whether this was a desirable situation.

2.27 In terms of general case management, it would appear that Northern Ireland has been at least as progressive as has England and Wales.⁷⁵ During our pre-consultation discussions, we heard repeated and powerful commendation of the work of Mr Justice Gillen – supported by a “Defamation Committee” of senior lawyers practising in the area – in addressing what was formerly a significant legacy of long-standing and unprogressed claims. Moreover, we heard that there has been a drive to achieve early determinations of meaning. There is no reason to believe that this approach to efficient management of claims should change in the future.

Overview of the Defamation Act 2013

2.28 The 2013 Act comprises seventeen sections, consisting of a mixture of codifying, revising and general provisions. It has revised the law of defamation in England and Wales in a range of ways. Section 1 introduces a “serious harm” test that will serve as threshold test to the bringing of a claim. Sections 2 to 7 concern defences. The main common law defences are abolished and replaced. Section 2 restates the justification defence under the label of “truth”, section 3 recasts the honest comment defence as “honest opinion”, and section 4 replaces *Reynolds* privilege with a new defence of “publication on a matter of public interest”. Section 4(3) restates the reportage variant of the defence. Section 5 provides a new defence for the operators of websites. Sections 6 and 7 deal with aspects of privilege, including the provision of a qualified privilege for statements made in peer-reviewed scientific or academic journals.

2.29 The latter part of the statute concerns publication, jurisdiction, the trial process and remedies. In a revision of particular importance to online publishers, section 8 introduces a “single publication rule” that will see the limitation period for claims run from the date of “first

⁷⁴ O’Kane, ‘Northern Ireland: defamation claims in 2013, numbers stabilise’, *Inform*, 21 March 2014.

⁷⁵ The rules of the court in respect of defamation claims are located in Order 82 of the Rules of the Court of Judicature (NI) 1980 SR 1980/346.

publication". Section 9 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. 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 signals the end of the presumption of trial by jury in defamation actions; jury trials will now occur only where ordered by the court. Sections 12 and 13 address the question of remedies. They provide the court with power to order publication of summaries of judgments and to compel the "take-down" of impugned publications. The final substantive provision, section 14, concerns aspects of the law of slander.

2.30 Each of the provisions of the Act is considered further in Chapters 3 and 4 below.

Social and personal importance of reputation

2.31 The personal and social importance of reputation is enormous. From Socrates to Shakespeare to Austen, classic and modern literature is replete with contemplation of the role of reputation. From a personal perspective, the appreciation of one's reputation among other people is of central importance to self-esteem and personal dignity.⁷⁶ It will clearly also influence the range of opportunities that are made available to a person. While reputation is not expressly identified as a protected right under the European Convention on Human Rights, in a series of cases beginning in 2004 the domestic and European courts recognised that it does fall within the right to respect for private life in Article 8.⁷⁷

2.32 Reputation is important not merely for its service to the individual concerned. As Lord Nicholls explained in *Reynolds v Times Newspapers*:

Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once

⁷⁶ See generally, Mullis and Scott, 'The Swing of the Pendulum: Reputation, Expression and the Recentering of English Libel Law'. (2012) *Northern Ireland Legal Quarterly*, 63(1), 27-58.

⁷⁷ The first case in which an association between Article 8 and reputation was affirmed – and then in a passing reference only – was *Radio France v France* (2005) 40 EHRR 706, at [31]. Shortly afterwards, in *Greene v Associated Newspapers* [2004] EWCA Civ 1462, at [68], the English Court of Appeal was content to assume that a right to reputation was among the rights guaranteed by Article 8. In *Pfeifer v Austria* (2009) 48 EHRR 8 the European Court determined that an applicant's right to reputation outweighed the countervailing interest in freedom of speech for the first time. This position has since been affirmed by the UK Supreme Court in *Guardian News and Media Ltd* [2010] UKSC 1, at [37]-[42] – see generally, Mullis and Scott, 'The Swing of the Pendulum: Reputation, Expression and the Recentering of English Libel Law'. (2012) *Northern Ireland Legal Quarterly*, 63(1), 27-58; Spielmann and Cariolou, 'The Right to Protection of Reputation Under the European Convention on Human Rights', in Spielmann, Tsirli and Voyatzis (eds) *The European Convention on Human Rights: a living instrument* (Brussels: Bruylant, 2011), 401-425.

*besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad.*⁷⁸

Reputation is also central to legal personhood. While corporate reputation is necessarily less broad in character, in the final analysis a company's reputation is perhaps its single most important, and its most vulnerable, asset.⁷⁹ So much is signalled by the growth and scale of the public relations sector.

2.33 In sum, reputation is central to the modern, large-scale industrial society. In its association with trust, it facilitates human interactions. While law is not its only guarantor, a society that fails to allow its members to defend reputations that have been falsely deprecated invites social dysfunction. It is important to acknowledge, therefore, that the creation of a "chilling effect" on freedom of expression – the deterrence of false and defamatory publication – is precisely a purpose of defamation law. It prevents unwarranted injury to reputation by means of incautious speech. The chilling effect is undesirable only to the effect that it causes the censorship of meritorious communications.

Vindication: plaintiffs' desire to "set the record straight"

2.34 It is often said that the plaintiff's primary goal when considering defamation proceedings is to "set the record straight" by obtaining a swift correction of misleading publications concerning themselves. This idea was regularly repeated by plaintiffs' lawyers during the debates on libel reform that culminated in the Defamation Act 2013. It was also reiterated more than once during our pre-consultation discussions, and is supported by such research as has been conducted on the question.⁸⁰ The general preference for a discursive remedy is also recognised in paragraph 1.4 of the English *Pre-Action Protocol for Defamation*, which states that

⁷⁸ [2001] AC 127, 201.

⁷⁹ Famously, American business magnate and investor Warren Buffett once noted that 'it takes twenty years to build a reputation and five minutes to ruin it'. See below, [4.26] et seq.

⁸⁰ That most plaintiffs were motivated by this desire, and not by the prospect of a financial windfall, was a core finding of the Iowa Libel Research project – see Bezanson, 'Libel Law and the Realities of Litigation: Setting the Record Straight' (1985) *Iowa Law Review*, 71, 215-233; 'The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get' (1986) *California Law Review*, 74, 789-808. (at [1.4]).

‘almost invariably, a plaintiff will be seeking an immediate correction and/or apology as part of the process of restoring his/her reputation’.⁸¹

2.35 As noted above, the primary mechanism available to achieve vindication of a sullied reputation through the defamation process is an award of damages. This approach to vindication was justified by Lord Hailsham in *Cassell v Broome* as necessary ‘in case the libel, driven underground, emerges from its lurking place at some future date...[to allow the plaintiff] to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge’.⁸²

2.36 While the symbolic value of damages can no doubt be deployed to serve this function, this seems hardly to represent the best means of achieving vindication. There are two core problems with relying on damages to perform this task. The first problem is that of the efficacy of the remedy. The award of damages alone for vindication will not necessarily highlight the errors that have been published. Indeed, when claims are settled it is generally recognised – and enforced as part of the settlement – that some other mechanism should be included to enhance the vindication achieved. This may involve, for example, an agreement that an appropriate correction and/or apology will be published, and perhaps even that an apologetic statement in open court will be made.⁸³ Moreover, when a case does run through the entire process to reach determination by the court, there will inevitably be a substantial time-lag of several months – if not years - between the publication of the statement complained of and the award of damages. It seems obvious that a more effective way of vindicating a person’s reputation is to ensure that the truth is aired and misrepresentations corrected, and that this should be done as swiftly as is possible.

2.37 The second problem with reliance on damages as a means of obtaining vindication is the sheer cost to plaintiffs of achieving that outcome. More accurately, the problem is the risk that the claim will not be successful and that costs must then be carried by the plaintiff, and to a lesser extent the fear that the damages award will be insufficient to meet the proportion of the costs bill that even a successful plaintiff would be obliged to meet. As noted above, the exclusion of the average prospective plaintiff from access to justice in this respect has been emphasised by key participants in the public debate.⁸⁴ It may be apocryphal, but it is often contended that the first question asked by publishers following receipt of a complaint regarding

⁸¹ Speaking after a jury found in favour of his claim, one notable plaintiff emphasised his disappointment that he ‘had to end up in court...[when he] would have been happy to settle for an apology and a public acknowledgement that it was wrong’ – ‘Declan Gormley wins libel case against Sinn Féin’, *BBC Online*, 14 December 2012.

⁸² [1972] AC 1027, at 1071.

⁸³ Clause 1(iv) of the PCC *Editors’ Code of Practice* provides similarly that ‘a publication must report fairly and accurately the outcome of an action for defamation to which it has been a party’.

⁸⁴ See above, at [1.03]

accuracy is whether the aggrieved person can afford to sue and not whether a publication has been properly stood up.⁸⁵ Legal aid is unavailable for defamation claims.

2.38 At first glance, this factor may be thought to be of lesser concern in Northern Ireland than in England and Wales given that the base costs charged by lawyers are very much lower.⁸⁶ Even so, during our pre-consultation discussions the lowest estimate made of the possible costs burden for a plaintiff forced to run a full case – a figure in the high tens of thousands of pounds – would be exorbitantly unaffordable for most people.⁸⁷ In addition, a crucial contrast with England and Wales is that conditional fee agreements (CFAs) – funding devices originally introduced as a means of promoting access to justice for relatively impecunious litigants – are not available as an option for plaintiffs in Northern Ireland.⁸⁸

Social and personal importance of freedom of speech

2.39 The central importance in a democracy of freedom of expression is universally recognised. It is regularly reiterated by European and domestic courts. In *Steel and Morris v United Kingdom*, for example, the European Court of Human Rights noted that it is ‘one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment’.⁸⁹ In *ex parte Simms*, Lord Steyn described the principle as ‘the lifeblood of democracy’, as ‘a safety valve’, and as ‘a brake on the abuse of power’.⁹⁰

2.40 Historically, defamation law in England and Wales and in Northern Ireland could be very easily criticised for striking the balance between reputation and freedom of speech too far in favour of the former. It is important to recognise, however, that the past twenty years have seen significant rebalancing of the law of defamation by the courts in favour of freedom of expression. Most obvious in this respect has been the introduction of the *Reynolds* privilege, but there have been a range of other judicial and statutory interventions. These include the effective capping

⁸⁵ Speaking during the Committee Stage debate on the Defamation Bill, Lord Triesmann noted that ‘when corporations, particularly wealthy corporations, decide to become plaintiffs, defendants cannot match their power with any equality of arms. It is also not at all infrequent that the plaintiff finds that they have no equality of arms with the defendant. If you find yourself contesting one of the major newspaper groups, it will tell you in pretty brusque terms that if you really want to bankrupt yourself, to see yourself and your family in penury for very many years, to lose your house or so on, just come on if you feel strong enough’ – see 741 HLDeb GC442-443, 17 December 2012.

⁸⁶ Estimates varied during our pre-consultation discussions, but the idea that base costs could be as much as four or five times higher in England and Wales than in Northern Ireland was commonplace.

⁸⁷ All estimates were hedged by reference to the particularity of individual cases, but the suggestion of a figure in the low hundreds of thousands of pounds was more commonly suggested for each party to a full trial. This would accord with the reporting of costs incurred in some recent notable actions – see, for example, McBride, ‘£80k awarded against Sinn Féin for malicious libel’, *Belfast Newsletter*, 17 December 2012.

⁸⁸ This factor is also relevant to the contention that the chilling effect created by defamation costs is not as poignant in this jurisdiction – see below, [2.46].

⁸⁹ (2005) 41 EHRR 22, at [87].

⁹⁰ *R v Secretary of State for the Home Department, ex parte Simms* [2000] 1 AC 115, at 126.

of damages in line with awards for non-pecuniary loss in personal injury cases,⁹¹ the imposition of restrictions on standing for certain types of body,⁹² the expansion of the defence of honest comment,⁹³ and the development of the abuse of process jurisdiction that provides for the court to strike out claims where no 'real and substantial tort' is at issue.⁹⁴

2.41 Notwithstanding these reforms, there are few people who could fail to be persuaded that prior to the Defamation Act 2013 the defamation regime could impact on the willingness of publishers to criticise those in positions of power. In a seminal study conducted in the mid-1990s, Barendt et al produced significant evidence of the existence of this chilling effect of defamation law on all branches of the media. Its effects might impact 'directly' on the decision whether to publish or broadcast specific material, or in some cases, 'structurally', to demarcate subjects that are simply never written about because of the inevitability of legal suit.⁹⁵ The clear fact that there was still potential for the misuse of libel law to preclude investigative journalism, to stifle scientific and medical debate, to undermine the important work of human rights organisations and other NGOs, and to invite the strategic legal tourist from abroad has been illustrated forcefully by the Libel Reform Campaign with numerous examples.⁹⁶ It is as yet too early to determine whether the 2013 Act has substantially ameliorated this position in England and Wales.

2.42 In both our pre-consultation evidence-gathering and in the public debate regarding defamation law in Northern Ireland, it has been a frequent argument that the position here remains precarious. The research conducted by Barendt et al found that the impact of defamation law was gradated: while national newspapers considered the law 'irksome', smaller media institutions – such as magazines, book publishers and importantly the regional press – often felt 'acutely vulnerable'.⁹⁷ While the conditions under which that study were conducted are in some respects not immediately comparable to those prevalent in Northern Ireland today, our pre-consultation discussions with journalists and some lawyers suggested that Northern Irish law does bite in a similar manner. We heard some notable examples. Similarly, one respondent to the survey conducted of QUB and UU faculty stated that:

⁹¹ The immediate catalyst for this change was the passing of s.8, Courts and Legal Services Act 1990 which gave the Court of Appeal a discretion to intercede where damages awarded were excessive. See further *Rantzen v Mirror Group Newspapers* [1994] QB 670; *John v Mirror Group Newspapers* [1997] QB 586.

⁹² See above, [2.14].

⁹³ For example, *Branson v Bower* [2001] EWCA Civ 791 saw the courts reflect greater readiness to treat inferences of fact as comment, while in *Lowe v Associated Newspapers* [2006] EWHC 320, Eady J held that there was no need fully to set out the facts on which the comment was based to rely on the defence.

⁹⁴ *Jameel v Dow Jones Ltd* [2005] EWCA Civ 75. See below, [4.13].

⁹⁵ Barendt et al, *Libel and the Media: The Chilling Effect* (Oxford University Press, 1997). One such area of structural chill that the authors identified was the suggestion of exploitative corporate activity. A second area was any allegation of police brutality – (at 192).

⁹⁶ See, for example, the Libel Reform Campaign documents (2009) *Free Speech is Not For Sale*.

⁹⁷ Barendt et al, *Libel and the Media: The Chilling Effect* (Oxford University Press, 1997), at 183.

In my own field...there is a need to be able to publish findings on, for example, pharmaceutical products which may not be welcomed by the manufacturer. The potential for companies (etc) to suppress publication through the threat of legal action (and accompanying financial ruin, regardless of outcome) of the individual scientists needs to be stopped (I am not sure how realistic this fear is, but the fear certainly exists).⁹⁸

Similar points have been made in public debate. The editor of the *Belfast Telegraph*, Mike Gilson, was reported as stating, 'I have edited newspapers in every country of the United Kingdom and the time and money now needed to fight off vexatious legal claims against us here is the highest I have ever experienced'.⁹⁹ Wider points were made about the *potential* for claims deleterious of free speech to be made in future. To the extent that the law allows powerful individuals or corporate entities to cauterise important, warranted comment concerning themselves, their activities, their products or their ideas, it is socially dysfunctional.

2.43 During the public debate on defamation law in Northern Ireland particular emphasis has been placed by some participants on the propensity of Northern Irish politicians to threaten or to bring legal proceedings on account of matters published. Lord Lester suggested that the decision not to adopt the 2013 Act may be 'because politicians in Northern Ireland want to be able to sue newspapers more readily';¹⁰⁰ Viscount Colville asserted that 'many of the Province's politicians are notoriously thin skinned about criticism'.¹⁰¹ Irrespective of the reasons for the original decision not to proceed with the legislative consent motion, such arguments do not accord with the attitude expressed by some Stormont Ministers in recent times.¹⁰²

2.44 This theme was placed in a wider context by participants in our pre-consultation discussions. They highlighted the absence of a formal "Opposition" under the constitutional arrangements made by the Northern Ireland Act 1999. The view expressed was that in such a context the role of the media as the "Fourth Estate" becomes more important, and that the interplay between journalists and politicians almost necessarily becomes more antagonistic than might otherwise be the case.

2.45 Certainly, there have been some notable claims in Northern Ireland involving politicians. Other than those determined one way or the other by the court, it is not possible to state definitively whether any of those claims involved unmeritorious attempts to constrain criticism. It is also very difficult to assess the extent to which the possibility of legal action that does not

⁹⁸ The range of potential repercussions for scientists of over-chilling defamation law was emphasised by Lord Triesmann in the Parliamentary debate on the Defamation Bill – see 741 HLDeb GC442-443, 17 December 2012.

⁹⁹ 746 HLDeb GC334, 27 June 2013 (per Viscount Colville).

¹⁰⁰ McBride, "'Unwise to block free speech law" at Stormont', *Belfast Newsletter*, 18 March 2013.

¹⁰¹ 746 HLDeb GC334, 27 June 2013.

¹⁰² McBride, 'Hamilton: I've an open mind about libel laws', *Belfast Newsletter*, 19 August 2014.

subsequently materialise is raised with the media by politicians. Hence, we offer no conclusions on this theme, other than to note that to the extent that the defamation regime does not militate adequately against abusive threats or actual claims, then the constitutional arrangement at Stormont does generate a particular need to be vigilant.

2.46 One intuitive distinction between Northern Ireland and England and Wales in respect of the chilling effect of the law derives from the fact that the costs regimes between these jurisdictions are very different. Lawyers' base costs are, in the main, very much lower in Northern Ireland.¹⁰³ Conditional fee agreements and "after-the-event" insurance are not permitted under court rules. Hence, lawyers are not able to recover "success fees" and insurance premiums alongside the larger part of their own (already very much lower) costs from a losing defendant-publisher. Insofar as it is the sheer cost of involvement in defamation proceedings that generates much of the chilling effect of the law, this necessarily entails that that effect – and hence the impact of the law on freedom of expression – must in general be weaker in Northern Ireland than it has been in England and Wales. As noted above, however, this is a question of degree. The prospective costs of involvement in defamation proceedings are still high, and – as noted – publishers maintain that they are significantly and unwarrantably constrained. To the extent that the defamation regime might be designed so as significantly to reduce this potential burden – for both plaintiffs and defendants – that would seem important for access to justice.

Freedom of expression and the correction of error

2.47 The importance and value of freedom of expression is not just personal or individual. It is also social in character. This is clear in the emphasis placed on the interests of the wider public in the rendition of the standard arguments from democracy and from truth.¹⁰⁴ This suggests a further respect in which the law of defamation may not adequately secure the provision of full and accurate information on matters of public importance. This is its failure

¹⁰³ An oft-cited statistic is that costs of proceedings in England and Wales are four times as high as the next most expensive European state (Ireland), and 140 times the average cost in other European jurisdictions – see PCMLP (2008) *Comparative Study of Costs of Defamation Proceedings Across Europe*. Available at: [WWW] <http://pcmlp.socleg.ox.ac.uk/> (accessed September 2014). While the sustainability and relevance of this research has been persuasively challenged – see Howarth, 'The Cost of Libel Actions: a sceptical note' (2011) *Cambridge Law Journal*, 70(2), 397-419 – the comparison between England and Wales and Ireland is fair. Our pre-consultation meetings lead us to believe that Northern Irish defamation cases are broadly equivalent in cost to those in the Republic (or even somewhat less expensive). It is perhaps ironic that a number of our pre-consultation discussants highlighted the fact that some defendant-publishers have inflated costs by engaging lawyers from the English bar.

¹⁰⁴ See generally, Barendt, *Freedom of Speech* (2nd edn, Oxford University Press, 2005), ch. 1. These ideas are encapsulated in the comments of Lord Steyn in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 1 AC 115, at 126: 'freedom of expression is, of course, intrinsically important: it is valued for its own sake... but... it is also instrumentally important... first... it promotes the self-fulfilment of individuals in society... secondly, in the famous words of Holmes J... "the best test of truth is the power of the thought to get itself accepted in the competition of the market"... thirdly... the free flow of information and ideas informs political debate... people are more ready to accept decisions that go against them if they can in principle seek to influence them'.

sometimes to ensure the correction of error, with the result that the wider public is often left misinformed by false publications.¹⁰⁵

2.48 This situation arises on account of a number of systemic factors. First, as noted above, limitations on access to justice for plaintiffs can mean that some errors are never challenged. Secondly, the award of damages alone for vindication does not necessarily highlight mistakes that have been published, and if apologies and corrections are made this is sometimes done without what might be considered to be due prominence. Thirdly, the manner in which the *Reynolds* public interest defence currently operates can mask the fact that the impugned publication has not been demonstrated to be true, and thus the plaintiff is left without vindication of reputation.

Importance of Consistency of Law between NI and England & Wales

2.49 One theme in the debate on the future of defamation law in Northern Ireland has been the perceived importance of consistency with England and Wales. Perhaps unsurprisingly, there is a range of views on this point. For some commentators in the public debate and for some of our pre-consultees, consistency appears to be of such imperative importance that the 2013 Act must be adopted forthwith and in full. For other pre-consultees, this theme was at best irrelevant.

2.50 Two preliminary points can be made in this context. The first is that, historically, while the common law dimensions of defamation law have been essentially consistent, Northern Ireland has always tended to lag in the adoption of statutory reforms. The Defamation Act 1952 was assimilated in Northern Ireland only through the Defamation Act (Northern Ireland) 1955. There was a much greater delay in the adoption of elements of the Defamation Act 1996 through a commencement order passed only in 2009 and effective in 2010.

2.51 The second preliminary point is that because in some respects the provisions of the 2013 Act make only limited substantive change to the pre-existing law, consistency between Northern Irish law and that in England and Wales is likely to be maintained irrespective of whether measures equivalent to those stated in the 2013 Act are actively adopted. For instance, even no equivalent of section 2 (the defence of truth) was adopted, the Northern Irish

¹⁰⁵ The imperative of making such corrections is recognised in journalists' own statements of professional ethics – see, for example, the PCC *Editors' Code of Practice*, clause 1(ii) (“a significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and - where appropriate - an apology published”); NUJ *Code of Conduct*, clause 3 (“[a journalist] does her/his utmost to correct harmful inaccuracies”) – although it is a common complaint that such principles are much-honoured in the breach. Interestingly, as regards the ‘Comment is free’ section of its website, *The Guardian* provides an automatic right of reply to any person mentioned in a published article - see [WWW] <http://www.guardian.co.uk/commentisfree/series/response> (accessed September 2014).

common law defence of justification could be expected to develop in large measure in parallel with the English statutory version.¹⁰⁶ The same may be true of the section 4 defence. It would be less true if one was discussing the section 1 serious harm rule, the section 8 single publication rule, or the section 3 honest opinion defence which appear to introduce more substantive changes to the pre-existing law.

2.52 Beyond these preliminary points, one clear advantage of consistency between the jurisdictions is that it becomes possible for Northern Irish judges, lawyers and citizens to revert to interpretations of the law delivered by English judges when seeking to understand the legal position in Northern Ireland. When the law is the same as, or very similar to, that of another jurisdiction in which litigation is more common, it becomes possible to “piggy-back” on the clarification of the law achieved over time by the courts.

2.53 A similar point can be made from the perspective of the publisher who seeks to understand in advance whether he or she is complying with the laws that might apply to a publication. Naturally, the applicability of the same or similar laws will make compliance a significantly less cumbersome task. During our pre-consultation discussions, it was suggested to us that the additional legal risk associated with divergent laws may prompt some national publishers to withdraw from the Northern Irish market with a concomitant impact on media plurality in Northern Ireland. Such a viewpoint has also been expressed often by Lord Black, an executive director of the Telegraph Media Group.¹⁰⁷ An alternative, albeit equally concerning prospect is that national publishers may adopt the “halfway house” of reducing significantly their coverage of Northern Irish affairs in order to limit their perceived exposure to less favourable laws. This view clearly presumes that the impact of the 2013 Act in favour of freedom of expression will be very substantial.

2.54 Some pre-consultees who contested the importance of consistency between Northern Ireland and England and Wales pointed out media publications sold in Northern Ireland are as likely to be cross-border publications (that is, publications sold in both Northern Ireland and the Republic of Ireland) as they are to be UK national publications. Correspondingly, it was contended that Northern Irish law should strive equally to be consistent with the Irish law of defamation.

2.55 We suspect that this last argument was presented less with a serious intent, and more to assert that striving for consistency per se is a “red herring”. We tend to concur in that view, and propose that the test as to whether a reform is desirable for introduction in Northern Ireland

¹⁰⁶ See below, [3.05] et seq.

¹⁰⁷ See, for example, 746 HLDeb GC336-338, 27 June 2013.

should be its prospective impact on the respective values of access to justice, freedom of expression and the protection of reputation. Consistency is certainly desirable, but not at the expense of adopting legal changes that might otherwise be rejected.

Rights-context: balancing free speech and reputation

2.56 Under the European Convention on Human Rights and the Northern Ireland Act 1999, legislators in Northern Ireland are obliged to develop the law in a manner consistent with human rights standards. The same obligation rests on courts in their development and application of the law under the Human Rights Act 1998. In the context of defamation, wherein both Article 10 ECHR protection for freedom of expression and Article 8 ECHR protection for reputation can be relevant, this will entail a need to balance the competing rights and interests.¹⁰⁸

2.57 The courts have developed a “new methodology” for judges engaged in the analysis of cases involving the balancing of rights. This was set out by the House of Lords in *Re S (a child)*.¹⁰⁹ This new methodology is now often applicable in the assessment of defamation claims.¹¹⁰ Where both rights are engaged, the court must begin from the position that neither right has any presumptive precedence. Article 10 ECHR can no longer be considered a “trump card”. While Lord Nicholls spoke in *Reynolds* of the appropriate starting point being freedom of expression and the need for the common law to be developed and applied in a manner consistent with Article 10 ECHR,¹¹¹ courts now articulate the need to find a balance between privacy and expression rights.¹¹²

2.58 In court, this methodology operates at two levels. First, the relevant aspects of the law must be assessed in the abstract to ensure that they allow scope for a balancing of rights to be undertaken. There is less room for general rules to determine outcomes in particular cases, unless imposed by primary legislation. “Bright-lines” do not sit well with rights-based

¹⁰⁸ See, for example, *White v Sweden* (2008) 46 EHRR 3; *Pfeifer v Austria* (2009) 48 EHRR 175; *Karako v Hungary* (2011) 52 EHRR 36; *A v Norway* 28070/06 [2009] ECHR 580 (9 April 2009); *Rukaj v Greece* 2179/08 [2010] ECHR 905 (21 January 2010); *Petreco v Moldova* (decision of 30 March 2010); *Saaristo v Finland* 184/06 [2010] ECHR 1497 (12 October 2010).

¹⁰⁹ [2004] UKHL 47, at [17] (*per* Lord Steyn). This requires that an intense focus on the comparative importance of the specific rights being claimed in the individual case is undertaken. The justification for interfering with or restricting each right must be taken into account, and finally the proportionality test applied to each.

¹¹⁰ See, for example, *Clift v Slough Borough Council* [2009] EWHC 2375; *Flood v Times Newspapers* [2009] EWHC 2375 (QB); *Brady v Norman* [2010] EWHC 1215 (QB); *Ronaldo v Telegraph Media Group Ltd* [2010] EWHC 2710 (QB). It might be expected that the courts will adopt a similar approach in defamation cases to that which they have developed for claims for misuse of private information. The process is likely to be rather more convoluted in defamation cases however. Defamation is a relatively technical area of law, wherein claims will generally be rather more complicated. An individual case might raise any of a myriad of different legal questions depending on the underpinning factual circumstances, each of which will require its own rendition under the new methodology. Moreover, a range of such issues may arise in one and the same case.

¹¹¹ *Reynolds v Times Newspapers* [2001] 2 AC 127, at 200.

¹¹² *Hunt v Times Newspapers Ltd* [2012] EWHC 1220 (QB), at [13]; *Flood v Times Newspapers Ltd* [2009] EWHC 2375, at [149] (*per* Tugendhat J).

jurisprudence. There must generally be scope for the particular circumstances of each case to influence outcomes.¹¹³

2.59 Secondly, judges will undertake an intense scrutiny of the facts of the case. On one side will be the plaintiff's Article 8 interest in reputation. This may be nugatory, or if it does exist, may be more or less strong depending on a range of variables. The nature of the information, the seriousness of the allegation, the credibility of the publisher, and the mode of and audience for the communication may all play a part in determining the extent to which the defamatory imputation might affect the plaintiff's perception of the harm caused to his or her reputation.¹¹⁴ Expression interests on the other side of the balance can also be more or less strong. Speech on a matter of scientific or political controversy will be accorded significant weight, bolstered by the cumulative interest on the part of the wider public in receiving information on important matters of public concern. Where the subject matter of the story concerns the private life of a celebrity, the Article 10 ECHR interest is likely to be less strong. There is a real likelihood that the coming years will see significant questions asked of disparate aspects of the law of defamation as the implications of the new approach are worked through.¹¹⁵

2.60 The ramifications of this approach for the legislative exercise are noteworthy, even though – in scenarios where Convention rights must be balanced against one another – legislators are allowed a 'wide margin of appreciation in determining the steps to be taken'.¹¹⁶ What they should not do lightly is exclude from the outset one or more rights from the court's consideration of how a given case should be determined. The law must provide an opportunity for the intense scrutiny on the facts of the individual case to be undertaken.

¹¹³ Although, note the approach adopted by the majority of the Strasbourg court in *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21.

¹¹⁴ For instance, the plaintiff would know that a publication in the *Belfast Telegraph* was more likely to be taken seriously by readers than the equivalent in an esoteric blog; a false allegation of paedophilia against a nursery worker would likely have more profound psychological consequences for the subject than inaccurate suggestions of sexual profligacy on the part of a celebrity.

¹¹⁵ For some possible outcomes in this respect, see Mullis and Scott, 'The Swing of the Pendulum: Reputation, Expression and the Recentering of English Libel Law' (2012) *Northern Ireland Legal Quarterly*, 63(1), 27-58.

¹¹⁶ *Johnston v Ireland* (1987) 9 EHRR 203, at [55].

CHAPTER 3: SUBSTANTIVE LAW AND THE IMPACT OF THE 2013 ACT IN ENGLAND AND WALES

3.01 The aim of this chapter is to review the impact of the Defamation Act 2013 on the substantive law of defamation in England and Wales, and to proffer consultation questions based on this analysis. Specifically, this involves consideration of the revision of the three main defences in sections 2, 3 and 4 of the Act; the expansion of qualified privilege in sections 6 and 7 (including the introduction of a new qualified privilege for peer-reviewed statements in scientific or academic journals), the elaboration of new defences for intermediaries in sections 5 and 10, and a modernising change to the law on slander in section 14.

3.02 The Defamation Act 2013 abolishes the three main common law defences, replacing each of them with a relabelled statutory variant. While the shift in nomenclature to that of “truth” is perhaps the most significant element in the section 2 restatement of the common law defence of justification, honest comment and *Reynolds* privilege have both been revised in more substantial fashion. Indeed, the Act has intertwined these two defences for reasons that are not altogether clear, but would appear to be based on pragmatism. This chapter suggests that the approach reflected in the 2013 Act may result in under-protection of certain forms of legitimate speech, and that certain “tweaks” to the structure of sections 3 and 4 may therefore be desirable.

3.03 As regards the extension of privilege, the paper notes the general concern that some privileges may be susceptible to challenge for failure adequately to allow consideration of the protection of reputation under Article 8 ECHR. It then reviews and comments on sections 6 and 7 of the Defamation Act 2014, commenting that the extension of privileges that they represent may be a second best solution to real problems.

3.04 In terms of the new defences for intermediaries, the paper sets out sections 5 and 10 of the Act. The consideration is broadly positive, although it notes criticism of section 5. The paper moots one addendum to section 5.

The defence of justification (truth)

3.05 As far as statements of fact are concerned, the primary defence to a claim for defamation is, and should be, that of “justification” or “truth”. Such a defence has been a mainstay of the law of defamation. Section 2 of the Defamation Act 2013 recasts and abolishes the pre-existing defence in England and Wales.

Common law

3.06 In Northern Irish law, it is a defence against a claim for defamation for a defendant-publisher to establish that an allegation is “substantially true”. This defence is known as “justification”, although it has long been thought that it might be better labelled the defence of “truth”.¹¹⁷ The underpinning idea is that a person should not be entitled to recover damages for injury to a reputation which he or she does not deserve.¹¹⁸ The defendant can rely on the defence of justification if he proves that ‘the main charge, or gist, of the libel’ is true.¹¹⁹ This is an objective requirement: it is the facts as they were, not the facts as they appeared to be to the defendant or to some other observer that must be proven.

3.07 The burden of proof as to whether an imputation is true lies on the defendant-publisher. Once it has been shown by the plaintiff that an imputation that identifies him or her has been published, and that it is defamatory, the law presumes that the allegation is false. There are policy arguments either way on the question of whether this presumption is appropriate. Notably, in the United States, the burden lies on the plaintiff to prove falsity. In *Jameel v Wall Street Journal Europe*, however, the Court of Appeal refused permission to argue the point before the House of Lords.¹²⁰ The court remarked that the suggestion that the presumption should be reversed was a far-reaching submission which would require a major change in the law of defamation.¹²¹ The European Court of Human Rights has confirmed the validity of the current approach.¹²² The Defamation Act 2013 makes no change in this respect.

3.08 While the defence is straightforward in concept, its application can be extremely complicated. In large part, this is due to the relationship between the defence and the highly complex rules regarding, first, the determination of meaning, and secondly the pleading of the defence.¹²³

3.09 The defence has been refined over time by way of statutory amendment. In Northern Ireland, section 5 of the Defamation (Northern Ireland) Act 1955 provides that:

¹¹⁷ See, for example, *Report of the Committee on Defamation* (Faulks Committee), Cmnd.5909 (1975), at [129]. Section 16 of the Irish Defamation Act 2009 renamed the defence as “truth”. The concern is that the name “justification” may convey to lay people the idea that there must be some good reason for the publication, whereas in fact even truths published maliciously are not actionable.

¹¹⁸ *McPherson v Daniels* (1829) 10 B & C 263, at 272; *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, at [33].

¹¹⁹ *Sutherland v Stopes* [1925] AC 47 (HL); *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, at [34].

¹²⁰ [2005] EWCA Civ 74.

¹²¹ [2005] EWCA Civ 74, at [55].

¹²² *EuropaPress Holding DOO v Croatia* (2011) 53 EHRR 27, at [63]; *Steel and Morris v UK* (2005) 41 EHRR 22, at [93].

¹²³ See Parkes and Mullis (eds), *Gatley on Libel and Slander* (12th edn, London: Sweet & Maxwell, 2013), at [11.5]-[11.16]; see further, ch. 5.

*in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.*¹²⁴

Section 2 of the 2013 Act

3.10 In the 2013 Act, the common law defence of justification is recast as the defence of truth in section 2. The section provides that:

- (1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.
- (2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.
- (3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.
- (4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed.

3.11 The Act abolishes the common law version of the defence for England and Wales.¹²⁵ This will generate a measure of uncertainty while the courts confirm whether or not pre-existing rules and precedents remain part of the law. Beyond that, the shift in nomenclature to that of "truth" is perhaps the most significant element in the section 2 restatement of the common law defence. The Explanatory Notes to the Act emphasise that the new provision, in large part, emulates the existing law set out in *Chase v News Group Newspapers Ltd.*¹²⁶ The word "imputation" is used rather than the more common alternatives of "meaning" or the "words or statement complained of". This is probably more apt given that it encompasses not just natural and ordinary meanings but also meanings that can only be conveyed by inference. Subsections (2)-(4) reproduce section 5 of the Defamation Act 1952 (the equivalent in English law of section 5 of the 1995 Act).¹²⁷ The older version is abolished.

¹²⁴ The equivalent measure for England and Wales is to be found in s.5 of the Defamation Act 1952.

¹²⁵ s.2(4).

¹²⁶ [2002] EWCA Civ 1772

¹²⁷ The new statutory language is slightly altered in that it provides that the defence shall not fail if the words not proved true do not *seriously harm* the defendant's reputation, rather than that - as under the current Northern Irish law - they do not *materially injure* the plaintiff's reputation. This change in language reflects the language used in section 1 of the 2013 Act. It may entail that the defence is somewhat easier for plaintiffs to rely on in future.

3.12 The new statutory defence might have gone further as regards the particular rule set out in subsections (2)-(4). The new defence does not extend to cover situations where there is a single defamatory imputation that may have several different “shades of meaning” as had been proposed in clause 5(3) of Lord Lester’s Private Member’s Bill. Neither does it equate to the defence of “contextual truth” that can be seen in section 26 in the Uniform Defamation Acts in Australia.¹²⁸ During our pre-consultation discussions there was no criticism offered of either the existing law or the restatement of the defence in section 2. We do not propose to consult on possible variants of the section 2 reform.

3.13 Given the equivalence between the existing common law defence of justification and the statutory version of the defence in section 2 of the 2013 Act, the maintaining of broad consistency between the law in England and Wales and that in Northern Ireland is likely to be possible irrespective of whether a rule equivalent to section 2 is introduced. If a provision similar to section 1 of the 2013 Act is introduced into Northern Irish law, then for the reason given in the Explanatory Notes to the 2013 Act, it would seem sensible for the language of section 5 of the Defamation (Northern Ireland) Act 1955 to be revised in line with section 2(2)-(4) of the 2013 Act.

Consultation question

Q 6: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 2 of the Act, the “defence of truth”, to be introduced into Northern Irish law?

The defence of honest comment (honest opinion)

3.14 An important distinction in the law of defamation is that between statements of fact and expressions of opinion or comment. As regards opinion or comment, the primary defence to a claim for defamation is that of “honest comment” or “honest opinion”.¹²⁹ Such a defence has been a mainstay of the law of defamation.

¹²⁸ The Australian defence is available where, in addition to the defamatory imputations of which the plaintiff complains, the impugned publication carried one or more other imputations that can be shown to be substantially true, and the imputations complained of do not cause further harm to the plaintiff’s reputation given the substantial truth of these “contextual imputations”.

¹²⁹ The traditional name for the defence – ‘fair comment’ – has been gradually superseded. In *Spiller v Joseph* [2010] UKSC 53, at [117], the Supreme Court preferred ‘honest comment’. That nomenclature had previously been adopted by the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL), at 165 and by the Privy Council in *Panday v Gordon* [2005] UKPC 36. The defence was termed ‘honest opinion’ by the Court of Appeal in *British Chiropractic Association v Singh* [2010] EWCA Civ 350, at [36]. The new statutory defence introduced in England and Wales by section 3 of the Defamation Act 2013 is also labelled ‘honest opinion’. ‘Honest opinion’ is used in the NZ Defamation Act 1992, in the uniform Australian legislation, and in section 20 of the Irish Defamation Act 2009. In this paper, “honest comment” is used in respect of the common law position (the current law in Northern Ireland), whereas “honest opinion” is used when discussing s.3 of the Defamation Act 2013.

3.15 The right to comment honestly on important matters has been considered a necessary ‘bulwark of free speech’.¹³⁰ The defence of honest comment is intended to promote vigorous free speech, so that ‘a critic need not be mealy-mouthed in denouncing what he disagrees with...[but rather is] entitled to dip his pen in gall for the purposes of legitimate criticism’.¹³¹ There are matters with which the public is legitimately concerned, and on such matters, it is desirable that any person should be able to comment freely, and even harshly, so long as he or she does so honestly and without “malice”.¹³² Over time, the defence has been less effective in promoting free speech than might have been hoped. This is almost certainly due to the high degree of legal technicality that has grown up around its various components. The Explanatory Note to the Defamation Bill proposed by Lord Lester expressed this view succinctly, arguing that honest comment suffers from ‘complex case law limiting [its] practical value’.¹³³ Yet, the rationale that underpins the honest comment defence is such that, perhaps especially in the context of online and scientific discussions, the circumstances in which it is available should be as clear as possible.¹³⁴

3.16 In *Spiller v Joseph*, the Supreme Court recently restated the five elements that must be proven by a defendant who wishes to rely upon the common law defence of honest comment.¹³⁵ This restatement continues to represent the state of the law regarding the defence in Northern Ireland. The five elements are: (1) the imputation must be recognisable as comment, as distinct from an imputation of fact; (2) the comment must be on a matter of public interest; (3) the comment must be based on facts which are true or protected by privilege; (4) the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based, and (5) the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views. In addition, if “malice” can be proven by the plaintiff – meaning that he or she can show that the defendant-publisher was not expressing a genuine opinion – this will defeat the defence of honest comment.

3.17 The Supreme Court emphasised ‘recognisability as comment’ as the key aspect of the defence. Hence, the underlying principle would appear to be that the airing of one’s view is not the same as asserting a fact, and – importantly – it is not treated as such by those to whom it is communicated. Where facts only are stated, truth is asserted; readers are not invited to demur. Where defamatory opinion is concerned, provided the inferential nature of the assertion is clear

¹³⁰ Faulks Committee, Cmnd.5909 (1975), at [151].

¹³¹ *Tse Wai Chun Paul v Albert Cheng* [2000] HKCFA 86, at [20] (per Lord Nicholls).

¹³² The “malice” which rebuts the defence does not mean ill-will or spite, but rather lack of belief in the opinion expressed.

¹³³ *Explanatory notes to the Lester Bill*, at [62].

¹³⁴ The need for the law to accommodate new forms of speech online was explicitly recognised in *Spiller v Joseph* [2010] UKSC 53, at [99] (per Lord Phillips MR) and [131] (per Lord Walker). On its importance in the context of scientific discussions, see Joint Committee on the Draft Defamation Bill, HL Paper 203 & HC 930, at [47].

¹³⁵ [2010] UKSC 53. The leading speech was given by Lord Phillips.

and the facts on which the opinion is based made available, the possibility of reasonable readers being misled by the expressed viewpoint does not arise in the same way.

3.18 It can be inferred that Parliament, when recasting the defence in the Defamation Act 2013, did not consider the restatement by the Supreme Court to be sufficient to make the defence more useable going forward. Section 3 of the Act recasts and abolishes the pre-existing defence in England and Wales. It makes one obvious and apparently significant change: the removal of the requirement that the comment be on a matter of public interest. It also appears to make a less obvious, but also potentially significant change relating to the knowledge of underpinning facts that the defendant-publisher is required to show. The impact of section 3 on the law of England and Wales is considered below.

3.19 A further view expressed and consulted on below is that the revision of the honest comment defence might sensibly have gone further in two respects, and by so doing made it clearly more valuable to the average person who comments on facts that he or she reasonably believes to be true. Such extensions might be of especial utility to those commenting on social media.¹³⁶

Common law: recognisability as comment

3.20 One source of the perceived over-technicality of the honest comment defence has been the absence of clarity in the distinction between statements of fact and the expression of opinion. It is a fundamental rule that the honest comment defence applies to comment and not to imputations of fact. If the imputation is one of fact, the defence must be justification or privilege. Hence, the recognisability of a statement as comment is a key determinant of the availability of the defence. This recognition of words as comment or as fact is based on an assessment of how they would strike the ordinary, reasonable reader.¹³⁷ The context in which the words complained of appear can be very important.¹³⁸

3.21 In common parlance, “comment” and opinion” are often equated with “evaluation” of some kind. As a matter of law, however, this is an over-simplification. Rather, comment is understood as ‘something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc’.¹³⁹ It may involve an evaluation, but it may also encompass the drawing of a further factual conclusion (insofar as this can be recognised to be an inference drawn from other, underpinning facts).

¹³⁶ The need for the law to accommodate new forms of speech online was explicitly recognized in *Spiller v Joseph* [2010] UKSC 53, at [99] (per Lord Phillips) and [131] (per Lord Walker).

¹³⁷ *Grech v Odhams Press* [1958] 1 QB 276 (CA), at 313; *London Artists v Littler* [1969] 2 QB 375 (CA), at 398.

¹³⁸ See, for example, *Convery v Irish News Ltd* [2008] NICA 14.

¹³⁹ *Branson v Bower* [2001] EWCA Civ 791; 32; *Skrine v Euromoney Publications Plc* [2001] EWCA Civ 1479, at [26].

3.22 A fact inferred from other facts can be verifiable or unverifiable. This has sometimes been treated as the dividing line between statements of fact and comments, with defendants being required to prove the truth of inferences of verifiable fact.¹⁴⁰ Other courts have been less hesitant to include inferences of verifiable fact within the concept of comment.¹⁴¹ The matter was considered by the Court of Appeal in *British Chiropractic Association v Singh* after counsel presented a direct challenge to the “unwarranted verifiable fact test” that had been deployed by the judge at first instance.¹⁴² The court considered that there was “force in [this] critique”, but proceeded to determine the appeal on a different basis.¹⁴³ Hence, the view expressed was *obiter dictum*. In *Spiller v Joseph*, Lord Phillips was more circumspect. He noted the divergence of opinion in the jurisprudence, called for ‘careful consideration’ of the matter, and questioned whether it was satisfactory for the concept of comment to extend so far. This consideration too was clearly given *obiter dictum*.¹⁴⁴

3.23 The editors of *Gatley on Libel and Slander* highlighted this issue as one ‘ripe for judicial determination’.¹⁴⁵ They leaned to the view that inferences of verifiable fact should be included within the defence, stating that:

*if the ability of an audience to recognise words as comment is key, then – as per the views expressed by counsel in Singh – it is not obvious why the verifiability or otherwise of the inference should be important. In counterpoint to Lord Neuberger’s (sic) concern as to the relative influence of allegations of fact (even if inferential only), it might be suggested that prejudiced or unwarranted inferences from underpinning facts – when recognisable – are generally appreciated as such with the ‘fallout’ landing on the speaker rather than his or her subject.*¹⁴⁶

It may be sensible in terms of the clarity of the law going forward for this matter to be established by statute in Northern Ireland.¹⁴⁷ This is the first of the possible additional reforms –

¹⁴⁰ See, for example, *Hamilton v Clifford* [2004] EWHC 1542 (QB); *British Chiropractic Association v Singh* [2009] EWHC 1101 (QB), at [14].

¹⁴¹ *Jeyaretnam v Goh Chok Tong* [1989] 1 WLR 1109 (Privy Council).

¹⁴² [2010] EWCA Civ 350, at [8]. Counsel asserted that the judge at first instance had been wrong to treat “verifiable fact” as being antithetical to comment.

¹⁴³ [2010] EWCA Civ 350, at [18]-[30].

¹⁴⁴ [2010] UKSC 53, at [114].

¹⁴⁵ Parkes and Mullis (eds), *Gatley on Libel and Slander* (12th edn, London: Sweet & Maxwell, 2013), at [12.10].

¹⁴⁶ Parkes and Mullis (eds), *Gatley on Libel and Slander* (12th edn, London: Sweet & Maxwell, 2013), at [12.10].

The comment should have referred to Lord Phillips.

¹⁴⁷ It may be that this change is included in the changes made to the law in England and Wales by section 3 of the 2013 Act. The Explanatory notes to the Act state that ‘as an inference of fact is a form of opinion, this would be encompassed by the defence’ (at [21]). There is no distinction drawn between inferences of verifiable and inferences of unverifiable fact. This is suggestive of an inclusive approach, although such a note can hardly be determinative of the question of whether the courts will in future take one view or the other on the question of whether that dichotomy provides the fault line between opinion and fact.

perhaps in this case a confirmation of the extant law – mooted above. If the defence were confirmed as encompassing inferences of verifiable fact, this would remove one level of complexity in its deployment. The fact that an inference has been drawn is obviously easier to establish than the fact that an inference of a specific type has been drawn. Attention would then turn to the underpinning facts from which the inference had been drawn.

Common law: the “truth” of underpinning facts

3.24 One of the five elements of the defence at common law is that the comment must be based on underpinning facts that are either true or protected by privilege. Where reliance is placed on “true” underpinning facts, their truth must be demonstrated by the defendant-publisher. If the truth of underpinning facts cannot be demonstrated, then the defence will fail. Similarly, the omission of some important qualifying fact that would falsify or alter the complexion of the facts that are stated will see the defence fail. Should a commentator wish to rely upon a privileged statement, he or she must give a fair and accurate account of the occasion on which the statement was made.

3.25 It is arguable that the basis for comment should extend also to include facts that the defendant-publisher “reasonably believed to be true” at the time of publication. That is, that the defence should be available when the factual basis for opinion expressed was either true, privileged, or reasonably believed to be true.

3.26 This is a matter of no small importance. Such a change could do much to alleviate the predicament of social media commentators. Such individuals commonly rely on facts published by someone else. It is clear that what can be expected of people reading the *Times* or watching the *Channel 4 News* should be very much less than what is expected of those writing for mainstream media. It should be perfectly acceptable for a person to tweet on the basis of something watched on *Newsnight* or read on the *Guardian* website. It is certainly reasonable that this should occur given the legitimate expectation that mainstream media publishers – at least those possessing a reputation for quality journalism – will have exercised a degree of professionalism and legal compliance in developing their output. Indeed, having people spread the word, in particular on matters of public importance, is precisely why journalism happens and why it is needed.

3.27 The introduction of such extended protection would not mean that the subject of a libel would have no avenue to seek redress. In the modern media environment, blog posts, tweets, links, likes and so on are the reasonably foreseeable result of the initial publication. As such, all harm caused by secondary publication is already attributable in law to the original publisher. An individual’s Article 8 right to reputation would be adequately protected.

3.28 The extension of the honest comment defence in such a manner was recognised as an option by the Ministry of Justice during the development of the Defamation Act 2013. Alongside publishing the Draft Defamation Bill, it consulted on the advisability of allowing an honest opinion defence on the basis of an “honest mistake”.¹⁴⁸ In the face of majority support for this development among consultees, the Government decided not to proceed. It contended that such a provision could complicate the law and undermine the need for a factual basis to the opinion.¹⁴⁹ The first view is contestable;¹⁵⁰ the second no more than a statement of the obvious. The Ministry of Justice also suggested that the offer of amends procedure would normally be available in such circumstances. This too is conjecture. Moreover, many plaintiffs would still likely be incentivised to sue by the expectation of compensation under the offer of amends process, whereas a broader honest opinion defence would likely deter the launching of legal action. Hence, in England and Wales, the utility of the honest opinion defence to social media commentators remains significantly weaker than might have been the case.

Section 3 of the 2013 Act: general

3.29 Section 3 of the Act renames and recasts the common law defence of honest comment as honest opinion.¹⁵¹ The intention underpinning the revisions was ‘to strip out unnecessary technical difficulties and make the renamed defence...user-friendly...[to] update and simplify...clarifying what the defendant must prove...and stating the elements of the defence in clear terms’.¹⁵² Section 3 provides:

- (1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
- (2) The first condition is that the statement complained of was a statement of opinion.
- (3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.
- (4) The third condition is that an honest person could have held the opinion on the basis of—
 - (a) any fact which existed at the time the statement complained of was published;
 - (b) anything asserted to be a fact in a privileged statement published before the statement complained of.

¹⁴⁸ Ministry of Justice, *Draft Defamation Bill: Consultation Paper CP3/11* (Cm 8020, Norwich: TSO), at [46]. Clearly, “honesty” is a standard more easily met than that of “reasonableness” considered here.

¹⁴⁹ Ministry of Justice, *Government’s Response to the Report of the Joint Committee on the Draft Defamation Bill* (Cm 8295, London: Stationery Office, 2012), at [36].

¹⁵⁰ In principle, it would become necessary for a plaintiff to show how his or her belief in the truth of the underpinning facts was reasonable. In practice, however, it could be expected that easily understood “rules of thumb” would develop and would deter the launching of claims in the first place.

¹⁵¹ The common law defence is abolished by s.3(8).

¹⁵² *Explanatory notes to the Lester Bill*, at [68].

(5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.

(6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person (“the author”); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.

(7) For the purposes of subsection (4)(b) a statement is a “privileged statement” if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—

- (a) a defence under section 4 (publication on matter of public interest);
- (b) a defence under section 6 (peer-reviewed statement in scientific or academic journal);
- (c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);
- (d) a defence under section 15 of that Act (other reports protected by qualified privilege).

(8) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.¹⁵³

3.30 The Explanatory Notes to the 2013 Act state that the new defence ‘broadly reflects the current law while simplifying and clarifying certain elements’.¹⁵⁴ Compared with the common law defence, however, there are three notable innovations in the statutory variant. These are considered in the following sections.

Section 3 of the 2013 Act: excision of the “public interest” criterion

3.31 The first point of difference with the common law is that the new statutory defence makes no reference to the need for the comment to be on a matter of public interest.¹⁵⁵ Some commentators have voiced concern regarding this shift.¹⁵⁶ In contrast, the Joint Committee on the Draft Defamation Bill considered the public interest dimension ‘an unnecessary

¹⁵³ In Northern Irish law, the equivalent to section 6 of the Defamation Act 1952 that is repealed by section 3(8) is to be found in section 6 of the Defamation (Northern Ireland) Act 1955. This concerns the extent of proof required in respect of claims arising from words consisting partly of allegations of fact and partly of expression of opinion.

¹⁵⁴ Explanatory notes to the Defamation Act 2013 at [19].

¹⁵⁵ One rider here is that if a defendant seeks to defend an opinion that was based on a privileged statement listed in s.3(7), this will necessarily reintroduce a public interest dimension. This is most obvious in respect of opinions based on facts defended under the s.4 defence as it is a gateway requirement for that defence that the statement complained of was or formed part of a publication on a matter of public interest.

¹⁵⁶ Phillipson, ‘The “Global Pariah”, the Defamation Bill and the Human Rights Act’ (2012) *Northern Ireland Legal Quarterly*, 63(1), 149-186; ‘Free comment on private lives’, *Inform*, 31 March 2012. This critique related specifically to an earlier version of the proposed statutory defence that also excluded any explicit requirement that the publication refer to the underpinning facts.

complication'.¹⁵⁷ In light of the general movement of the common law defence over time, this change can be seen as essentially unproblematic.¹⁵⁸ Fundamentally, the basis for excluding liability in respect of opinions is their recognisability as no more than an individual's viewpoint. Whether those viewpoints relate to matters of public interest would seem to be neither here nor there.

Section 3 of the 2013 Act: knowledge of underpinning facts

3.32 A second point of difference is that the statutory defence would appear to allow a defendant publisher to rely on any fact that existed at the time of publication. This contrasts markedly with the position at common law. In order to rely on the defence at common law, the defendant must have known the facts on which the opinion was based, at least in general terms, at the time the comment was made.¹⁵⁹ This provision was introduced notwithstanding Lord Phillip's reflection in *Spiller v Joseph* that such a change 'would radically alter the nature of the defence'.¹⁶⁰ At first glance, the statutory version of the defence would seem to enable a defendant who has published an opinion on the basis of wholly false facts to succeed in the defence at trial if he or she is able to discover some other true fact of which he or she was previously ignorant (relating perhaps to a wholly different and distant phase of the plaintiff's life) on which an honest person could have based the comment.

3.33 It may be that the section 3(3) condition will impose an effective limitation on the mischief that may be caused by this seeming change. The publication must still, notwithstanding the defendant's own ignorance of them, somehow have indicated to readers the previously unknown facts on which the purported opinion was based.¹⁶¹ In a real case, it may be serendipitous indeed for the defendant to be able to locate an exculpatory factual basis for his or her comment that could be drawn within whatever referential language was used in the original publication. Nevertheless, for a statutory amendment that was intended to make the defence more simple and user-friendly, it seems likely that section 3 will require significant litigation and judicial interpretation before its contours are fully understood.

¹⁵⁷ Joint Committee on the Draft Defamation Bill, HL Paper 203 & HC 930, at [69a].

¹⁵⁸ In *Spiller v Joseph* [2010] UKSC 53, Lord Phillips acknowledged that in this context 'the concept of public interest has been greatly widened' (at [101]), and suggested - albeit without discussion - that 'there may be a case for widening the scope of the defence of fair comment by removing the requirement that it must be on a matter of public interest' (at [113]).

¹⁵⁹ *Lowe v Associated Newspapers Ltd* [2006] EWHC 320 (QB), at [74].

¹⁶⁰ [2010] UKSC 53, at [110].

¹⁶¹ It may also be possible for a plaintiff, at least in principle, to prove that the defendant did not have the newly found facts in mind when publishing the opinion, and hence that he or she did not in fact hold the opinion. Even this option - potentially available under section 3(5) - would be fraught. The fact of the matter would be that the defendant did hold the opinion, albeit on a different, erroneous basis.

Section 3 of the 2013 Act: privileged statements

3.34 A third point of difference with the common law is that - by a combination of sections 3(4)(b) and 3(7) - the new statutory defence expands the types of privileged statement on which an honest opinion can be based. Most notably, and for the first time, the definition of a “privileged statement” on which an opinion can be based includes statements that would have a section 4 defence (or in common law parlance, statements benefitting from *Reynolds* privilege). This is unproblematic in itself, but two potential concerns are worthy of note.

3.35 The first concern is that the language of section 3(4)(b) – specifically, the use of ‘before’ – would appear to preclude the defence of a comment on privileged facts that was published *contemporaneously* with the privileged statement. This might occur, for example, when a press release is issued alongside a larger document, or where a journalist or blogger comments on facts that he or she has published in the same article. These are not infrequent events. As a matter of principle, it is difficult to explain why such opinions should not be protected by the Act. Why the law should treat contemporaneous publication of facts mixed with opinion any differently from a press release published one minute after a report, or a comment piece published moments after a news item or investigative findings is unfathomable.

3.36 Two possible explanations as to why section 3(4)(b) was written in this manner can be suggested. The first is that it is a quirk of the legislative history of the Act. Notably, there was no insistence that the privileged statement be published *before* the statement complained of in the Private Member’s Bill introduced by Lord Lester.¹⁶² That Bill would have included facts defensible under a public interest defence as a legitimising basis for comment. When the Government published its Draft Bill, however, the range of privileged statements that could be relevant for the purposes of the honest comment defence was more limited. Statements privileged under the equivalent of section 4 were not to be included in the section 3 defence, and the Draft Bill adopted the ‘before’ terminology. This was attributed to a desire not to over-complicate the relationship between the two defences.¹⁶³ Other forms of privileged statements are unlikely often to include commentary or critique alongside the privileged content. Hence, the language of the provision merely reflected the then-expected actuality. The Government then reneged on its position, and included facts asserted in statements privileged by section 4. Thus, it seems that the requirement that the privileged statement be published ‘before’ the statement complained of may have been carried through by way of oversight from the Government’s Draft Bill. If this was the explanation, then that element should have been addressed when it was decided to re-extend the bases on which opinions might be expressed to include statements defensible under section 4. In terms of possible reform of Northern Irish

¹⁶² cl.3(4)(b).

¹⁶³ Ministry of Justice, *Draft Defamation Bill: Consultation Paper CP3/11* (Cm 8020, Norwich: TSO), at [47].

law, the matter could be addressed by the substitution of “before, or contemporaneously with” for “before” in section 3(4)(b).

3.37 A second possible explanation is that the authors of the Bill did contemplate this theme, but considered the apparent lacuna unimportant in light of the extension of the section 4 defence to cover opinions. If that was the case, then the question of whether any Northern Irish equivalent to section 4 should extend to cover expressions of opinion becomes more important.¹⁶⁴

3.38 The second concern that arises from the interplay between section 3(4)(b) and section 3(7) is that it leaves the defence unavailable to some commentators. The statutory arrangement makes sense from the perspective of the publisher who mixes fact and comment (section 4), or who him- or herself follows-up on publication of (what turn out to be false) facts with further, separate commentary (section 3). It does not make sense from the perspective of the publisher who relies on facts published by someone else when commenting. This is, of course, the common position of the social media commentator. That publisher is in effect asked to prove the section 4 public interest defence by proxy. This is an impossible feat. That such difficulties would be faced was recognised by the Government during the development of the Act.¹⁶⁵

3.39 There seems little reason to exclude such a commentator from the protection of the law. A preferable option may be to reserve section 4 for the defence of statements of fact on matters of public interest, for the definition of “privileged statement” in section 3(7) to exclude reference to section 4,¹⁶⁶ and instead for the bases for comment in section 3(4) to include ‘any fact that the publisher “reasonably believed” to be true at the time the statement complained of was published’. The defence would then be available when the factual basis for opinion expressed was either true, privileged, or reasonably believed to be true.

Consultation questions

Q 7: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 3 of the Act, the “defence of honest opinion”, to be introduced into Northern Irish law? Would it instead be preferable to continue with the common law approach as restated in *Spiller v Joseph*?

¹⁶⁴ See below, [3.54].

¹⁶⁵ Ministry of Justice, *Government’s Response to the Report of the Joint Committee on the Draft Defamation Bill* (Cm 8295, 2012), at [41].

¹⁶⁶ See below, [3.54].

Q 8: Should it be confirmed that the defence of honest comment/honest opinion extends to encompass inferences of verifiable fact from underpinning facts?

Q 9: Should it be possible for a defendant-publisher to rely on the defence of honest comment/ honest opinion where he or she held a “reasonable belief” in the truth of the underpinning facts on which a defamatory comment was made?

Q 10: If it is desirable for a rule equivalent to section 3 of the 2013 Act to be introduced into Northern Irish law, would it be desirable for the provision to be amended so as to allow opinions published contemporaneously with privileged statements to benefit from the defence?

Q 11: If it is desirable for a rule equivalent to section 3 of the 2013 Act to be introduced into Northern Irish law, would it be desirable for the definition of “privileged statements” in section 3(7) to exclude reference to section 4, and instead to include in section 3(4) reference to ‘any fact that he or she reasonably believed to be true at the time the statement complained of was published’?

***Reynolds* privilege for responsible communication (publication on matter of public interest)**

3.40 In *Reynolds v Times Newspapers Ltd*,¹⁶⁷ the House of Lords established a new variant of qualified privilege. This downplayed the traditional “duty and interest” test, and emphasised instead the questions of whether the publication was on a matter of public interest, and whether it was the product of responsible journalism. In addition, a variant of *Reynolds* privilege developed to cover ‘reportage’.¹⁶⁸

3.41 This development was heralded as a “constitutionalisation” of defamation law.¹⁶⁹ Lord Nicholls explained that the decision would allow ‘appropriate weight’ to be given to ‘the importance of freedom of expression by the media on all matters of public concern’.¹⁷⁰ In the ensuing years, however, the *Reynolds* privilege was pleaded on a sizeable number of occasions, but rarely successfully. The issue returned to the highest court twice more, in

¹⁶⁷ [2001] 2 AC 127 (HL).

¹⁶⁸ Reportage is ‘a special, and relatively rare, form of *Reynolds* privilege’ (*Flood v Times Newspapers Ltd* [2012] UKSC 11, at [77] (per Lord Phillips MR)). It provides an exception to the general “repetition rule” which treats the repetition of a defamatory statement as being equally liable to a claim for defamation as the original statement. The doctrine provides that a journalist can be protected by *Reynolds* privilege if he or she reports the positions adopted in an ongoing dispute, without adopting or endorsing any of the allegations made by the parties to the dispute.

¹⁶⁹ Loveland, ‘The Constitutionalisation of Political Libels in the English Common Law’ [1998] *Public Law* 633.

¹⁷⁰ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, at 204-205.

Jameel v Wall Street Journal Europe,¹⁷¹ and in *Flood v Times Newspapers Ltd.*¹⁷² These later decisions reiterated the development following a period when judges at first instance were said to have engaged in an over-heavy scrutiny of journalistic practices.¹⁷³ They emphasised the flexibility of the new principles, and the scope afforded under them to editorial judgment. Notwithstanding such decisions, the defence has been criticised as being cumbersome to deploy in practice.

3.42 In England and Wales, the transposition of the *Reynolds* privilege into statutory form in section 4 of the Defamation Act 2013 has seen a notable change, at least in terms of form. In the discussion that follows, the possible interpretations of the new section 4 defence are noted, although it is suggested that the defence will almost certainly be interpreted in keeping with the common law *Reynolds* privilege. One significant divergence is noted however: the extension of the new form “public interest” defence to cover opinions as well as statements of fact. The conceptual awkwardness of this approach is noted, and an alternative approach mooted.

Common law

3.43 The common law *Reynolds* privilege which represents the current law in Northern Ireland rests on three key questions: whether the subject matter of the publication was of sufficient public interest; whether it was reasonable to include the particular material complained of, and whether the publisher had met the standards of responsible journalism or publication.

3.44 It is not possible exhaustively to delimit the range of subject matters that fall within the amorphous concept of the ‘public interest’. In its ruling in *Reynolds*, the Court of Appeal explained that the public interest consisted of:

*matters relating to the public life of the community and those who take part in it, including...activities such as the conduct of government and political life, elections and public administration...[and] more widely...the governance of public bodies, institutions and companies which give rise to a public interest in disclosure, but excluding matters which are personal and private, such that there is no public interest in their disclosure.*¹⁷⁴

The concept of the public interest is a familiar one in the jurisprudence on defamation, copyright, misuse of private information, confidence and other causes of action. It is rarely a problematic area in the application of the law to specific circumstances.

¹⁷¹ [2006] UKHL 44.

¹⁷² [2012] UKSC 11.

¹⁷³ *Jameel v Wall Street Journal* [2006] UKHL 44, at [38] (per Lord Hoffmann).

¹⁷⁴ [2001] 2 AC 127, at 176-177 (per Lord Bingham).

3.45 Under *Reynolds* privilege, the fact that the general subject matter of the article is of proper public interest does not necessarily mean that the defence applies to the entire contents. It must have been reasonable to include the material complained of as part of the overall picture. In *Jameel*, Lord Hoffmann explained that:

*The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article.*¹⁷⁵

Judges should be careful, however, to leave room for editorial discretion over precisely how a story is best told. This need for restraint was a key theme of their Lordships' speeches in *Flood v Times Newspapers Ltd.*¹⁷⁶ Lord Dyson considered it an "important principle" that:

*although the question of whether the story as a whole was a matter of public interest must be determined by the court, the question of whether defamatory details should have been included is often a matter of how the story should have been presented. On that issue, allowance should be made for editorial judgment.*¹⁷⁷

In making this point, he was reiterating a commonly stated judicial aversion to over-reaching the judicial function.¹⁷⁸

3.46 Most difficulty in the application of the *Reynolds* privilege has centred on the concept of "reasonableness" of the impugned journalism or communication more broadly. In *Reynolds*, Lord Nicholls famously set out a non-exhaustive list of ten circumstances which would be relevant to the issue of whether the standards of responsible journalism had been met in a given case. A key theme in *Jameel* was the insistence that judges should not treat Lord Nicholls' listing as a series of hurdles against which the defendant-publisher conduct should be assessed. Ultimately, what is required is compliance with the standards of ethical journalism, or circumspection and care in communications more broadly.

¹⁷⁵ [2006] UKHL 44, at [51].

¹⁷⁶ [2012] UKSC 11.

¹⁷⁷ [2012] UKSC 11, at [192].

¹⁷⁸ See, for example, *Jameel v Wall Street Journal Europe* [2006] UKHL 44, at [51] (per Lord Hoffmann) and [108] (per Lord Hope); *Flood v Times Newspapers* [2012] UKSC 11, at [137] (per Lord Mance), and [199] (per Lord Dyson).

Section 4 of the 2013 Act

3.47 Section 4 of the Defamation Act 2013 introduces the defence of “publication on a matter of public interest”. This replaces and abolishes the *Reynolds* privilege in England and Wales. Section 4 provides:

- (1) It is a defence to an action for defamation for the defendant to show that—
 - (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
 - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
- (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
- (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.
- (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement, as it considers appropriate.
- (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.
- (6) The common law defence known as the *Reynolds* defence is abolished.

3.48 Three main points can be highlighted regarding the new statutory defence. The first concerns the concept of the public interest in section 4(1)(a). The concept is not defined in the Defamation Act 2013. It might be expected, however, that it will operate in essentially the same way as that in the common law. This was the view expressed in the Explanatory Notes to the 2013 Act.¹⁷⁹ Also familiar to the common law is the further idea that either the whole or part only of the publication need be on a matter of public interest, such that the specific statement complained of may not itself fall into that category. This reflects the fact that editorial judgment may see some items included for journalistic reasons that it may not be strictly “necessary” for the public to learn. The requirement that judges recognise editorial freedom is emphasised in section 4(4).

¹⁷⁹ Explanatory Notes to the Defamation Act at [30].

3.49 The second comment on the defence relates to section 4(1)(b). Until late in the legislative process, the wider elements of the section 4 defence of publication on a matter of public interest were essentially unremarkable. They did little more than reiterate *Reynolds privilege* in statutory form. For that reason, it was criticised by campaigners who proposed a defence based on a good faith or absence-of-malice standard equivalent to that in US law.¹⁸⁰ The defence ultimately passed by Parliament, however, is different. The requirement that a defendant demonstrate that publication was “responsible” has been jettisoned. Instead, under section 4(1)(b), a publisher must in future show that he or she ‘reasonably believed that publishing the statement complained of was in the public interest’. This new form of defence was initially mooted by Lord Lester during the Second Reading debate on the Defamation Bill in the House of Lords.¹⁸¹ It was then considered by the Joint Committee on Human Rights in its review of the proposed legislation.¹⁸²

3.50 Due to the fact that there has not yet been a case brought in England and Wales in which a section 4 defence has been argued, it is not yet possible to state authoritatively how the statutory version of the law will be interpreted. There are two tenable interpretations. The first option would see the “reasonable belief” test require only a belief that is based on rational grounds. This would entail that the defence would fail only in the unusual circumstance where the belief was proven false, capricious or irrational. The practical ramifications of this interpretation would be worrying. Interpreted in this way, the concept of “reasonableness” would differ little from that of good faith or honesty, and would clearly be too generous to publishers.

3.51 Almost certainly, however, the courts will adopt the second possible interpretation. This would entail that the assessment of whether a journalist’s belief was reasonable would involve essentially the same analysis as that which is applied currently under the responsible journalism element of the *Reynolds* privilege. The question would be how the belief was reasonable rather than how the journalism was responsible, but a well-resourced journalist could not reach a reasonable belief that publication was in the public interest without first having done what an ethical journalist should do to stand up a story.

3.52 Clearly, this second approach represents the intention of Parliament when passing the 2013 Act. During the Committee stage debate, Lord McNally affirmed that ‘in determining whether in all the circumstances the test is met, we would expect the courts to look at many of the same sorts of considerations as they have done before’, and that ‘the courts will need to

¹⁸⁰ See, for example, the Libel Reform Campaign’s *Briefing for second reading debate* - available at: [WWW] <http://tiny.cc/inktyw> (accessed September 2014).

¹⁸¹ 739 HL Deb 953-954, 9 October 2012. Its authorship is attributed to Sir Brian Neill.

¹⁸² [2012-13] *Seventh Report: Legislative Scrutiny - Defamation Bill*. HL Paper 84; HC 810.

look at the conduct of the publisher in deciding that question'.¹⁸³ Similarly, the Explanatory Notes to the Act explain that the new defence 'is based on... and... is intended essentially to codify the common law defence...[while] the current case law would constitute a helpful (albeit not binding) guide to interpreting how the new statutory defence should be applied'.¹⁸⁴

3.53 It is highly probable that the new defence can be expressed succinctly in the same words as Lord Brown deployed in *Flood v Times Newspapers Ltd* when depicting the *Reynolds* privilege:

*could whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?*¹⁸⁵

As such, and subject to the discussion below regarding applicability of the defence opinion, the law in Northern Ireland might be expected to develop consistently with that under the 2013 Act irrespective of whether an equivalent statutory version was enacted. There may yet be some powerful symbolic value in adopting the section 4 approach, however, as the test very clearly emphasises the importance of public-spirited journalism in a democratic society.¹⁸⁶

3.54 The final point regarding the section 4 defence concerns the extension of the defence beyond statements of fact only to the expression of opinion achieved through section 4(5). That provision explains that 'for the avoidance of doubt', the section 4 defence can be used irrespective of whether the impugned statement is a statement of fact or an expression of opinion. In this regard, section 4 is novel. While the Court of Appeal in *British Chiropractic Association v Singh* regarded it as an open question whether *Reynolds* applied also to opinion,¹⁸⁷ both Lord Nicholls and Lord Hobhouse had stated in *Reynolds* itself that statements of opinion were to be protected, if at all, only by honest comment.¹⁸⁸ The position taken in the House of Lords is preferable. Section 4(5) adopts the Court of Appeal's view and in so doing elides the important distinction between statements of fact and opinions.

3.55 The scenario in which a defence may be available in light of the extension of the section 4 defence to cover expressions of opinion is that where a publisher offers criticism on the basis of facts that prove to be wrong. This might happen most often, where a publication mixed

¹⁸³ 741 HLDeb GC534, 19 December 2012. This was also the view expressed by the Joint Committee on Human Rights (at [28]).

¹⁸⁴ *Explanatory Note to the Defamation Act 2013*, at [29] and [35].

¹⁸⁵ *Flood v Times Newspapers* [2012] UKSC 11, at [113].

¹⁸⁶ The "reasonable belief" standard is familiar from the Public Interest Disclosure Act 1998, and in (as yet not in force) statutory reforms to section 55 of the Data Protection Act 1998.

¹⁸⁷ [2010] EWCA Civ 350, at [31].

¹⁸⁸ [2001] 2 AC 127, at 201 and 193-5 (*per* Lord Nicholls), and 237-8 (*per* Lord Hobhouse).

Reynolds-privileged facts with comment thereon. Under the common law, neither the defence of honest comment nor a *Reynolds* defence could succeed in protecting the comment in such a scenario, in the first case because the underpinning facts were wrong and in the second because opinions were not protected.

3.56 It may be that this extension of the defence to cover the expression of opinion as well as statements of fact explains why the Act adopted the new form of the defence over the statutory recasting of the *Reynolds* privilege that was seen in the earlier versions of the Bill. A key complaint regarding the envisaged statutory version of the *Reynolds* defence was that it included reference to the “tone” of the publication as one factor relevant to responsibility (this had been one of Lord Nicholls’ original ten factors). Arguably, this factor jarred with judicial assertions of the importance of editorial freedom. Certainly, it was understood to do so by some eminent supporters of the Bill, and a primary purpose of the shift to the new reasonable belief defence in section 4 was to ensure that editorial freedom should be sufficiently taken into consideration.¹⁸⁹ It is possible that the jettisoning of the reference to “tone” in the revised defence took on such importance for the supporters of the Bill due to the intention to allow section 4 to apply to both statements of facts and opinions. Opinions expressed in vituperative fashion would otherwise fall foul of the test under section 4, even though they might be acceptable under section 3. If this is the explanation, then the concern was a feature of an underlying mistake; the extension of section 4 to cover the expression of opinion is conceptually flawed.¹⁹⁰

3.57 There are two dimensions to the concept of “tone” in *Reynolds* privilege. On one hand, tone might refer to the degree to which the piece mixed fact with (vituperative) comment. On the other hand, tone might refer to the degree of certainty with which an allegation is levelled. The original proposal for a statutory defence had specifically cited the issue of whether the publication ‘draws appropriate distinctions between suspicions, opinions, allegations and proven facts’. These additional words spoke immediately to the issues of determination of meaning and justification (*Chase* levels of meaning), and were clearly intended to emphasise that circumspection in the levelling of allegations made is a marker of responsibility. This must remain a factor in the determination of whether the requisite belief under section 4 is “reasonable”. Publishers can be emotive, haranguing and cruel while publishing content that is identifiable as opinion only, but they should not be permitted to defend serious allegations of fact without evidence by reference to “editorial freedom”. One problem with the statutory provision, therefore, is that it implies that allegations of fact at lower degrees of certainty (*Chase* levels 2 or 3) and highly vituperative comment thereon can be mixed, when such vituperation

¹⁸⁹ 741 HLDeb GC533, 19 December 2012 (per Lord McNally).

¹⁹⁰ This is not to say that the same publication might not include distinct statements of which some may be defended as a statement of fact under section 4, while others are defended as expressions of opinion under section 3.

must almost necessarily transform the allegation of fact into a firm allegation of guilt (*Chase* level 1).

3.58 It may be preferable for the distinction between statements of fact and comments to be maintained through the separation of the applicable defences. As discussed above, if an equivalent to section 4 is introduced into Northern Irish law, one option would be to excise section 4(5), to remove reference to the section 4 defence in section 3(7), and to include in the section 3(4) bases for comment ‘any fact that the publisher “reasonably believed” to be true at the time the statement complained of was published’. Conversely, in the interests of consistency between Northern Ireland and England and Wales, it may be thought better simply to adopt the statutory version of the defence outright.

Consultation questions

Q 12: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 4 of the Act, the “defence of publication on a matter of public interest”, to be introduced into Northern Irish law? Would it instead be preferable to continue with the common law approach as restated in *Jameel v Wall Street Journal Europe* and *Flood v Times Newspapers Ltd*?

Q 13: If it is desirable for a rule equivalent to section 4 of the 2013 Act to be introduced into Northern Irish law, would it be desirable for the extension of the defence to opinions in section 4(5) to be excised?

Q 9 redux: Should it be possible for a defendant-publisher to rely on the defence of honest comment/honest opinion where he or she held a “reasonable belief” in the truth of the underpinning facts on which a defamatory comment was made?

Privilege

3.59 Privileges provide a defence to a defamation claim where a person has published a statement on a privileged occasion. There is a wide range of distinct privileges deriving from both common law and a range of statutes. Privilege can be “absolute”, such as when a person gives evidence in court or speaks during Parliamentary debate, or “qualified”. Qualified privilege can be defeated by proof of “malice”. Some variants of qualified privilege relate to the reporting of things said at different types of event, and as such limit the scope of liability under

the repetition rule.¹⁹¹ Some variants of qualified privilege require that the defendant-publisher is willing to publish a statement by way of explanation or contradiction.

3.60 The Defamation Act 2013 extends the range of privileges in two ways. First, in section 6 it introduces a new form of privilege applicable to statements published in peer-reviewed in scientific or academic journals. Secondly, in section 7 it refines and extends a number of pre-existing statutory privileges.

3.61 One further introductory point can be made regarding privilege. It has been suggested that some variants of privilege may be susceptible to challenge by reference to the Convention-protected right to reputation.¹⁹² The essential problem is that the blanket nature of privileges often will not allow for any assessment of the relative strength of the competing interests in the particular case. Privileges accord a presumptive priority to the Article 10 ECHR interest. Each privilege will require assessment over time to determine whether the policy reflected in its structure – in each case, a casting of the perceived relative importance of free speech and reputation – remains Convention-compliant.¹⁹³

3.62 An exercise of this type has been undertaken with regard to the absolute privilege granted to MPs in respect of statements made in Parliament, which found that the current rule does not breach either Article 6 or Article 8 of the Convention.¹⁹⁴ This ruling has been subject to criticism,¹⁹⁵ and – perhaps importantly – it was determined before the recognition of the Convention status of the right to reputation. In another context, the new jurisprudence has already dictated that a different approach must be taken to the existence of qualified privilege where the defendant is a public authority.¹⁹⁶ This may be only the first in a series of developments in this area of the law.

3.63 It is arguable that the availability of privilege in any particular case must become more fact-sensitive, and that the courts must find means of weighing the plaintiff's Article 8 rights in the balance. To have only proof of malice as a restriction on the defence does not provide an avenue for the strength of the reputation interest to be taken into account. It may be that for

¹⁹¹ See above, at [2.12].

¹⁹² Mullis and Scott, 'The Swing of the Pendulum: Reputation, Expression and the Recentering of English Libel Law'. (2012) *Northern Ireland Legal Quarterly*, 63(1), 27-58.

¹⁹³ *Clift v Slough Borough Council* [2009] EWHC 1550, at [112].

¹⁹⁴ *A v United Kingdom* (2003) 36 EHRR 51. Notably, there was some measure of dissension among the judges of the Strasbourg court in their respective analyses of the justifiability of an absolute immunity.

¹⁹⁵ One commentator, for example, has noted that "this might not be the final word on the compatibility of Parliamentary immunity with human rights. It is even arguable that a domestic court could reopen the question... the case should spur the Commons to consider reform, either by creating internal procedures that allow individuals some form of redress for serious abuses of privilege, or by creating a mechanism whereby privilege could be suspended in certain situations... there is much that could be done to square parliamentary immunity with Arts 6 and 8 without risking the freedom of debate within the Chamber" - see Barber, 'Parliamentary immunity and human rights' (2003) *Law Quarterly Review*, 119(Oct), 557-560, at 559.

¹⁹⁶ *Clift v Slough Borough Council* [2009] EWHC 1550 and 2010] EWCA Civ 1484.

reporting privileges, it will be deemed sufficient that the plaintiff's Article 8 interest could be pursued through a claim against the primary exponent of the defamatory allegation (that is, the person whose statement is being reported).¹⁹⁷ This option is obviously not available for other forms of privilege (for example, that in section 6).

Section 6 of the 2013 Act: peer-reviewed statements in scientific or academic journals

3.64 Section 6 of the 2013 Act reflects one of the primary aims of the libel reform movement, that being to alleviate the constraint imposed by defamation law on scientific discourse. It provides that:

- (1) The publication of a statement in a scientific or academic journal (whether published in electronic form or otherwise) is privileged if the following conditions are met.
- (2) The first condition is that the statement relates to a scientific or academic matter.
- (3) The second condition is that before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by—
 - (a) the editor of the journal, and
 - (b) one or more persons with expertise in the scientific or academic matter concerned.
- (4) Where the publication of a statement in a scientific or academic journal is privileged by virtue of subsection (1), the publication in the same journal of any assessment of the statement's scientific or academic merit is also privileged if—
 - (a) the assessment was written by one or more of the persons who carried out the independent review of the statement; and
 - (b) the assessment was written in the course of that review.
- (5) Where the publication of a statement or assessment is privileged by virtue of this section, the publication of a fair and accurate copy of, extract from or summary of the statement or assessment is also privileged.
- (6) A publication is not privileged by virtue of this section if it is shown to be made with malice.
- (7) Nothing in this section is to be construed—
 - (a) as protecting the publication of matter the publication of which is prohibited by law;
 - (b) as limiting any privilege subsisting apart from this section.
- (8) The reference in subsection (3)(a) 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.

¹⁹⁷ It is also possible that reliance could be placed on the requirement that what was published was relevant and not excessive.

3.65 As can be read off the face of the section, the provision accords privilege where two conditions are met. The first is that the statement must relate to ‘a scientific or academic matter’.¹⁹⁸ Secondly, before publication, the statement must have been subject to ‘an independent review of the statement’s scientific or academic merit’.¹⁹⁹ This review must have been carried out by the editor of the journal, and one or more persons with expertise in the scientific or academic matter concerned. Fair and accurate copies, extracts from or summaries of such statements are also protected,²⁰⁰ as are any assessments made by the reviewers provided that such assessments are published in the same journal and were written in the course of the review.²⁰¹ The privilege is defeated if the statement can be shown to have been published with malice.²⁰²

3.66 Plainly, much scientific and academic speech is highly important, and its suppression due to the unwarranted defamation chill is a pressing social problem.²⁰³ Hence, there is great merit in the goal of facilitating free speech in this context.

3.67 Nevertheless, the approach taken to address the problem reflected in section 6 is open to criticism. A first preliminary criticism is that there is necessarily a measure of uncertainty created by the language used in the new provision. The Act does not define ‘scientific or academic matter’ or ‘expertise’. The first term could be understood in a very broad manner. It is unclear, for example, whether any quality threshold is implied. “Expertise” is also an obviously nebulous concept. The scope of the provision will be determined by litigation. The second preliminary concern is that, in terms of the sustainability of the provision, it is potentially problematic that only proof of malice should defeat the privilege. As discussed above, a defence designed in this way may not allow for an appropriate balance to be struck between the rights and interests protected under Article 8 ECHR and Art 10 ECHR.

3.68 Beyond this, section 6 can be criticised further on account of having done both too little and too much. In the former respect, it is notable that the privilege applies only to peer-reviewed publications that meet the conditions set out in subsections (2) and (3). It is not a general protection for academic speech. Section 6 would not have assisted any of the defendants in the recent scientific *causes célèbres*. In *Bowker v RSPB*, for instance, the defendant was sued in respect of emails critical of a paper written by the plaintiff.²⁰⁴ In *British Chiropractic Association v Singh* and *Rath v Guardian Newspapers* [2008] EWHC 398 (QB), the

¹⁹⁸ s.6(2).

¹⁹⁹ s.6(3).

²⁰⁰ s.6(5).

²⁰¹ s.6(4).

²⁰² s.6(6).

²⁰³ Joint Committee on the Draft Defamation Bill, HL Paper 203 & HC 930, at [47].

²⁰⁴ [2011] EWHC 737 (QB).

defendants were sued in respect of newspaper articles.²⁰⁵ In *El Naschie v MacMillan Publishers Ltd*, the statements complained of were published in an academic journal but in the editorial section, and the case turned on the integrity of editorial self-publication and peer review, not a scientific or academic matter.²⁰⁶ In the abortive case of *GE v Thomsen*, the claim was brought in respect of comments made at an academic conference,²⁰⁷ while the doctor and researcher Peter Wilmschurst was sued in respect of, *inter alia*, statements he made in a radio broadcast. When academics speak in the media or communicate their research through other less formal means than a peer-reviewed journal, they will have to rely on relevant general defences. The privilege cannot attach to a statement in a book, even if peer-reviewed. It would likely not attach to a statement that impugned the *bona fides* or competence of the plaintiff.²⁰⁸

3.69 Simultaneously, section 6 can be criticised as having done too much due to the fact that it is by no means obvious why scientific speech should be considered worthy of greater protection than is accorded to other forms of important speech on matters of public interest. Hence, it is unclear why it should necessarily be treated differently.

3.70 Extending qualified privilege to statements in peer-reviewed publications may amount to little more than a “sticking plaster” approach. It may have been an easy option for legislators who have moved to protect a seemingly neatly circumscribed mode of publication while leaving the wider problem unaddressed. It is a provision that implicitly decries the difficulty of deploying the primary defamation defences. Contributions to academic or scientific discourse might be thought, quintessentially, to be of such a nature as to attract the defences of honest comment/honest opinion or justification. In light of these concerns, a preferable way forward may be to ensure that such primary defences are so readily usable as to deter attempts to bully through the threat of legal action. Failing that, adoption of even this partial solution to the problem of the chilling effect on scientific speech must be seen as a positive step.

Section 7 of the 2013 Act: extension of privilege

3.71 Section 7 of the Defamation Act 2013 is a lengthy provision that makes a series of refinements of and extensions to pre-existing statutory privileges set out in the Defamation Act 1996. For instance, section 7(1) amends section 14(3) of the 1996 Act to extend the absolute privilege applying to fair and accurate contemporaneous reports of court proceedings to essentially all domestic and international courts established under domestic laws or

²⁰⁵ [2010] EWCA Civ 350 and [2008] EWHC 398 (QB) respectively.

²⁰⁶ [2012] EWHC 1809 (QB).

²⁰⁷ A range of documents associated with this case can be accessed at [WWW]

<http://www.propublica.org/documents/item/ge-v-thomsen-a-british-libel-case> (accessed September 2014).

²⁰⁸ See, for instance, *El Naschie v MacMillan Publishers* [2012] EWHC 1809, at [10] (per Sharp J).

international agreements.²⁰⁹ Subsections (3)-(10) make a number of amendments to the range of qualified privileges set out in Part 2 of Schedule 1 to the 1996 Act that require the defendant-publisher to publish a reasonable letter or statement by way of explanation or correction when requested to do so. Various parts of section 7 also extend protections already afforded to fair and accurate copies of or extracts of certain types of documents also to fair and accurate summaries of those documents. Protections afforded to fair and accurate reports of various public proceedings in the UK and EU are extended to the reporting of equivalent events anywhere in the world. This includes the fair and accurate reporting of public meetings, press conferences and the proceedings of scientific or academic conferences and associated material held anywhere in the world.

3.72 Section 7 can be seen as an exercise in “reasonable housekeeping”. The refinements and extensions of privilege are for the most part unproblematic. It is worth noting, however, the potentially quite significant extent to which at least some of these revisions cut into the repetition rule. As noted above, cases may arise in which courts are asked to consider the extent to which the structure of a given privilege adequately permits the balancing of reputational and free speech interests.

Consultation questions

Q 14: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 6 of the Act, the qualified privilege for statements in peer-reviewed scientific or academic journals, to be introduced into Northern Irish law?

Q 15: If the 2013 Act is not adopted in its entirety, would it be desirable for the extension and clarification of various privileges set out in section 7 of the Act to be introduced into Northern Irish law?

Defences for Intermediaries

3.73 One feature of defamation law is that any person involved in a chain of publication is understood to be separately a “publisher”. Traditionally, this brought printers, distributors, retailers and the like into consideration as potential defendants alongside the more obvious authors, editors and publishers. Which potential defendant(s) would be sued then became a matter of choice for a plaintiff. This element of the law generates a problem from a free speech perspective in that many such “secondary publishers” or “intermediaries” have little stake in the content of what has been published. Their decision as to whether to continue in the chain of

²⁰⁹ s.7(1) (amending s.14(3) of the 1996 Act).

publication is ostensibly a straightforward cost-benefit exercise that can be significantly influenced by any threat of legal action.

3.74 This issue had been ameliorated to some extent in English law by the introduction of section 1 of the Defamation Act 1996. This provides that a person has a defence to defamation proceedings if he or she shows that (a) he or she was not the author, editor or publisher of the statement complained of; (b) reasonable care was taken in relation to its publication, and (c) he or she did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement. This is the defence of innocent dissemination. A particular problem that the Defamation Act 2013 was intended to address is the risk that online intermediaries may prefer to take down content posted by other parties who use their services rather than face potential liability themselves as secondary publishers. In this respect, a further defence is set out in European law and is available under Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 SI 2013/2002. This provides that

Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where—

(a) the service provider—

(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider.

Thus, where a post is uploaded to a website by an identifiable person, the existing law provides that the host will have a defence only in the absence of knowledge on their part of the defamatory statement.

3.75 Two provisions in the 2013 Act are of particular value to such intermediaries. First, the lengthy section 5 provides a new defence for website operators in respect of statements posted on their sites by third parties.²¹⁰ Section 5 provides that:

²¹⁰ s.5(2). Sensibly, given the fast changing nature of internet platforms, ‘website operator’ is not defined in the Act. The range of platforms in existence makes it almost inevitable, however, that the meaning of the words will be litigated.

- (1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.
- (2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.
- (3) The defence is defeated if the claimant shows that—
- (a) it was not possible for the claimant to identify the person who posted the statement,
 - (b) the claimant gave the operator a notice of complaint in relation to the statement, and
 - (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.
- (4) For the purposes of subsection (3)(a), it is possible for a claimant to “identify” a person only if the claimant has sufficient information to bring proceedings against the person.
- (5) Regulations may—
- (a) make provision as to the action required to be taken by an operator of a website in response to a notice of complaint (which may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal);
 - (b) make provision specifying a time limit for the taking of any such action;
 - (c) make provision conferring on the court a discretion to treat action taken after the expiry of a time limit as having been taken before the expiry;
 - (d) make any other provision for the purposes of this section.
- (6) Subject to any provision made by virtue of subsection (7), a notice of complaint is a notice which—
- (a) specifies the complainant’s name,
 - (b) sets out the statement concerned and explains why it is defamatory of the complainant,
 - (c) specifies where on the website the statement was posted, and
 - (d) contains such other information as may be specified in regulations.
- (7) Regulations may 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 purposes of this section or any provision made under it.
- (8) Regulations under this section—
- (a) may make different provision for different circumstances;
 - (b) are to be made by statutory instrument.
- (9) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(10) In this section “regulations” means regulations made by the Secretary of State.

(11) The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice in relation to the posting of the statement concerned.

(12) The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.

3.76 The second new provision that is relevant in this context is section 10. This 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 the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.

Taken together, these provisions significantly extend the existing protection available to website operators in respect of posts by identifiable posters. Where posters are not identifiable, the effect of the Act is to encourage website operators voluntarily to disclose their identity and contact details.

3.77 The section 5 defence is available unless the plaintiff shows that: (a) it was not possible for him to identify the person who posted the statement; (b) he gave the operator a notice of complaint in relation to the statement, and (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.²¹¹ The new defence applies in respect of posts by identifiable individuals even where the website operator has knowledge of the post, provided that he is not responsible for the statement. Consequently, the website operator can safely leave up such a post, unless and until a court orders its removal under section 13 of the Act. Where the website operator acts as a moderator by, for example, adding or deleting posts, section 5(12) makes clear that the defence is not defeated by reason only of that fact.²¹²

3.78 Under section 5(7), the notice of complaint given by the plaintiff should (a) include the complainant's name; (b) set out the statement concerned explaining why it is defamatory of the complainant; (c) specify where on the website the statement was posted, and (d) such other information as may be specified in regulations. Critically, the notice need not engage substantively with the question whether the statement is in fact defamatory. This approach can be criticised on the basis that a website operator should not be required to reveal identity details

²¹¹ s.5(3).

²¹² Where the moderation involves editing or even deletion of part of the post, however, knowledge may stray into participation, and the website operator may become liable as a primary publisher.

or take down the statement complained of on the basis of “half the story”. Nevertheless, it has the merit of placing the responsibility on the website operator to investigate if it wishes to leave the statement up. Knowledge should import some responsibility; it is not unreasonable to require a website operator to take steps to ascertain the truth of an allegation that it is knowingly publishing. Somewhat surprisingly, the Act is silent as to the action required of a website operator in response to a notice of complaint. Section 5(5) provides, however, that regulations may specify the action required, and that such specification may include, in particular, ‘action relating to the identity or contact details of the person who posted the statement and action relating to its removal’. Regulations have now been introduced that elaborate a complex scheme for securing the “safe harbour”.²¹³

3.79 As regards anonymous or pseudonymous posts, section 10 makes it significantly more difficult to proceed against online intermediaries. Precisely what issues a court will consider in determining whether it was reasonably practicable to bring a claim against the primary publisher is not clear, however, and remains to be determined through litigation.

3.80 In principle, the effect of sections 5 and 10 is significantly to improve the position of website operators that publish third party material. Whether or not the third party publisher is identifiable, knowledge of the defamatory nature of the material does not in itself defeat the defence, and – in respect of unidentified posts – provided the website operator acts promptly to notify the plaintiff of the third party’s identity or takes the statement down, it has little to fear by way of liability. The guidelines published under section 5, however, have been criticised as ‘cumbersome and of questionable benefit’.²¹⁴ One commentator took the view that ‘for those wishing to reduce risk and costs, [the process] will almost certainly not be worth the hassle...those who care passionately about freedom of expression and are willing to take risks to further that objective may think about it a little longer’.²¹⁵

3.81 While there is clearly merit in these provisions, it is notable that highly defamatory and indefensible postings will often remain visible pending determination of any claim brought against the author. In this respect, it is perhaps regrettable that Parliament has not imposed on website operators an obligation to append a notice of complaint alongside statements that they choose to leave up. Such an obligation had been proposed by the Joint Committee on the Draft Defamation Bill.²¹⁶ It would have had the merit of alerting any readers to the fact that the statements were contested. This possibility was rejected by the Government following discussions with internet companies on the purported basis that significant practical and

²¹³ The Defamation (Operators of Websites) Regulations 2013 SI 3028/2013.

²¹⁴ Bedat, ‘Defamation Act 2013: the Section 5 Regulations, cumbersome and of questionable benefit?’, *Inform*, 7 March 2014.

²¹⁵ Hurst, ‘Defamation Act 2013: Section 5, it’s decision time for website operators’, *Inform*, 6 January 2014.

²¹⁶ Joint Committee on the Draft Defamation Bill, HL Paper 203 & HC 930, at [104].

technical difficulties would leave it unworkable in practice.²¹⁷ Arguably, this is to make the perfect the enemy of the good.

Consultation questions

Q 16: If the 2013 Act is not adopted in its entirety, would it be desirable for the new defence for website operators set out in section 5 of the Act to be introduced into Northern Irish law? If so, should this include an obligation for website operators to append a notice of complaint alongside statements that are not taken down?

Q 17: If the 2013 Act is not adopted in its entirety, would it be desirable for the new defence for secondary publishers set out in section 10 of the Act to be introduced into Northern Irish law?

Slander

3.82 Section 14 of the 2013 Act makes two changes to the law of slander, modernising the law in an obviously sensible manner. Section 14 provides that:

- (1) The Slander of Women Act 1891 is repealed.
- (2) The publication of a statement that conveys the imputation that a person has a contagious or infectious disease does not give rise to a cause of action for slander unless the publication causes the person special damage.

The law of slander normally requires that special damages be proven if a claim is to succeed. In a small number of areas, no special damage need be proven. One of these, set out in the Slander of Woman Act 1891, arises where ‘words spoken and published...impute unchastity or adultery to any woman or girl’. A second arises on the basis of the common law, and relates to imputations that a person suffers from a contagious or infectious disease. The effect of section 14 is to require the proof of special damage in respect of claims brought on account of such imputations.

Consultation question

Q 18: If the 2013 Act is not adopted in its entirety, would it be desirable for the changes made to the law of slander by section 14 of the Act to be introduced into Northern Irish law?

²¹⁷ Ministry of Justice, *Government’s Response to the Report of the Joint Committee on the Draft Defamation Bill* (Cm 8295, 2012), at [78]-[80].

CHAPTER 4: JURISDICTION, PROCEDURE AND THE IMPACT OF THE 2013 ACT IN ENGLAND AND WALES

4.01 As has been noted above, many commentators on the law of defamation assert that the primary problems in the area arise on account of procedural complexity and the associated cost of embroilment in defamation disputes. Attempts have been made over time to address this theme in England and Wales, with means of accelerating settlements having been introduced under the Defamation Act 1996, active case management by judges, and the introduction and refinement of a Pre-Action Protocol for Defamation cases under the Civil Procedure Rules. Parallel changes have been made to Northern Irish law and practice. Yet, there is significant evidence that this essential problem of defamation law has not been adequately mitigated. The Defamation Act 2013, in section 11, takes a significant step in this regard by reversing the presumption that defamation claims will be heard by a judge and a jury.

4.02 The Defamation Act 2013 also includes a number of reforms that are intended to limit the number of claims that might be brought. In section 1, the Act introduces a “serious harm” test. This was explained by the authors of the Act as an attempt to build upon and extend existing common law doctrines. It would appear that it is in fact of an altogether different character. In section 8, the Act introduces a temporal “single publication rule”. This is intended to obviate the possibility that publishers will be subject to a perpetual risk of legal suit that arises due to the fact that the “publication” of defamatory material is understood to occur when a statement is read and not when it is printed, broadcast or uploaded. In section 9, the Act also introduced a change to the jurisdictional test in an attempt to address a perceived problem of “libel tourism”. Each of these provisions is reviewed in this chapter

Mode of trial

4.03 Unusually for civil law proceedings, in both England and Wales and in Northern Ireland the standard approach to defamation claims has been trial by a judge with a jury.²¹⁸ The judge is responsible for determining questions of law, while the jury must determine questions of fact. In practice, very few cases ever reach a full trial and it is open to the judge to rule that a claim should be tried by judge alone on grounds of complexity. Nevertheless, the fact that a jury trial may be deployed, and the perception that this may generate significantly higher costs is an important factor weighing in publishers’ decisions as to whether to fight cases or to settle. This suggestion was accepted by all of the lawyers with whom it was discussed during our pre-consultation meetings. Intuitively, the prospect of a higher costs burden increases the leverage available to a plaintiff when pushing for a favourable settlement.

²¹⁸ In Northern Ireland, defamation juries comprise seven members.

4.04 Higher costs in defamation actions are associated with the complexity of the case. Trials involving juries can be more complex for a number of reasons. For instance, in respect of some aspects of the law, there can be a somewhat cumbersome interplay between judge and jury. Most problematic in this regard, as we heard during our pre-consultation discussions, is the use of juries in cases involving the *Reynolds* privilege (which represent a substantial proportion of actions defended by the media). The editors of *Gatley* contend that such cases ‘are peculiarly unsuited to trial by jury, by reason of the confused division of functions of judge and jury, and by the jury having to find specific facts, sometimes necessitating an “exam paper” of questions for the jury to answer’.²¹⁹

4.05 When a jury is involved, the determination of the meaning of the words complained of can also generate additional cost and uncertainty. First, the judge will assess – usually at a pre-trial hearing - whether the words are “capable” of bearing any of the range of meanings put forward by the parties. Thereafter, it is left to the jury to fix on the “single meaning” that should be attributed to the words in the determination of the claim. This takes place only at the end point of the trial. The meaning in fact determined by the jury may be different to any of the proposed meanings, and is not ultimately stated and therefore remains closed to scrutiny. Moreover, because all capable meanings remain on the table, the parties must tailor the legal arguments so as to meet any of the possible eventualities, perhaps arguing and evidencing defences which are ultimately irrelevant given the jury’s selection.

4.06 More generally, jury trials simply take longer due to the fact that matters must be explained to the jury’s satisfaction and witnesses tend to give their evidence in chief orally (before a judge alone the statement of the witness will usually stand as his evidence in chief and there will be a consequential saving of costs).²²⁰

4.07 While the higher costs associated with jury trials lean towards the reversal of the presumption in favour of trial jury, there are powerful arguments of principle that push for retention of the current approach. Courts have repeatedly emphasised the importance of the right to trial by jury.²²¹ Many questions in the law of defamation must be answered from the perspective of the ordinary, right-thinking member of the community. In some respects at least, judges are far from ordinary. Moreover, there must be concern that any individual decision-maker will be more prone to allowing unconscious predilection to influence determinations of fact. A number of our pre-consultation discussants contended further that the role of the jury has been particularly important in the Northern Irish context insofar as it has facilitated a “voice”

²¹⁹ Parkes and Mullis (eds), *Gatley on Libel and Slander* (12th edn, London: Sweet & Maxwell, 2013), at [34.1]. In *Jameel v Wall Street Journal* [2005] EWCA Civ 74, at [70], Lord Phillips MR reflected that ‘the division between the role of judge and that of the jury when *Reynolds* privilege is in issue is not an easy one; indeed it is open to question whether jury trial is desirable at all in such a case’.

²²⁰ *Fiddes v Channel Four Television* [2010] EWCA Civ 730, at [18] (per Lord Neuberger MR).

²²¹ See, for example, *Fiddes v Channel Four Television* [2010] EWCA Civ 730.

in the legal process for the average person. The decision to resile from trial by jury in the defamation context is not one that should be taken lightly.

4.08 Notably, should the scheme set out in Chapter 5 below be adopted, the rationale for the presumption against a jury trial is correspondingly weakened to the extent that the process of determination of meaning becomes redundant, and disputes are focused on core errors of factual uncertainty. Even in that context, however, there would be cost-related grounds for introducing a presumption of trial by judge sitting alone.

Section 11 of the 2013 Act: presumption in favour of trial by judge only

4.09 Section 11 of the Defamation Act 2013 provides for the reversal of the presumption that defamation trials will be heard by a jury. This is achieved through the amendment of section 69 of the Senior Courts Act 1981 and section 66(3) of the County Courts Act 1984 that formerly provided for trial by jury in all but a narrow range of specified circumstances. The provision does not abolish the jury trial as such, although the recent decision of the English High Court in *Yeo v Times Newspapers* – a case in which the argument for a jury trial was peculiarly strong given the identity of the plaintiff – suggests that use of a jury will occur only in truly exceptional circumstances.²²² Henceforth, defamation trials will be conducted without a jury unless the court orders otherwise. In England and Wales, this could be considered to be an affirmation of recent judicial practice; increasingly often, judges had ordered trial without a jury on the ground that the case would require the ‘prolonged examination of documents’.

4.10 As a matter of principle, section 11 represents a significant change for the future of the defamation court. In practice, the shifting of the presumption will likely have a quite profound impact on the management of cases. It can be expected that applications for the early determination of the actual meaning of the words complained of will become commonplace. In turn, this will allow counsel to dispense with the need to prepare alternative arguments to accommodate the fact that a jury may select one meaning over another only at the end-point of the trial. Costs should be significantly reduced in consequence, while the early determination of meaning may see a significant proportion of cases settle as the parties appreciate that grounds for fighting on have been lost. All that said, even to get to the point at which a judge determines meaning will yet be sufficiently costly as to preclude the option of going to law for many plaintiffs and defendants. In addition, it might be expected that such a shift will focus attention on the artificiality and perhaps the unfairness of the single meaning rule that requires judges to select

²²² [2014] EWHC 2853 (QB). During the Parliamentary debates on the Defamation Bill, it was suggested that such circumstances might arise should one of the parties be a member of the judiciary or somehow drawn from a similar social or “Establishment” background to judges generally. In such a case, a jury may serve as a hedge against subconscious bias or the suspicion thereof.

one meaning only from among the shades of meaning and different meanings that are available on a natural reading.

Consultation question

Q 19: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 11 of the Act which reverses the presumption that defamation claims will be heard by a jury to be introduced into Northern Irish law?

The Threshold of Seriousness

4.11 Given the potential impact of defamation law on public communication, it is important that essentially trivial libels are not considered by the courts. To allow trivial claims to proceed would waste court resources, and would also allow pressure to be brought to bear illegitimately on publishers (both in a given case, and more generally). The common law has developed two related tests designed to exclude such claims at an early stage. A further test was introduced as section 1 of the 2013 Act. This statutory test was intended to ‘raise the bar for bringing a claim’,²²³ albeit ‘modestly’.²²⁴ The test has a particular variant applicable to claims brought by ‘bodies that trade for profit’.

4.12 The desirability or otherwise of introducing the section 1 test into Northern Irish law has been perhaps the most contentious issue addressed during our pre-consultation discussions.

Jameel abuse of process jurisdiction

4.13 Under the *Jameel* abuse jurisdiction,²²⁵ the defendant publisher can seek to persuade the court that there has been no “real and substantial tort”. If the court agrees, it can strike out the claim as an abuse of process. This may be done where the defamatory sting is a trivial one,²²⁶ but also where the publication was to only a very small number of people,²²⁷ or where winning the case would not achieve any tangible advantage to the plaintiff in terms of vindication.²²⁸ Presumably, the jurisdiction could also be exercised in a case where there is a

²²³ *Explanatory Note to the Defamation Act 2013*, at [11].

²²⁴ 741 HLDeb GC423, 17 December 2012, (per Lord McNally –Minister of State).

²²⁵ *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75. In that case itself, an online publication had accessed on only five occasions, of some of which may have been by the plaintiff’s legal advisers. See generally, Hyde, ‘Procedural Control and the Proper Balance between Public and Private Interests in Defamation Claims’ (2014) *Journal of Media Law*, 6(1), 47-68.

²²⁶ See, for example, *Daniels v BBC* [2010] EWHC 3057.

²²⁷ See, for example, *Hays plc v Hartley* [2010] EWHC 1068; *Wallis v Meredith* [2011] EWHC 75; *Williams v MGN Ltd* [2013] EWHC 848; *Tamiz v Google* [2013] EWCA Civ 68.

²²⁸ See, for example, *Henderson v London Borough of Hackney* [2010] EWHC 1651, at [42]; *Hamaizia v Commissioner of Police for the Metropolis* [2013] EWHC 848.

question over whether the plaintiff was sufficiently identified.²²⁹ Prior to the advent of the 2013 Act in England and Wales, such applications had become commonplace,²³⁰ albeit that they were not always been successful.²³¹ The test has also recently been adopted by the Supreme Court of New South Wales.²³²

4.14 This existing common law rule is intended to ensure that proceedings will be halted if there is no realistic prospect of a trial yielding any tangible advantage that would justify either the dedication of court resources or the expense that would be incurred by the parties. In the first regard, the Court of Appeal explained in *Jameel* that:

*an abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.*²³³

In the second respect, the court added that ‘keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation...require[s] the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant’s reputation’.²³⁴ In short, as Lord Phillips explained, proceedings will be struck out where ‘the game will not merely not have been worth the candle, it will not have been worth the wick’.²³⁵

Threshold of seriousness

4.15 In *Thornton v Telegraph Media Group Ltd*, Tugendhat J derived a further threshold test having conducted an analysis of the concept of “defamation” as it has been developed and

²²⁹ This point was argued - albeit unsuccessfully - before the court in *Jameel* itself - see [2005] EWCA Civ 75, at [42]-[47].

²³⁰ For example, in addition to those noted above, see *Smith v ADVFN Plc* [2010] EWHC 3255 (QB); *Kaschke v Gray* [2010] EWHC 1907 (QB); *Khader v Aziz* [2010] EWCA Civ 716 (confirming *Khader v Aziz* [2009] EWHC 2027 (QB)); *Brady v Norman* [2010] EWHC 1215 (QB); *Kaschke v Osler* [2010] EWHC 1075 (QB); *Budu v British Broadcasting Corporation* [2010] EWHC 616 (QB); *Williams v MGN Ltd* [2009] EWHC 3150 (QB); *Lonzim Plc v Sprague* [2009] EWHC 2838 (QB).

²³¹ See, for example, *Lewis v Commissioner of Police of the Metropolis* [2011] EWHC 781 (QB); *McKeown v Attheraces Ltd* [2011] EWHC 179 (QB); *France v Freemans Solicitors* [2010] EWHC 3291 (QB); *Cairns v Modi* [2010] EWHC 2859 (QB); *Taylor v Associated Newspapers Limited* [2010] EWHC 2494 (QB); *McLaughlin v London Borough of Lambeth* [2010] EWHC 2726 (QB); *Ronaldo v Telegraph Media Group Ltd* [2010] EWHC 2710 (QB); *Underhill v Corser* [2010] EWHC 1195 (QB); *Baturina v Times Newspapers Ltd* [2010] EWHC 696 (QB).

²³² *Bleyer v Google* [2014] NSWSC 897.

²³³ [2005] EWCA Civ 75, at [54].

²³⁴ [2005] EWCA Civ 75, at [55].

²³⁵ [2005] EWCA Civ 75, at [69].

applied in English law. This was the “threshold of seriousness” test.²³⁶ It has since been understood as a specific version of the broader *Jameel* abuse of process jurisdiction, focused on the question of whether an imputation was defamatory.²³⁷ Thus, this variant was established specifically to weed out cases in which the allegation made was relatively trivial.²³⁸ It resonates with the jurisprudence on Article 8 ECHR that requires intrusions on private life to reach a certain level of seriousness before the Convention right is engaged.²³⁹

Section 1 of the 2013 Act: the standard “serious harm” test

4.16 The Explanatory Notes to the 2013 Act explain that section 1 is intended to ‘build 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’.²⁴⁰ Section 1(1) provides the core test: ‘a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant’.²⁴¹

4.17 The desirability of the introduction of the section 1 test in Northern Ireland has been perhaps the most contentious issue addressed during our pre-consultation discussions. Concerns were expressed regarding the design and the likely operation of the test. Scholars and practitioners who have commented on the English law have criticised the test on two grounds.²⁴² First, on account of a perceived lack of conceptual clarity, and secondly, due to practical difficulties that it is expected to generate in terms of the need to collate evidence of harm for presentation to the court at an early stage in proceedings.

4.18 On the conceptual level, it is argued that the move to the statutory test has seen its basic character changed. While the *Jameel* abuse of process jurisdiction serves as a “gateway”, jurisdictional test, section 1 changes the substantive law. Insofar as the *Jameel* test

²³⁶ [2010] EWHC 1414 (QB). See also *Daniels v British Broadcasting Corporation* [2010] EWHC 3057 (QB), at [43]-[51].

²³⁷ This analysis was adopted by Sharp J in *Daniels v British Broadcasting Corporation* [2010] EWHC 3057 (QB), at [43]-[51]. In that case, the judge explicitly related the power to strike out to the *Jameel* abuse jurisdiction, as had Tugendhat J in *Thornton*, at [60] and [89]. In *Thornton*, however, Tugendhat J also divined the threshold of seriousness from the concept of “defamatory” as he understood it on the basis of an extensive review of the jurisprudence (at [90]-[94]).

²³⁸ [2010] EWHC 1414 (QB), at [90].

²³⁹ See, for example, *M v Secretary of State for Work and Pensions* [2006] UKHL 11, at [83] (per Lord Walker).

²⁴⁰ *Explanatory Note to the Defamation Act 2013*, at [11]. In fact, this is not what the ‘series of cases’ referred to. Rather, as noted above, they have been directed to the question of whether any real and substantial tort has been committed. That a statement is “defamatory” is one component only of the tort of defamation. For this reason, commentators have suggested that the law would be better phrased along the lines that, ‘A court has no jurisdiction

²⁴¹ In *Cooke v MGN* [2014] EWHC 2831 (QB), at [32], Bean J suggested that the date at which one looks backwards or forwards to determine whether serious harm has been or is likely to be caused is the date of issue of the claim. An alternative approach would be that the difference in grammatical tenses relates to the times pre- and post-publication of the impugned statement.

²⁴² See, for example, Tench, ‘Defamation Act 2013: A Critical Evaluation - Part 2: “Serious Harm”’, *Inform*, 27 July 2014; Mullis and Scott, ‘Tilting at Windmills: the Defamation Act 2013’ (2014) *Modern Law Review*, 77(1), 87-109.

related to the defamatory nature of the publication, it could be assessed solely by reference to the words used. Previously in England and Wales, and currently in Northern Ireland, the law looks to the *tendency* of the words to lower the reputation of the plaintiff. The question of whether a publication has the tendency adversely to affect a person's reputation can be determined by examining the statement on its own.

4.19 In England and Wales, section 1 now requires that the plaintiff show that publication has caused or is likely to cause serious harm. This is a significant departure. At first glance, it would appear to introduce a requirement that serious harm must be empirically demonstrated. Thus, whether a publication has caused, or is likely to cause, serious harm (or serious financial harm) is likely to require a careful investigation of facts of the case. In particular, the court must assess the inherent gravity of the allegation, the nature and status of the publisher and publishee, the plaintiff's existing reputation and financial position, and whether similar allegations have been published before.

4.20 Such a requirement to prove harm has been avoided by the courts, not only in England and Wales and Northern Ireland but in almost all common law jurisdictions. This has been done for fear that – given the nature of harms addressed by the law of defamation – it would place an unfair burden on the plaintiff and undue strain on the court. Requiring proof of harm necessarily imposes an obligation on the court that it is not well placed to manage. It may also generate a tendency for counsel to present courts with a range of pseudo-scientific propositions concerning the circumstances in which harms to reputation may or may not be caused.

4.21 In practical terms, the reform may have the undesirable effect of increasing the complexity and cost of proceedings. It would seem likely that defendant-publishers will seek to challenge many libel claims on a “section 1 basis” with mini-trials taking place on the issue of “serious harm” at the outset of such claims. Hence, an important effect of section 1 in such cases seems likely to be to place a more onerous burden on the plaintiff at the preliminary stage. Plaintiffs will be forced to offer up evidence of how the harm they have suffered is serious. In *Cairns v Modi*, Tugendhat J warned against this very risk:

*the jurisdiction recognised in Jameel has proved very useful. It has been applied in a number of different circumstances in various judgments in this court. But it must not be seen as an additional hurdle which claimants must overcome, increasing the complexity and cost of litigation, instead of reducing it.*²⁴³

4.22 These concerns would appear to have been borne out in the first case decided in England and Wales under the new rule. In *Cooke v MGN*, the court was asked to determine

²⁴³ [2010] EWHC 2859, at [44].

whether serious harm had been caused to the chief executive of a social housing charity (and to the charity) by a reference to her in an article largely focused on alleged disreputable profiteering from low income tenants by another landlord.²⁴⁴ Counsel for the plaintiff asserted that in light of the “evidential difficulties”, it would be inappropriate for the court to engage in a ‘sophisticated “analytical” approach’.²⁴⁵ The plaintiff was not in a position to adduce evidence about specific individuals who thought less of her as a result of the article. Conversely, counsel for the defendant newspaper argued for an approach based on ‘tangible’ evidence.²⁴⁶ Both counsel proceeded on the premise that the plaintiff’s reputation would not have been affected in the eyes of those people who knew her well and had access to good information regarding her working life, but rather in the eyes of people who knew her less well.²⁴⁷ Bean J concluded that there was no specific evidence that the article had caused harm to the plaintiff, that serious harm could not be inferred, and that it was not more likely than not that serious harm would be caused in the future. Hence, the claim could not proceed. Important in this regard was the fact that the newspaper had published a clarification and apology (albeit not one that had been agreed by the plaintiff).²⁴⁸

4.23 The case has left significant uncertainty regarding the operation of the section 1 test. It is not clear what type of evidence must be adduced to meet the threshold. Neither is it obvious when an apology will be sufficient to eradicate or sufficiently reduce any risk of harm. The judge indicated further that in some circumstances serious harm could be inferred from the publication as obvious, and that in such cases evidence of harm would not be required.²⁴⁹ He suggested that this would be the case where egregious allegations – for example of murder or paedophilia – had been made. The limits of this category are not clear however. Neither was it stated that allegations of the illustrative types would or should always meet the threshold. Reflecting on the case, one commentator noted that ‘both claimants and defendants [are left] in a position of uncertainty that will only be resolved by further litigation...perhaps that is the most seriously harmful outcome of all’.²⁵⁰

²⁴⁴ [2014] EWHC 2831 (QB). See generally, Sjøvoll, ‘*Cooke and Midland Heart Ltd v MGN: A seriously harmful approach to serious harm?*’ *Inform*, 13 August 2014.

²⁴⁵ [2014] EWHC 2831 (QB), at [40].

²⁴⁶ [2014] EWHC 2831 (QB), at [42].

²⁴⁷ Such a proposition is supported in some measure by the results of social psychological studies regarding reputation, but it can hardly be postulated as a hard rule to be followed invariably by the courts. It is likely that the determining factor as to whether the subject’s reputation is affected in a person’s eyes is the amount and credibility of knowledge and information that conflicts with the libellous statement that the person holds. For example, if a person wrongly suspects that his or her partner has been unfaithful, they may be more likely to treat a false publication to that effect as confirmatory rather than fanciful.

²⁴⁸ [2014] EWHC 2831 (QB), at [40]. Previously, this factor would have been relevant, if at all, only in the determination of the appropriate level of damages.

²⁴⁹ [2014] EWHC 2831 (QB), at [43].

²⁵⁰ Sjøvoll, ‘*Cooke and Midland Heart Ltd v MGN: A seriously harmful approach to serious harm?*’, *Inform*, 13 August 2014.

4.24 During our pre-consultation discussions, different views were expressed as to whether the adoption of the section 1 test in Northern Ireland is desirable. On one hand, it was suggested that such a rule would reduce the likelihood that unmeritorious and trivial cases will be brought in future. Hence, on this view, adoption of the section 1 test in Northern Ireland is obviously desirable. Northern Irish judges will be able to rely on English precedents regarding such uncertainties as exist over the operation of the test. On the other hand, it was suggested that – because of the increased cost to litigants involved in presenting evidence of harm – adoption of the rule would have the effect of making it more difficult for all but very wealthy plaintiffs to justify the potential expense of bringing claims for defamation. This was perceived to be a likely outcome even in cases where the plaintiff had a wholly justified complaint. That is, the impediment to claims being brought would apply to all cases, not only trivial claims. On this view, the fact that the *Jameel* abuse of process jurisdiction already exists and has begun to be used fairly often leaves it simpler, and hence better, to continue with the current common law approach.

4.25 In short, it can be argued that the section 1(1) test does very much more than place the common law test onto a statutory footing while raising the hurdle modestly. One commentator has suggested that if that were the intended aim, then a preferable form of phrasing would be:

*a court has no jurisdiction to hear a claim in defamation in respect of the publication of a statement unless that publication was at the time of publication likely to cause serious harm to the reputation of the claimant.*²⁵¹

It may be that the section 1(1) test should be adopted in Northern Ireland only following a conscious decision that it is desirable to require plaintiffs empirically to demonstrate that serious harm has resulted from a publication.

Section 1 of the 2013 Act: the test for corporations

4.26 Section 1(2) of the 2013 Act adds an additional element to the serious harm requirement in respect of ‘bodies that trade for profit’. It provides that ‘for the purposes of this section, 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’.

²⁵¹ Tench, ‘Defamation Act 2013: A Critical Evaluation - Part 2: “Serious Harm”’, *Inform*, 27 July 2014. Tench would extend this rule to the tort of malicious falsehood in order to avoid claims simply being channelled into that alternative tort.

4.27 Corporate reputation is an enormously important, perhaps the most important, asset held by businesses.²⁵² At present in Northern Irish law, corporations are able to sue.²⁵³ The protection afforded to them, however, is not as extensive as that allowed to natural persons. This is due to the fact that ‘a company cannot be injured in its feelings, it can only be injured in its pocket’.²⁵⁴ Hence, a company could recover damages for harm to its business or trading reputation, but not for hurt feelings. The Government had originally taken the view that no especial impediment should be introduced to claims brought by corporations. As the then Lord Chancellor explained to the Culture, Media and Sport Committee in 2009:

*Bodies corporate do have reputations and on their reputations depend the livelihoods of, in large corporations, thousands of people and their share price, in which your pension fund or mine might be invested.*²⁵⁵

4.28 Section 1(2) was introduced as a ‘modest reform’ by way of amendment to the Government Bill in the House of Lords.²⁵⁶ It responded to the fact that many of the claims that had generated the momentum for reform had involved such plaintiffs: ‘corporations...using their deep pockets and access to lawyers to stifle public criticism of them or their products’.²⁵⁷ Such a proposal had been supported by the Joint Committee on the Draft Defamation Bill,²⁵⁸ by the Joint Committee on Human Rights,²⁵⁹ and by the Culture, Media and Sport Committee.²⁶⁰ All of these committees recognised the significant inequality of arms that can be brought to bear in such cases and the opportunity that this affords corporations willing to engage in such conduct to silence critics (irrespective of the merits of their criticism). The requirement to show serious financial loss was understood as a means of balancing the need to allow corporations to protect their reputations while also deterring corporations from exploiting defamation law. Recommending a measure very similar to section 1(2), the Joint Committee on the Draft Bill

²⁵² This fact has been strongly emphasised by the redirection of corporate PR effort in recent years so as to include the “reputational dimension” into all-strategic planning. The exercise is no longer limited to lobbying and “fire-fighting” as events occur – see Burt, *Dark Art: the Changing Face of Public Relations* (London: Elliott & Thompson, 2012).

²⁵³ *South Hetton Coal Co Ltd v North-Eastern News Assoc Ltd* [1894] 1 QB 133.

²⁵⁴ *Lewis v Daily Telegraph* [1964] AC 234, at 262 (per Lord Reid). As Lord Hope explained in *Jameel v Wall Street Journal Europe* [2006] UKHL 44 at [95], however, ‘this does not mean... that it can only be injured in a way that gives rise to loss which, because it can be calculated, has the character of special damage. What it means is that it must show that it is liable to be damaged in a way that affects its business as a trading company.’

²⁵⁵ [2009-10] *Second Report: Press Standards, Privacy and Libel* (HC362), at [174].

²⁵⁶ 741 HLDeb GC442, 17 December 2012 (per Baroness Hayter).

²⁵⁷ 741 HLDeb GC441, 17 December 2012 (per Baroness Hayter). Baroness Hayter explained further: ‘it was an American corporation that sued cardiologist Dr Peter Wilmschurst; the British Chiropractic Association sued Simon Singh; GE Healthcare sued Danish radiologist Professor Thomsen; Trafigura sued the BBC; manufacturers are forever threatening or trying to sue *Which?*; and McDonald’s infamously and, as it turned out, rather stupidly sued two individuals. *Nature*, the *Lancet* and the *British Medical Journal* - organisations that almost by definition exist for the public good - are no strangers to the threatening letters, mostly from corporations. Similarly, we heard in the Joint Committee from Mumsnet, which told us that it was very often the purveyors of baby foods and products, rather than individuals protecting their reputations as parents, which threaten to take action’.

²⁵⁸ [2010-12] *First Report: Draft Defamation Bill* (HL Paper 203/HC 930), [108]-[118].

²⁵⁹ [2012-13] *Seventh Report: Legislative Scrutiny - Defamation Bill* (HL Paper 84/HC 810), [54]-[58].

²⁶⁰ [2009-10] *Second Report: Press Standards, Privacy and Libel* (HC362), [164]-[178].

invited the Government to be ‘determined and creative in preventing corporations from using the high cost of libel claims to force publishers into submission’.²⁶¹ The Joint Committee on Human Rights recommended that the concept of serious financial loss should be understood ‘relative to the nature, size and scope of the claimant business or organisation’.²⁶²

4.29 This element of the 2013 Act did not feature strongly in our pre-consultation discussions. Precisely how its terms will be interpreted by the English courts remains to be seen.²⁶³ A number of arguments against adoption of this rule can be imagined however. It might be argued, for instance, that the concept of ‘serious financial loss’ does not capture the range of harms that might be caused to corporate reputations, or alternatively that harm to corporate reputation may not manifest itself obviously or clearly in specific, identifiable financial loss.²⁶⁴ If this is sustainable, it may become serendipitous whether a body trading for profit can show a link between a false publication and particular financial losses it has suffered. Harms caused may take the form of intangible lost opportunities, and it is difficult to quantify financial losses that ensue from the unappreciated refusal of others to enter new trade or associations with the defamed body. Proving causation of loss will provide a further obstacle.²⁶⁵ It may also be argued that the fact that corporations appear to have sued relatively often merely reflects the importance of reputation to such organisations.

4.30 Separately, it might be argued that the apparent tendency of some corporations to bring claims to “bully” opponents is a symptom of more general problems with defamation law. If this is the case, then a better approach to limiting abusive claims by corporations would be somehow to address the fact that the complexity of this area of law seems to leave it peculiarly open to misuse by relatively powerful and/or wealthy litigants. Subject to the discussion of the single meaning rule and discursive remedies below, and as with the discussion of the expansion of privilege, this may be no more than a “nirvana fallacy”.

²⁶¹ [2010-12] *First Report: Draft Defamation Bill* (HL Paper 203/HC 930), [117].

²⁶² [2012-13] *Seventh Report: Legislative Scrutiny - Defamation Bill* (HL Paper 84/HC 810), [58].

²⁶³ See generally, Lambert, ‘Defamation Act 2013: not all bad news for corporate claimants’, *Inform*, 7 February 2014.

²⁶⁴ *Jameel v Wall Street Journal Europe* [2006] UKHL 44, at [26] (per Lord Bingham), [95]-[98] (per Lord Hope), and [121] (Lord Scott). See generally, Coe, ‘The value of corporate reputation and the Defamation Act 2013: a brave new world or road to ruin?’ (2013) *Communications Law*, 18(4), 113-121.

²⁶⁵ As Lord Scott mused in *Jameel v Wall Street Journal Europe* [2006] UKHL 44, at [121]: ‘It seems to me plain beyond argument that reputation is of importance to corporations. Proof of actual damage caused by the publication of defamatory material would, in most cases, need to await the next month’s financial figures, but the figures would likely to be inconclusive. Causation problems would usually be insuperable. Who is to say why receipts are down or why advertising has become more difficult or less effective? Everyone knows that fluctuations happen. Who is to say, if the figures are not down, whether they would have been higher if the libel had not been published?’

Corporate standing to sue: the Australian model

4.31 The approach to corporate libel claims set out in section 1 of the 2013 Act begs the question of whether bodies that trade for profit should be barred altogether from suing for defamation. An analogy is sometimes drawn by those who argue for the removal of corporate standing with the barring of claims by local authorities in *Derbyshire County Council v Times Newspapers*.²⁶⁶ The analogy is not strong, however, given the absence of the democratic underpinning to the authority's powers that was crucial in that case.²⁶⁷ The Culture, Media and Sport Committee noted that corporations are able to avail of a range of other opportunities to respond to false allegations, suggesting that removal of standing might not be inherently problematic.²⁶⁸ In *Jameel v Wall Street Journal Europe*, however, the House of Lords reaffirmed the right of corporations to sue in defamation by a bare majority. Hence, legislative intervention would almost certainly be necessary to preclude corporations from bringing defamation claims in future.

4.32 Interestingly, in 2005 the various Australian States and Territories passed uniform defamation laws that included restrictions on corporate standing in defamation law.²⁶⁹ These provided that corporations with ten or more full-time or equivalent employees, formed with the object of obtaining a financial gain, would lose their right to sue. Section 9 of the uniform laws provided that:

- (1) A corporation has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless it was an excluded corporation at the time of the publication.
- (2) A corporation is an excluded corporation if -
 - (a) the objects for which it is formed do not include obtaining financial gain for its members or corporators; or
 - (b) it employs fewer than 10 persons and is not related to another corporation --and the corporation is not a public body.²⁷⁰

²⁶⁶ [1993] AC 534.

²⁶⁷ See *McDonalds Corp v Steel and Morris* [1999] EWCA Civ 1144.

²⁶⁸ [2009-10] *Second Report: Press Standards, Privacy and Libel* (HC362), [176]-[178]. This might include, for example, media engagement, advertising and other public relations exercises, or bringing legal claims on the basis of other causes of action. Alternatively, some person associated with the corporation – an executive, a manager or a director for instance – might sue personally if they were implicated by any allegation regarding the corporation's conduct. See also, Collins, 'Protecting Corporate Reputations in the Era of Uniform National Defamation Laws' (2008) *Media and Arts Law Review*, 13, 447.

²⁶⁹ See generally, Collins, 'Protecting Corporate Reputations in the Era of Uniform National Defamation Laws' (2008) *Media and Arts Law Review*, 13, 447; Rolph, 'A Critique of the National Uniform Defamation Laws' (2008) *Torts Law Journal*, 16, 207-248, at 215-220. Interestingly, this had been opposed by the Federal government.

²⁷⁰ The remainder of the provision largely comprises definitions of key terms in the rule. Section 9(5) maintains the right to sue of individuals associated with the corporation in question.

4.33 There would appear to be little empirical evidence as to the impact of these reforms in Australia.²⁷¹ Certainly, there have been calls for the change to be either reversed or revised to permit corporations to sue but only to recover identifiable losses. The basis of such arguments is that the current provisions ‘fail to provide adequate protections to corporations in a volatile environment’.²⁷² The rule has been criticised further on account of the arbitrary choice of ten as the number of employees relevant for (non-) exclusion, and the failure to appreciate that alternative legal avenues are ‘fraught with difficulty’.²⁷³

4.34 What evidence there is would tend to suggest two things. The first is that, unsurprisingly, ‘corporations have been compelled to rely on alternative causes of action...usually without the success that they might have received had they been able to sue for defamation’.²⁷⁴ The second is that removal of corporate standing to sue may paradoxically have resulted in greater access to prior restraint by way of interim injunctions granted on the basis of other causes of action.²⁷⁵ The dearth of evidence regarding the wider impact of and responses to the legislative reform in Australia leaves it difficult to draw much insight as yet from this parallel.

Consultation questions

Q 20: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 1(1) of the Act, the “serious harm” test, to be introduced into Northern Irish law? Would it instead be preferable to rephrase the statutory test so as better to reflect the stated intention of the authors of the Act? Would it instead be preferable to continue with the common law approach reflected in *Jameel v Dow Jones*?

Q 21: If the 2013 Act is not adopted in its entirety, and irrespective of whether the standard “serious harm” test is adopted, would it be desirable to introduce into Northern Irish law a rule that ‘bodies that trade for profit’ must show ‘serious financial loss’ if they are to bring a claim in defamation? Would it instead be preferable to introduce a bar on corporate claims equivalent to that introduced under the Australian Uniform Defamation Acts?

²⁷¹ Although, see Rolph, ‘Corporations’ Right to Sue for Defamation: An Australian Perspective’ (2011) *Entertainment Law Review*, 22, 195-200.

Entertainment Law Review 195 (among other points noting an unintended consequence of the changes; namely, the possibility of corporations more easily obtaining pre-publication injunctions by using other actions than defamation);

²⁷² Submission of the NSW Bar Association to the Attorney General’s Review of the Defamation Act 2005 (NSW), 12 April 2011.

²⁷³ Submission of the NSW Bar Association to the Attorney General’s Review of the Defamation Act 2005 (NSW), 12 April 2011.

²⁷⁴ Rolph, ‘Corporations’ Right to Sue for Defamation: An Australian Perspective’ (2011) *Entertainment Law Review*, 22, 195-200, 197.

²⁷⁵ Rolph, ‘Corporations’ Right to Sue for Defamation: An Australian Perspective’ (2011) *Entertainment Law Review*, 22, 195-200, 200.

Limitation and the Single Publication Rule

4.35 In the law of defamation, one of three elements of a claim that a plaintiff must prove is that publication had occurred. Publication is understood to occur when a statement is received, heard or read by a third party (that is, someone other than the plaintiff or defendant-publisher). Hence, publication can occur at multiple different points in time, with each such publication generating a separate and distinct cause of action. This is sometimes known as the “multiple publication rule”.

4.36 The multiple publication rule can generate injustice and social detriment by creating potentially perpetual liability for publishers. This is especially problematic in the context of online publication. The concern has been that, at the extreme, online publishers may cavil at this perpetual risk of suit, and so renege altogether on maintaining internet archives of past publication. Short of this, the legal risk may affect the integrity of archives by prompting publishers to “pull” past articles against which complaint was made.²⁷⁶ During the debate on libel reform and in the continuing debate in Northern Ireland, the rule has been criticised often on the basis that the “current law has not caught up with technology”,²⁷⁷ and that the mid-Nineteenth Century origins of the rule mean that its retention marks out antediluvian tendencies among the judiciary.²⁷⁸

4.37 Section 8 of the Defamation Act 2013 replaces the existing multiple publication rule. It provides that:

(1) This section applies if a person—

- (a) publishes a statement to the public (“the first publication”), and
- (b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

(2) In subsection (1) “publication to the public” includes publication to a section of the public.

(3) For the purposes of section 4A of the Limitation Act 1980 (time limit for actions for defamation etc) any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

(4) This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.

²⁷⁶ The association here with the emergence of a “right to be forgotten” in European law is obvious.

²⁷⁷ Lester, ‘Free Speech: the gloves are off’, *Sunday Times*, 30 May 2010.

²⁷⁸ See, for example, Pannick, ‘We no longer live in a gentlemen’s club, so let’s reform libel law’, *The Times*, 15 July 2010; Kampfner, ‘Media law: the quiet revolution gains momentum’, *Guardian*, 31 May 2010; Singh, ‘Reform of our libel law is long overdue’, *Daily Telegraph*, 25 May 2010.

(5) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters)—

- (a) the level of prominence that a statement is given;
- (b) the extent of the subsequent publication.

(6) Where this section applies—

- (a) it does not affect the court's discretion under section 32A of the Limitation Act 1980 (discretionary exclusion of time limit for actions for defamation etc), and
- (b) the reference in subsection (1)(a) of that section to the operation of section 4A of that Act is a reference to the operation of section 4A together with this section.

Hence, for the future in England and Wales, a new “single publication rule” is intended to prevent a claim being brought in respect of a publication of the same material by the same publisher following the expiry of a one-year limitation period that runs from the date of first publication to the public.²⁷⁹ The clause does not apply where the manner of the subsequent publication is materially different from the manner of the first publication.²⁸⁰ In assessing this issue, the matters to which the court may have regard include the level of prominence that a statement is given, and the extent of the subsequent publication.²⁸¹

4.38 The criticism of the multiple publication rule and the associated preference for the new statutory provision would appear to be somewhat partial. The criticism decried the perpetual risk of suit being brought, but failed to acknowledge the concomitant potential for ongoing harm to be caused precisely by that continuing publication. In fact, the multiple publication rule had been assessed on a number of occasions in recent years by both the domestic and the European courts and found to be entirely compliant with the Convention right to freedom of expression.²⁸² The new rule can be criticised correspondingly as wrong in concept because it elides the harms caused by ongoing publication. Reputational harm does indeed flow not from the act of publication (in its everyday rather than legal sense), but rather when the reading occurs. Irrespective of when first publication occurs, each reading has the potential to harm the reputation of the person defamed. The problems caused by the perpetual availability of damaging publications online are an increasingly pressing concern.²⁸³

²⁷⁹ s.8(1)-(2).

²⁸⁰ s.6(4).

²⁸¹ s.6(5).

²⁸² *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805; *Times Newspapers Ltd v United Kingdom* app. no. 3002/03 [2009] EMLR 14.

²⁸³ See generally, Solove, *The Future of Reputation: Gossip, Rumor and Privacy on the Internet* (Yale University Press, 2007).

4.39 Specific concern has been expressed regarding the design of the new rule, and its likely efficacy in the face of challenge based on the Article 8 right to reputation.²⁸⁴ The proposed rule in section 8 is not absolute, but admits of circumstances in which the one-year limitation period may be lifted.²⁸⁵ This may be done whenever a judge deems it ‘equitable...in all the circumstances of the case’ (including the reasons for the delay on the part of the plaintiff). Judges must interpret legislation as far as it is possible to do so to cohere with Convention rights. Faced with a plaintiff who argues credibly that a reading of a defamatory online publication that took place yesterday, and which might be emulated tomorrow, has had adverse serious consequences for his or her Article 8 right to reputation, it must be questionable whether a judge will refuse to lift the limitation period (at least for the years after first publication when no especial practical difficulty would be caused to the defendant). Moreover, as courts have stated repeatedly, the expression interest in ongoing publication is comparatively weak.²⁸⁶ Arguably, therefore, the judge will find him- or herself in this position on every occasion that the harm to reputation might be described as ‘serious’ (as per section 1). This will mean that the supposed “safe harbour” will prove illusory.

4.40 Relative to the current position under the multiple publication rule, this outcome would be pathological for the defendant-publisher. Under the multiple publication rule, a defendant would be liable only for harm attributable to publication that had occurred within the preceding year.²⁸⁷ Should the section 8 limitation be lifted by a judge under section 32A, the defendant would become liable for all harms caused beginning from the date of first publication.²⁸⁸ Obviously, this is likely often to be very much more significant than what has occurred in the previous year only.

4.41 Notwithstanding the argument set out above, it may be thought preferable still to introduce the single publication rule on the grounds of its symbolic importance. Other options may be available to avoid a chilling effect impacting on the maintaining of online archives. The task might be left to the section 1 serious harm test or its common law equivalent. If no significant publication had occurred recently, then no proceedings would be permitted. If recent reading of the material had caused serious Article 8 harm, however, this option would leave the publisher liable. If the above argument is correct, then the position under this approach would in practice be little different to that which may transpire under section 8, except that the risk of pathological consequences would have been eradicated. Alternatively, the multiple publication rule might be retained, but also a new defence introduced that would absolve a publisher from

²⁸⁴ Mullis and Scott, ‘Tilting at Windmills: the Defamation Act 2013’ (2014) *Modern Law Review*, 77(1), 87-109.

²⁸⁵ s.8(6)(a) and s.32A, Limitation Act 1980.

²⁸⁶ *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805, at [74].

²⁸⁷ The extent of which publication the plaintiff would be required to demonstrate – *Al Amoudi v Brisard* [2006] EWHC 1062.

²⁸⁸ Subject to the standard limitation period for tort of six years - s.2, Limitation Act 1980.

the risk of suit after the elapse of one year following first publication on the condition that he or she appended a notice to statement indicating that its veracity had been challenged.²⁸⁹

Consultation questions

Q 22: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 8 of the Act, the single publication rule, to be introduced into Northern Irish law? Would it be preferable instead to retain the multiple publication rule, or to introduce an alternative defence requiring the attaching of a notice of complaint?

Jurisdiction: ‘libel tourism’

4.42 As noted above, the international, political furore that emerged around the concept of “libel tourism” was one of the primary drivers of the libel reform campaign. There is a wide disparity of view on the facticity of this phenomenon. In our view, it has been sufficiently demonstrated that the use of threats to bring legal proceedings in England by corporations and others from other jurisdictions has been a fact of life for journalists, NGOs, media organisations and others in a number of jurisdictions. It has also been shown that very few such cases in fact ever reached the English courts.

4.43 As proved to be the case in respect of England and Wales for the Libel Working Group established by the Lord Chancellor in 2009, is difficult to identify many firm cases of “libel tourism” that have occurred in the Northern Irish courts. Of the more renowned cases among claims that did not reach trial, most have tended to involve either plaintiffs who - while enjoying international fame - have had for a particular reputation to defend in this jurisdiction, or plaintiffs who might be characterised best as the impecunious “David” seeking redress for clear harms caused by recalcitrant, international, “Goliath” publishers. This is not to contend that other cases that better fit the pejorative designation have simply not occurred here. It does help to explain the fact that none of our pre-consultation discussants raised the prospect of reform in this regard as a matter of concern, although a sizeable number expressed the view that the existing jurisdictional rules are perfectly appropriate and effective.

4.44 The existing law provides that a claim can be summarily dismissed where it discloses no “real or substantial tort” that has occurred in Northern Ireland. Just such an order was recently affirmed by the Northern Irish Court of Appeal having been made by the High Court.²⁹⁰

²⁸⁹ Mullis and Scott, ‘Worth the Candle? The Government’s Draft Defamation Bill’ (2011) *Journal of Media Law*, 3(1), 1-17, at 14-15.

²⁹⁰ *Ewing v Times Newspapers Ltd* [2013] NICA 74.

4.45 Section 9 of the Defamation Act 2013 goes further than this, although it is limited in its potential scope by the international obligations of the United Kingdom. The provision states:

(1) This section applies to an action for defamation against a person who is not domiciled—

- (a) in the United Kingdom;
- (b) in another Member State; or
- (c) in a state which is for the time being a contracting party to the Lugano Convention.

(2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

(3) 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.

(4) For the purposes of this section—

- (a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation;
- (b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention.²⁹¹

The operative part of this provision is subsection (2) which installs the rule that an action cannot be brought against a publisher domiciled in a non-EU or “non-Lugano” jurisdiction, unless ‘of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action’. The meaning of ‘the most appropriate place’ will fall for consideration by the courts.

Consultation question

Q 23: If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to section 9 of the Act, the rule on “libel tourism”, to be introduced into Northern Irish law?

²⁹¹ See also, s.9(5).

CHAPTER 5: ADDITIONAL REFORM OPTIONS: REMEDIES AND THE SINGLE MEANING RULE

5.01 As noted in the introduction, there is a view that by focusing on restating the substantive law and seeking to address specific and pressing problems that were highlighted during the public debate on reform, the Defamation Act 2013 may represent a missed opportunity to address the worrisome impact of the law on freedom of expression while ensuring the proper valorisation of reputation. A more sensible and effective, although perhaps counter-intuitive, target for reform may have been the longstanding “single meaning rule”. Allied with the introduction of a range of discursive remedies – corrections, retractions, and rights of reply – the jettisoning of that rule might have gone far towards ending the “casino” element in defamation proceedings. These themes are discussed in the first two parts of this chapter.

5.02 More generally, there have been long-standing arguments concerning the desirability of otherwise of discursive remedies. The Defamation Act 2013 includes two new powers that fall within this area: the section 12 power for a court to order a summary of its judgment to be published, and the section 13 power to order the “take-down” of a defamatory statement. These are discussed briefly in the final part of this chapter. In addition, a small number of further options in respect of discursive remedies are noted, and further comment on such themes invited.

Withdrawal of the single meaning rule

5.03 When a dispute is transposed from the public sphere to the courtroom, the “single meaning rule” dictates that each set of “words complained of” must be understood to hold one meaning only. Where language is ambiguous or uncertain, one interpretation only from the range of possibilities must be selected. This is thought to simplify the task confronting the court; to make it manageable.

5.04 Intuitively, dealing with one meaning only promises to make the task of the court more straightforward. The process of selecting the single meaning, however, is so highly complex and technical as to border on the arcane. Simplification in this sense may not equate to good public policy. Due to the single meaning rule, the process of transposing a dispute from the public sphere to the legal forum provides opportunities for parties and their lawyers to indulge in cost-generating game playing. This is all perplexing to non-lawyers, not so much on account of their ignorance in the face of the technical sophistication of a complex body of law, but rather because it seems so fundamentally unnecessary. Justice is not served; indeed, quite the opposite. The imbalance between wealthy and relatively impecunious litigants is exacerbated.

5.05 In the paragraphs that follow, this paper explains briefly the complexity of the court-based process used to determine meaning and explains the single meaning rule. Secondly, it considers the justifications that have been offered for the rule over time, especially as articulated recently in a judgment delivered by Lord Neuberger in the Hong Kong Final Court of Appeal.²⁹² That judgment offered an implied rejoinder to criticism of the rule previously aired in the English Court of Appeal.²⁹³ Thirdly, the chapter considers what might be the practical ramifications of any withdrawal of the single meaning rule. It is suggested that such a move, coupled with the introduction of appropriate discursive remedies, would offer the best means possible of providing the parties to most potential defamation disputes with mutually acceptable outcomes quickly, while focusing intractable disputes immediately on the core points of contention. A diagrammatic representation of the scheme proposed for consultation is included at page 88.

The single meaning rule: explanation and critique

5.06 Disputes about meaning are often central to defamation actions. They are ‘very often if not always the most important issue’.²⁹⁴ If a court is able to determine meaning early in proceedings, very often the dispute will be settled.²⁹⁵ Outside of legal innuendo cases, there is no attempt to divine the actual inferences drawn by recipients of the publication at issue. Determination of meaning is not an empirical exercise.²⁹⁶ Neither is the publisher’s intended meaning directly relevant. The test is that of how the words would have been understood by the ordinary, reasonable recipient of the publication in question.²⁹⁷ In accordance with the single meaning rule, the court is required to pretend that only one interpretation of each imputation involved will have been inferred by all such ordinary, reasonable people. Thereafter, this choice will form the basis of the disposal of (that element of) the case.

5.07 Plainly, this involves a legal abstraction from reality. This abstraction is often explicitly recognised by the courts. In *Slim v Daily Telegraph*, Lord Justice Diplock acknowledged that:

everyone outside a court of law recognises that words are imprecise instruments for communicating the thoughts of one man to another. The same words may be understood by one man in a different meaning from that in which they are understood by another and both meanings may be different from that which the author of the words intended to

²⁹² *Oriental Daily Publisher v Ming Pao Holdings* [2012] HKCFA 59.

²⁹³ *Ajinomoto Sweeteners v ASDA Stores* [2010] EWCA Civ 609.

²⁹⁴ Joint Committee on the Draft Defamation Bill, HL Paper 203 & HC 930-II, Q622 (per Mr Justice Tugendhat).

²⁹⁵ For a recent example, see *RBoS Shareholders Action Group Ltd v News Group Newspapers Ltd* [2014] EWHC 130 (QB). For discussion, see ‘Sun settles claim by RBoS Shareholders Action Group’, *Inform*, 19 February 2014.

²⁹⁶ *Hough v London Express Newspapers* [1940] 2 KB 507, per Goddard LJ.

²⁹⁷ An ‘impeccable synthesis of the authorities’ on this theme offered by Eady J was reiterated by the Court of Appeal in *Gillick v Brooke Advisory Centre* [2001] EWCA Civ 1263 (per Lord Phillips MR).

*convey...[and]where...words are published to the millions of readers of a popular newspaper, the chances are that if the words are reasonably capable of being understood as bearing more than one meaning, some readers will have understood them as bearing one of those meanings and some will have understood them as bearing others of those meanings.*²⁹⁸

A similar point was made by Lord Nicholls in *Bonnick v Morris (Jamaica)*:

*language is inherently imprecise. Words and phrases and sentences take their colour from their context. The context often permits a range of meanings, varying from the obvious to the implausible. Different readers may well form different views on the meaning to be given to the language under consideration.*²⁹⁹

One might add that some readers will recognise the ambiguity of language where it exists, and reach no firm conclusion as to what message the author was intending to convey. In short, language is complicated and human communication rarely achieved perfectly.

5.08 Having assumed the task of determining the meaning of imputations, the courts have been compelled to develop wide-ranging tools with which to divine singular meanings. In the simplest – and relatively unusual – cases, publications may comprise forms of words that are susceptible to only one possible interpretation, or may involve both a literal and an innuendo meaning that can be inferred from the words themselves (false or popular innuendo). Also relatively straightforward are the cases in which a publication or broadcast includes a number of separate and distinct allegedly defamatory imputations. In principle, these imputations will be independently actionable, and must be separately defended if the plaintiff chooses to sue.³⁰⁰ In these first two scenarios, the defence of truth is straightforward in concept: each imputation is either substantially true or not, and the dispute will be determined by reference to the evidence that each party adduces.

5.09 Beyond this, however, there is a range of more complicated scenarios in which the determination of meaning is more difficult. In these areas, the insistence that the law proceed to identify a single meaning of the words becomes more problematic. One such scenario is that where what appear to be a number of separate and distinct imputations might arguably be

²⁹⁸ [1968] 2 QB 157, 171-173.

²⁹⁹ [2002] UKPC 31, at [20].

³⁰⁰ A plaintiff accused of being a thief and an adulterer, for instance, might choose to sue on the accusation of adultery only, in which case the defendant cannot then seek to justify the charge of theft. It is no defence to a charge that “You called me A” to say, “Yes, but I also called you B on the same occasion and that was true” - see *Cruise v Express Newspapers plc* [1999] QB 931, 954; *Warren v Random House Ltd* [2008] EWCA Civ 834.

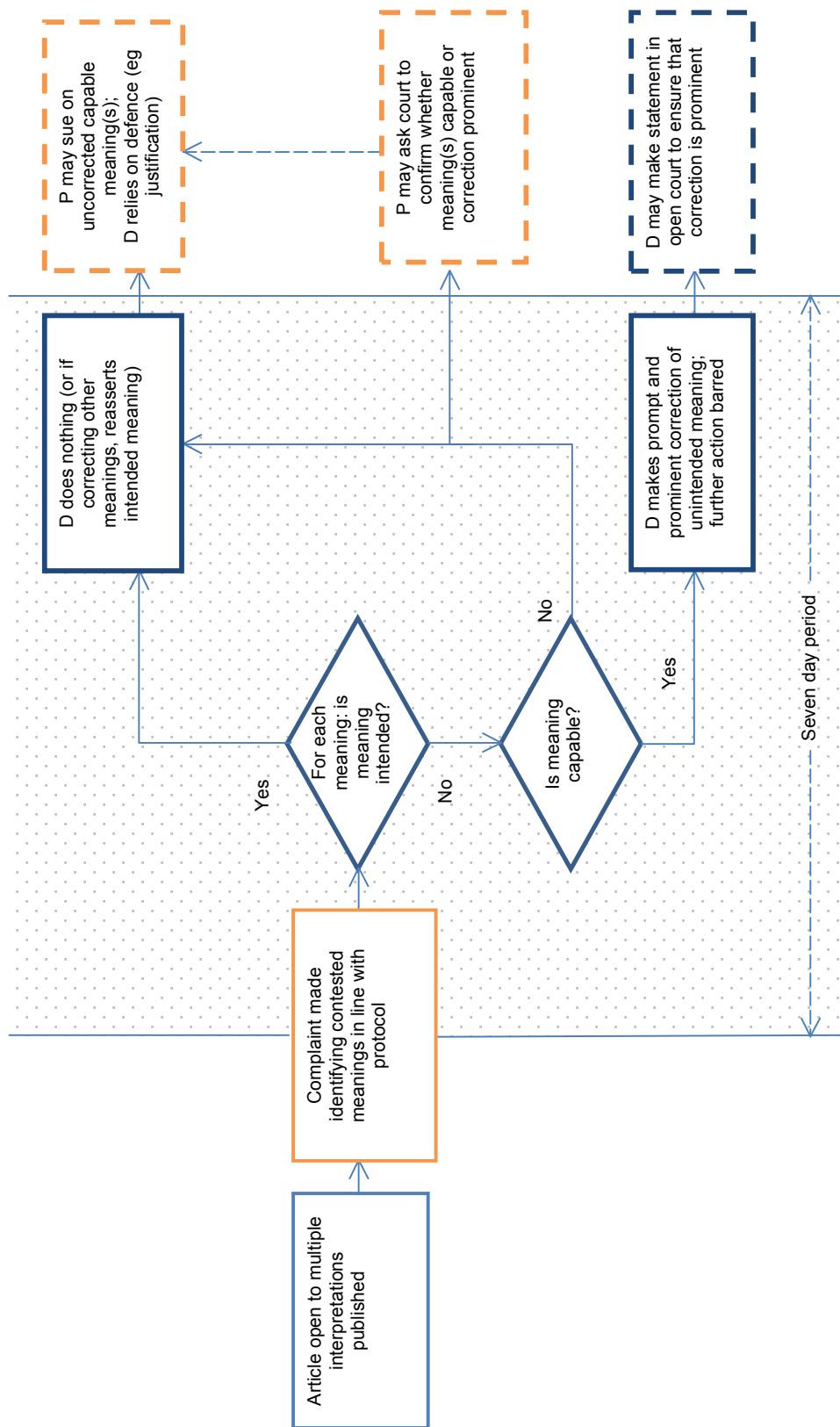


Chart 1: Complaints process under scheme set out in chapter 5

— Actions / decisions for publisher (D)

— Actions / decisions for prospective plaintiff (P)

understood as instances of the same general, singular imputation.³⁰¹ That is, the seemingly separate allegations can be said to possess a “common sting”.³⁰² Others arise where the same form of words is semantically capable of bearing a number of slightly differing, and progressively more serious, interpretations. The words may elicit a number of “shades of meaning”.³⁰³ Naturally, in such cases the defendant will seek to persuade the court to select a less serious meaning as that which would be inferred by the reasonable reader. This is known as the “*Lucas-Box*” meaning.³⁰⁴ Relatedly, an allegation can be published with varying force in that it is made with a greater or lesser degree of certitude: the “*Chase* levels” of meaning.³⁰⁵ Finally, a seemingly anodyne form of words may bear an innuendo meaning for a section of the wider audience the members of which possess some special, extraneous knowledge that informs only their interpretation of the phrase in question (legal innuendo).³⁰⁶

5.10 The need to select one from among an array of possible meanings has resulted in complex rules and practice on the pleading of meanings. At present in both English and Northern Irish law, the plaintiff must specify in the statement of case the defamatory meaning that he or she believes the contested words hold.³⁰⁷ Plaintiffs tend to plead only a narrow range of meanings. On occasion, he or she may “hedge bets” by offering different arguments in the alternative. As the litigation develops, the court is not bound to the plaintiff’s pleaded meaning,³⁰⁸ save that it will not find that the words bear a meaning more serious than that contended for.³⁰⁹ The plaintiff is free, therefore, to offer additional argument related to meanings other than those first presented in response to defences that speak to lesser meanings. Indeed, not to do so may be self-defeating as the judge or jury may ultimately tend

³⁰¹ This is distinct from the circumstances in which a party is permitted to rely on evidence of other examples of poor conduct, which have not been alluded to in what was published, in order to prove a general imputation of which the specific published allegation is said to be illustrative – see, for example, *Williams v Reason* [1988] 1 WLR 96.

³⁰² This is the basis of the *Polly Peck* justification defence. A useful illustration is that where failure to prove one specific allegation of adultery on which the plaintiff sued may not undermine a defence of truth if a other instances of adultery that have been alleged can be proven and the common sting of the allegations is read as one of adulterous promiscuity – see *Khashoggi v IPC Magazines Ltd* [1986] 1 WLR 1412. Sometimes, of course, it may be of the utmost importance to the plaintiff that one particular allegation of adultery is disproven.

³⁰³ For example, the statement ‘X is helping police with their inquiries into a murder’ could be taken to mean any or all of the following: that X murdered someone else, that he was complicit in the murder, that he knew about the murder, that the police believe that he might know something about the murder or about its surrounding circumstances, or that he was a forensic psychologist involved in suspect profiling.

³⁰⁴ *Lucas-Box v News Group Newspapers Ltd* [1986] 1 WLR 147.

³⁰⁵ *Chase v News Group Newspapers* [2002] EWCA Civ 1722. These strengths of allegation are (i) that the plaintiff is guilty of X; (ii) that there are grounds to suspect that the plaintiff is guilty of X, and (iii) that there are grounds for investigating whether the plaintiff is guilty of X.

³⁰⁶ This last scenario has become a special case: it is the only situation in which the defamatory meaning of a libel is in any sense tested empirically through adduced evidence.

³⁰⁷ Civil Procedure Rules (CPR) (SI 1998/3132 as amended), Pt 53, PD, at 2.3(1). It is suggested in the *Pre-Action Protocol for Defamation* that plaintiffs should also include the meaning(s) attributed to the words complained of in the “letter before action” – at [3.3].

³⁰⁸ *Lucas-Box v News Group Newspapers* [1986] 1 WLR 147, at 153 (*per* Ackner LJ). See, generally, Kenyon, *Defamation: Comparative Law and Practice*, UCL Press 2006, at 54-60 (which includes a comparison with the position in Australia). A caveat exists in relation to pleaded legal innuendo meanings – see Kenyon, at 54, n292.

³⁰⁹ *Cook v Telegraph Media Group Ltd* [2011] EWHC 1134 (QB), at [11].

towards the defendant's view when deciding on the single meaning to be attributed. The defendant must set out any lesser meaning he or she wishes to plead in the statement of case, and must do so with sufficient particularity to allow the plaintiff to know the case he or she faces.³¹⁰

5.11 In cases where the meaning of the impugned publication is ambiguous or multifarious, the abstraction from reality involved in applying the single meaning rule will always result in a measure of injustice. The potentially pathological consequences of the rule were highlighted by the Court of Appeal in *Ajinomoto Sweeteners*:

*if the single meaning rule does achieve a fair balance in defamation law between the parties' competing interests, that would appear to be the result of luck rather than judgment... the application of the rule can also be said to carry with it the potential for swinging the balance unfairly against one party or the other, resulting in no compensation in cases when fairness might suggest that some should be due, or in over-compensation in others.*³¹¹

A similar point has been made in other jurisdictions: 'to insist upon an innocent interpretation where any reasonable person could, and many reasonable people would, understand a sinister meaning is to refuse reparation for a wrong that has in fact been committed'.³¹² Clearly, the converse also applies.

5.12 The consideration of the single meaning rule offered by the unanimous Court of Appeal in *Ajinomoto Sweeteners v ASDA Stores* was excoriating.³¹³ That case concerned the application of the rule in the context of claims for malicious falsehood. In the course of his judgment, however, Lord Justice Rimer reflected that 'if the single meaning rule did not exist, I doubt if any modern court would invent it, either for defamation or any other tort'.³¹⁴ Lord Justice Sedley described it as 'anomalous, frequently otiose and, where not otiose, unjust'.³¹⁵ In his half-hearted, but seminal, affirmation of the rule in *Slim v Daily Telegraph*, Lord Justice Diplock described the law of defamation as 'artificial and archaic' in this respect.³¹⁶ Commentators have described it as a legal fiction 'the existence of which owes much to accidents of history rather than legal principle or policy'.³¹⁷

³¹⁰ For a forceful demonstration of this requirement, see *Ashcroft v Foley* [2011] EWHC 292 (QB).

³¹¹ *Ajinomoto Sweeteners v ASDA Stores* [2010] EWCA Civ 609, at [43] (per Rimer LJ).

³¹² *Entienne P/L v Festival City Broadcasters* [2001] SASC 60.

³¹³ *Ajinomoto Sweeteners v ASDA Stores* [2010] EWCA Civ 609.

³¹⁴ *Ajinomoto Sweeteners v ASDA Stores* [2010] EWCA Civ 609, at [43].

³¹⁵ *Ajinomoto Sweeteners v ASDA Stores* [2010] EWCA Civ 609, at [31].

³¹⁶ [1968] 2 QB 157, at 171.

³¹⁷ Doley and Mullis, *Carter Ruck on Libel and Privacy* (6th edn, London: LexisNexis, 2010).

Justifications offered for the single meaning rule

5.13 Yet, the single meaning rule is incontrovertibly a facet of English and of Northern Irish defamation law. In *Lait v Evening Standard Ltd*,³¹⁸ the Court of Appeal traced the origins of the rule back as far as *Merivale v Carson*, a case decided in the late nineteenth century.³¹⁹ The House of Lords affirmed it in *Charleston v News Group Newspapers* as ‘too well established to require citation of authority’,³²⁰ while its use was described as ‘unexceptional’ by Lord Nicholls in *Bonnick v Morris*.³²¹ The question must be asked, therefore, as to why the law has embraced a rule that generates a focus on counterfactual artifice instead of plain fact. Seldom have justifications been articulated by the courts. In light of that fact, Lord Neuberger’s recent judgment is a welcome contribution.

5.14 When Lord Neuberger sat recently as a member of the Hong Kong Final Court of Appeal in *Oriental Daily Publisher v Ming Pao Holdings*, the sole purpose behind his contribution in a concurring judgment was to affirm the single meaning rule as an ‘essential’ feature of defamation law that ‘makes obvious good sense’.³²² From his Lordship’s speech, but also other sources, it is possible to divine a range of putative justifications that have been advanced by the courts and others over time.

5.15 A first justification is that ascribing singular meanings to words is part and parcel of legal practice. In *Slim v Daily Telegraph*, Lord Justice Diplock explained that:

*the argument between lawyers as to the meaning of words starts with the unexpressed major premise that any particular combination of words has one meaning which is not necessarily the same as that intended by him who published them or understood by any of those who read them but is capable of ascertainment as being the ‘right’ meaning by the adjudicator to whom the law confides the responsibility of determining it.*³²³

This was echoed by Lord Neuberger in *Oriental Daily v Ming Pao*. He explained that the determination of the meaning of words ‘is a question which arises in many areas of law, most notably perhaps in cases involving the interpretation of statutes, contracts and notices’.³²⁴

³¹⁸ [2011] EWCA Civ 859.

³¹⁹ (1887) 20 QBD 275.

³²⁰ [1995] 2 AC 65, at 71 (per Lord Bridge).

³²¹ *Bonnick v Morris* [2002] UKPC 31, at [21].

³²² *Oriental Daily Publisher v Ming Pao Holdings* [2012] HKCFA 59, at [141].

³²³ *Slim v Daily Telegraph* [1968] 2 QB 157, at 172.

³²⁴ *Oriental Daily Publisher v Ming Pao Holdings* [2012] HKCFA 59, at [140].

5.16 For the most part, this explanation is manifestly misdirected. The lawyers' interpretative task to which Lord Justice Diplock referred is most often that of assisting the court in determining the meaning of words as terms of law. In contrast, the determination of the meaning of words in a publication is a matter of fact, not law. Lord Neuberger is of course correct to highlight the fact that allowing legal terms to have multiple meanings would 'self-evidently lead to chaos and uncertainty in many cases'.³²⁵ There is simply no correspondence, however, between the discussion of statutory or contractual interpretation and the single meaning rule in defamation law.

5.17 It is of course interesting that the imperfection of communication can bear on legal issues in different contexts, but the strength of this analogy as a justification for the single meaning rule in defamation law is nugatory. The reason why the words in *Mannai Investment* had to be interpreted one way or the other as a matter of fact was to allow the court to decide whether the contract persisted or not (and impliedly to determine whether there had been a subsequent breach of contract). This requires a binary determination. There is no equivalent necessity in the defamation context that might explain why one meaning only must be attributed to impugned words. To argue otherwise is tautologous. If this were the only justification offered for the state of the law, the single meaning rule would be a rule of law only because it has been a rule of law.

5.18 Incidentally, a closer analogy to the context in which the single meaning rule is used in defamation law is the determination of whether there might be confusion between commercial signs or symbols among consumers in European and domestic trademark law. In that context, the High Court recently roundly rejected the suggestion that European precedent compelled the recognition of a single meaning rule.³²⁶ In debunking the proposition, Arnold J noted that he was 'not aware of any textbook or academic commentary which supports the existence of a single meaning rule in trade mark law... nor am I aware of any authority from the superior courts of the other Member States to support the existence of such a rule'.³²⁷ Moreover, he added that 'the single meaning rule which exists in English defamation law is widely regarded as

³²⁵ *Oriental Daily Publisher v Ming Pao Holdings* [2012] HKCFA 59, at [141]. To be fair, Lord Neuberger's version of the point was not limited to legal interpretation. His reference to "notices", and his invocation of *Mannai Investment v Eagle Star Life Assurance* [1997] AC 749 extended his argument to cover instances outside of defamation where the need to interpret ambiguous words might arise as a question of fact. In the case cited, the House of Lords was required to decide whether a tenant had properly given notice as required under a break clause in his lease in order to bring a tenancy to a close. On their face, the words in the notice were not in fact ambiguous: read strictly, it was clear that the tenant had not done what was required of him. The issue was rather whether the words should be understood by reference to their context, which was that the tenant had obviously intended to act as required under the contract but had erred. Their Lordships split on that issue.

³²⁶ *Interflora Inc v Marks & Spencer plc* [2013] EWHC 1291 (Ch), [213]-[224].

³²⁷ *Interflora Inc v Marks & Spencer plc* [2013] EWHC 1291 (Ch), at [221].

anomalous'.³²⁸ As already noted, the Court of Appeal has also rejected the notion of a single meaning rule in the closely analogous context of malicious falsehood.³²⁹

5.19 It may be that pragmatic justifications for the single meaning rule are more persuasive. Indeed, in *Lait v Evening Standard*, Lord Justice Laws introduced the rule precisely as 'a fiction adopted by the law for practical reasons'.³³⁰ Even so, such reasons have generally been more assumed than expressed. It is possible to draw out three main, somewhat inter-related, practical justifications for the single meaning rule, however, from the jurisprudence and wider literature.

5.20 The first of these is based upon the fact that libel involves jury trials. In *Slim v Daily Telegraph*, Lord Justice Diplock noted that:

*the recognition that there may be more than one meaning which reasonable men might understand words to bear does not absolve the jury from the duty of deciding upon one of those meanings as being the only 'natural and ordinary meaning' of the words. Juries, in theory, must be unanimous upon every issue on which they have to adjudicate; and since the damages that they award must depend upon the defamatory meaning that they attribute to the words, they must all agree upon a single meaning as being the 'right' meaning.*³³¹

At least with regard to England and Wales, there is an obvious rejoinder to this justification: juries have become more or less obsolete in the defamation context. Even if this contention might once have justified the single meaning rule, it cannot do so for the future.

5.21 There is also room to be sceptical about Lord Justice Diplock's premise on its own terms. It seems an unnatural exercise to require a group of twelve individuals to fix on one interpretation when, if anything, they would be better placed than a single adjudicator to appreciate the multiplicity of meanings. Such limited evidence as is available on juries' undertaking of the task suggests that they are often unwilling or unable to agree on singular meanings, or that they engage in compromise between meanings.³³² Certainly, the abstraction of the single meaning rule must make the task of the jury no less difficult, but much less natural, than asking the group to proceed on the basis that multiple reasonable meanings were possible.

5.22 In *Oriental Daily*, Lord Neuberger offered two further pragmatic arguments in favour of the single meaning rule. Both suggested that removing the rule would result in an obviously

³²⁸ *Interflora Inc v Marks & Spencer plc* [2013] EWHC 1291 (Ch), at [224].

³²⁹ *Ajinomoto Sweeteners v ASDA Stores* [2010] EWCA Civ 609.

³³⁰ [2011] EWCA Civ 859.

³³¹ *Slim v Daily Telegraph* [1968] 2 QB 157, at 174.

³³² See, for example, Kenyon, *Defamation: Comparative Law and Practice*, UCL Press 2006, 120-123; Shillito and Barendt, 'Libel Law' (1999) *Yearbook of Copyright and Media Law*, 4, 370-386.

undesirable increase in legal costs in libel litigation. His Lordship's first point was an elaboration of Lord Justice Diplock's premise. Lord Neuberger asserted that abolition of the rule would 'lead to the dispiriting, expensive, and time-consuming prospect of many witnesses being called by each party, to explain how they understood the statement in question'.³³³ A similar assertion was made in *Charleston*.³³⁴ This assumption that evidentiary practice would necessarily have to change if the single meaning rule was excised from the law, however, is ungrounded. It is not obvious why the presumption that harm flows from defamatory meanings should be affected, or that a court would be unable to attribute quantum of harm to different meanings recognised.

5.23 If the question was whether any given interpretation could reasonably be inferred from the impugned words, with all such reasonable interpretations remaining on the table, then the exercise reverts to one of easy impression. There would be no need for any evidence on how a publication was in fact interpreted. To reiterate Lord Justice Diplock's statement of the rather obvious, 'the chances are that if the words are reasonably capable of being understood as bearing more than one meaning, some readers will have understood them as bearing one of those meanings and some will have understood them as bearing others of those meanings'.³³⁵ A presumption that all reasonable meanings will have been inferred by at least some recipients of a publication is in fact much more legitimate than a presumption that all reasonable recipients will have inferred a single meaning. It is not beyond the wit of a court to ascribe relative likelihoods that a given interpretation will have been drawn to different possible interpretations of a given publication.

5.24 Lord Neuberger's second pragmatic argument in favour of the extant rule was that jettisoning it would 'lead to greater uncertainty in outcome...[as] instead of a statement with two possible meanings giving rise to a problem requiring a binary resolution, it would give rise to a problem which had a multiplicity of potential answers, along what might be seen as a continuous spectrum'.³³⁶ Lord Neuberger appears to presume that without the single meaning rule the determination of disputes would become by degrees more complex than at present. This is a serious concern, but it can be met with two responses.

5.25 The first response is that, as discussed below, it may be possible to ensure that only contested meanings – that is, for example, an interpretation that the defendant asserts positively to be true which the plaintiff insists is false – might be considered by the court. All other meanings might be weeded out in advance of proceedings such that disputes focused on language and not truth might be quickly resolved.

³³³ *Oriental Daily Publisher v Ming Pao Holdings* [2012] HKCFA 59, at [142].

³³⁴ *Charleston v News Group Newspapers* [1995] 2 AC 65, at 71 (per Lord Bridge).

³³⁵ *Slim v Daily Telegraph* [1968] 2 QB 157, at 173.

³³⁶ *Oriental Daily Publisher v Ming Pao Holdings* [2012] HKCFA 59, at [142].

5.26 Secondly, Lord Neuberger's argument also seems almost wilfully to underplay the reality of how pleading and argument over meaning in libel cases currently proceeds. At present, both sides proffer meanings to the court that best serve their own interests in the defamation game. The very fact that the court must settle on a single meaning has the result that obfuscation and complication become a worthwhile exercise. It is no stretch of the imagination to suppose that the insight once afforded by an interviewee to Professor Andrew Kenyon is generalisable to all defamation practitioners:

*when I get a claim, I would have a look at that article and do two things. One is I would form my own view [about its meaning], as any person in the world would... and the second thing I'd do is [ask] what meaning can I extract out of it which is most helpful to my clients. The two things are often quite different.*³³⁷

As things stand, all capable meanings already remain on the table until the single meaning is determined by the court. The context created by the single meaning rule encourages the parties to enter into a legal game, rather than to address concerns raised and to mollify them quickly and effectively – if appropriate – through real-world action. Parties are incentivised poorly by the existing law. The process discourages defendants in particular from responding appropriately to plaintiffs' complaints. It encourages plaintiffs to plead high on meanings. Much argument between parties is focused on meaning in the hope that the court will select one that is favourable to this side or that. The tenor of the defamation game becomes one of strategy and semantics, rather than the attempt to address any core dispute. Costs are significantly increased.

Codicil: "early" determination of meaning and the continuing problem of cost

5.27 As a codicil, it must be noted that in recent times, the tendency of English courts to consider libel disputes without a jury has expedited the determination of meaning, often placing the exercise in the preliminary stage of litigation. This tendency will likely accelerate under the 2013 Act with the removal of the presumption of trial by jury. Relative to the previous position, where meaning was determined by the jury only at the endpoint of a trial, this would appear to be a very significant advance. Even after the shift, however, much time and effort – and correspondingly cost – prior to and in the early stages of litigation must still be dedicated towards the meaning issue.

³³⁷ Kenyon, *Defamation: Comparative Law and Practice*, UCL Press 2006, at 119-120. Furthermore, on the strength of interviewees' comments Kenyon notes that the meanings pleaded by defendant's are often verbose and general, not because the lawyers wish to establish those meanings *per se*, but rather because the general meaning provides a wider gateway to evidence (at 120).

5.28 Table 1 opposite illustrates that “early” determination is a misnomer. On the most generous analysis of recent cases, there is still a mean time elapse of 499 days between the date when publication occurs and the court’s judgment on determination of meaning is handed down. There is a profound irony in the fact that the law presumes that the members of the original audience will readily have taken a view upon reading or hearing a defamatory statement, but yet the court takes the best part of a year and a half to achieve the same.

5.29 Even with an increased tendency for the court to determine meaning in the preliminary stages of litigation, the cost of this more expeditious process will continue to place defamation litigation intended to vindicate reputation far out of the realms of the possible for many plaintiffs. The cost will continue to threaten defendants with a financial chill that is impossible for many to withstand.

Discursive remedies, barring of claims and withdrawal of the single meaning rule

5.30 Absent the single meaning rule, the determination of meaning issue and the complicated associated rules on pleading would effectively disappear. As Lord Neuberger and Lord Justice Laws noted, retaining a range of meanings in defamation actions and running these all through the court would become cumbersome and unfair, however, particularly in circumstances where a publisher simply did not intend the more damaging interpretations.³³⁸ It might be expected that publishers would seek to placate plaintiffs as swiftly as possible with corrections and retractions where unintended meanings could be inferred. In itself, this would be very desirable, but as things stand it would clearly give plaintiffs an undeserved “whip-hand”.

5.31 This need not be an argument for retaining the counterfactual single meaning rule however. One option would be to couple the removal of the single meaning rule with the introduction of appropriate “discursive remedies” that might provide an attractive “way out” for defendants. That is, the law might recognise, applaud and promote the tendency of publishers to provide a discursive solution to disputes generated by publication. The jettisoning of the single meaning rule and the introduction of discursive remedies together could take all but the intractable disputes on specific contested meanings out of the legal forum. Those cases that rested on some fundamental dispute of fact would still go to court, but would be dealt with more efficiently. All others might be resolved through enhanced public sphere engagement, not bowdlerising legal chill.

³³⁸ Anecdotally, this was the experience in New South Wales prior to the uniform defamation acts of 2005. As the cause of action rested upon possible imputations, publishers were sometimes left to defend meanings that they had never contemplated when publishing the impugned words.

Table 1: Time elapse between publication and court determination of meaning in the ten most recent cases involving “early determination” of meaning.

Case Name	Date of Publication	Date of Hearing	$\Delta 1$	Date of Judgment	$\Delta 2$
<i>Yeo v Times Newspapers</i> [2014] EWHC 2853 (QB)	9 June 2013; 23 June 2013, and continuing online publication	30 July 2014	417	20 August 2014	438
<i>Cooke v MGN Ltd</i> [2014] EWHC 2831 (QB)	26 January 2014	23 July 2014	179	13 August 2014	200
<i>Mughal v Telegraph Media Group Ltd</i> [2014] EWHC 1371 (QB)	15 June 2013	30 April 2014	320	7 May 2014	327
<i>Contostavlos v News Group Newspapers Ltd</i> [2014] EWHC 1339 (QB)	16 November 2012 and continuing online publication	11 April 2014	512	1 May 2014	532
<i>Meadows Care Ltd v Lambert</i> [2014] EWHC 1226 (QB)*	30 May 2012	2 April 2014	673	16 April 2014	687
<i>Uppal v Endemol UK Ltd</i> [2014] EWHC 1063 (QB)	25 June 2012 and 19 July 2012	7 April 2014	652	9 April 2014	654
<i>Johnston v League Publications Ltd</i> [2014] EWHC 874 (QB)	22 August 2011	28 February 2014	922	26 March 2014	948
<i>Building Register v Weston</i> [2014] EWHC 784 (QB)	23 October 2012 (continuing online)	12 March 2014	506	20 March 2014	514
<i>McEvoy v Michael</i> [2014] EWHC 701 (QB)**	20 October 2010, 2 March 2011	3 March 2014	1231	18 March 2014	1246
<i>White v Express Newspapers</i> [2014] EWHC 657 (QB)	17 June 2012	18 March 2014	640	18 March 2014	640
Mean $\Delta 1$ = 605.2 days; Median $\Delta 1$ = 640 days; Mean $\Delta 2$ = 618.6 days; Median $\Delta 2$ = 640 days					
Omitting <i>Johnston</i> and <i>McEvoy</i> as outliers, Mean $\Delta 1$ = 487.4 days; Median $\Delta 1$ = 512 days; Mean $\Delta 2$ = 499 days; Median $\Delta 2$ = 532 days					

- The cases included above were drawn from the table ‘Media Law Cases: 2010-14’ that is available on the Inform blog (see [WWW] <http://inform.wordpress.com/table-of-cases-2/> (accessed September 2014))
- $\Delta 1$ is the number of days between the date of publication and the date of the hearing on the determination of meaning; $\Delta 2$ is the number of days between the date of publication and the date of the judgment on the determination of meaning. Where there was more than one impugned publication involved in a claim, the measurement is taken from the date of the first publication.
- * denotes a claim for slander; ** denotes a claim heard outside London.
- In *Kadir v Channel 5 Television Ltd* [2014] EWHC 2305 (QB), determination of meaning took place at the substantive trial in the High Court before the judge alone. This related to a news broadcast aired on 27 December 2011. The case was heard on 2-3 July 2014 ($\Delta 1=944$), and the judgment handed down on 15 July 2014 ($\Delta 2=957$).
- In *Thompson v James* [2014] EWCA Civ 600, the Court of Appeal heard an appeal on the determination of meaning in respect of publications made on 28 February, 22 March and 6 April 2011. The court heard the appeal on 30 April 2014 ($\Delta 1=1158$), and handed down its judgment on 14 May 2014 ($\Delta 2=1172$).

5.32 Discursive remedies – corrections, retractions, rights of reply and apologies – have long been identified as being of potential utility in the defamation context.³³⁹ The potential of such options has grown enormously in the context of online and social media.³⁴⁰ In some respects, they are already commonplace in the United Kingdom. Their use is haphazard however, and their availability as a matter of law is limited. In contrast, in many European jurisdictions discursive remedies are the primary mechanism utilised.³⁴¹ It is often said that plaintiffs’ primary aim is to obtain a swift correction of misleading publications concerning themselves.³⁴² It is also a tenet of good journalism that errors should be corrected.³⁴³

5.33 Clearly, a key question becomes what forms of discursive remedy might serve this purpose.³⁴⁴ Rights of reply, retractions and corrections, and apologies are each different in character. A right of reply allows a plaintiff the opportunity to “set the record straight”, but it clearly does not also amount to any admission on the part of a publisher that what has been said was inaccurate. Apologies, if sincere, may do much to salve the hurt felt by a plaintiff, but as a mandated remedial device they invite cynicism both in their use and their appreciation.³⁴⁵ From a wider perspective, the existence or otherwise of contrition on the part of a publisher seems somewhat beside the point.

5.34 In contrast, a voluntary retraction or correction provided “promptly” and “prominently”, with its explicit recognition of error, would often – perhaps generally – be sufficient to provide a

³³⁹ See, Fleming, ‘Retraction and Reply: Alternative Remedies for Defamation’ (1978) *University of British Columbia Law Review*, 12, 15-31; Bezanson, Cranberg and Soloski, *Libel Law and the Press: Myth and Reality* (Free Press, 1987). For a recent reflection on the possibilities of this approach, see Kenyon, ‘Protecting Speech in Defamation Law: Beyond *Reynolds*-Style Defences (2014) *Journal of Media Law*, 6, 21-46.

³⁴⁰ See, generally, Ardia, ‘Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law’ (2010) *Harvard Civil Rights-Civil Liberties Law Review*, 45, 261-328.

³⁴¹ Tomlinson, ‘Libel, damages and declarations of falsity’, *Inform*, 2 November 2011. See generally, Bruggemeier, Ciacchi and O’Callaghan (eds), *Personality Rights in European Tort Law* (Cambridge: CUP 2010); Koziol and Warzilek (eds), *The Protection of Personality Rights Against Invasions by Mass Media* (New York: Springer Wein, 2005).

³⁴² This idea was oft-cited by plaintiffs’ lawyers during the debates on libel reform that culminated in the Defamation Act 2013. It was also a core finding of the Iowa Libel Research project that plaintiffs were motivated by this desire, and not by the prospect of a financial windfall - see Bezanson, ‘Libel Law and the Realities of Litigation: Setting the Record Straight’ (1985) *Iowa Law Review*, 71, 215-233; ‘The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get’ (1986) *California Law Review*, 74, 789-808. This general preference among libel plaintiffs for a discursive remedy is also recognised in the English *Pre-Action Protocol for Defamation* (at [1.4]).

³⁴³ Cl.1(ii) of the Press Complaints Commission (PCC) *Editors’ Code of Practice* states that ‘a significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and – where appropriate – an apology published’. Similarly, clause 3 of the NUJ *Code of Conduct* provides that ‘[a journalist] does her/his utmost to correct harmful inaccuracies’. Interestingly, as regards the ‘Comment is free’ section of its website, the *Guardian* newspaper provides an automatic right of reply to any person mentioned in a published article (see <http://www.guardian.co.uk/commentisfree/series/response>). Broadcasters can be compelled by Ofcom to carry summaries of fairness and standards complaints and the regulator’s adjudications - see ss. 119-120, Broadcasting Act 1996.

³⁴⁴ Strictly, the nomenclature of “remedy” in this context is inappropriate, given that the action taken by the publisher would pre-empt any determination of a dispute by a court.

³⁴⁵ Joint Committee on the Draft Defamation Bill, HL Paper 203 & HC 930-II, at Q604 (per Desmond Browne QC and Hugh Tomlinson QC).

good measure of vindication.³⁴⁶ The most effective way of vindicating a person's reputation must be to ensure that the truth is fully and quickly aired, and misrepresentations corrected. Certainly, a substantive intervention in the public sphere that pre-empted litigation would deliver more effective vindication than a compelled payment of damages following a protracted and contested legal dispute.

5.35 In the absence of any compulsion to correct or retract, or of any advantage to publishers from having done so, it might reasonably be questioned why – barring ethical rectitude – they might take the trouble.

5.36 To incentivise the use of such tools, the law might stipulate that the prompt and prominent correction or retraction of an error following receipt of a complaint would preclude any further action in respect of the meaning in question. Plaintiffs could be obliged to communicate the imputations complained of and the meaning ascribed to the words in question to the publisher in advance of bringing any action thereby allowing publishers the opportunity to publish a correction or retraction. Alongside assessing the capability of any meanings over which remedial action was not taken by the publisher, provision could be made for a court to assess whether the complained of meaning had been properly corrected before any action could proceed.

5.37 It could be argued that such a scheme might easily be gamed by publishers in the sense of publishing stories and followed by corrections to avoid potential liability. Both the value of publishers' own reputations for accuracy and credibility and the potential availability of a claim for malicious falsehood, however, might be expected to militate against abuses. Moreover, any inadequacy in the discursive remedy afforded would permit the plaintiff to proceed to court.

5.38 To appreciate the potential utility of this approach in the absence of a single meaning rule, one can consider the outcomes in cases involving ambiguous or multifarious potential meanings. For example, in a case involving *Chase* levels of meaning (the descending scale from the firm allegation, through an allegation of reasonable suspicion, to the suggestion that there is reason to investigate further), the plaintiff might suggest that all three meanings can be taken from a publication.³⁴⁷ On receipt of a complaint, the defendant might respond that the form of words used could not tenably be interpreted as the most serious meaning (A). He or she might agree, on reflection, that the words could be understood as amounting to an allegation of reasonable suspicion (B), but assert that no such meaning was in fact intended. Instead, he or she might posit that all that was intended was the identification of a need to

³⁴⁶ This general principle was recognised in *Cooke v Mirror Group Newspapers* [2014] EWHC 2831 (QB).

³⁴⁷ Similar exercises might be conducted in respect of the scenario in which “shades of meaning” can be inferred from a publication.

investigate some matter further (C). In those circumstances, he or she might publish a note to the effect that there had been no intention to suggest (A) or (B) thereby providing vindication on those meanings insofar as this was necessary.³⁴⁸ He or she might also say that it is not considered tenable that (A) could be inferred, and – importantly – that (C) absolutely was intended. Should the plaintiff then wish to proceed to litigate on meaning (C), this would remain possible. Indeed, this would comprise a honing of the dispute onto the territory of the allegation made and intended.³⁴⁹ This would be achieved prior to going to court, and without any expensive technical lawyering on the pleading of meanings.

5.39 Other types of cases involving complexity of meaning would also be easily refined so as either to dissolve or to focus quickly on core disputes of fact. For instance, in the – surely infrequent – cases in which it was important for a plaintiff to differentiate between individual allegations that carried a common sting – “I may be an adulterer, but I was not unfaithful with *that* man” – this could be easily accommodated with a retraction of the contested particular allegation if it could not be stood up. Similarly, the parsing of “shades of meaning” and the correction of any unintended misrepresentation would see *Lucas-Box* pleadings – where the defendant contends that the plaintiff’s meaning is not conveyed at all, and proposes instead to justify an alternative meaning – become an artefact of legal history.

5.40 One potential problem with an approach that involves the barring of claims was identified during the latter stages in the consideration of the Defamation Bill. The Libel Reform Campaign had mooted a possible defence that would operate to bar proceedings in respect of statements made in good faith on matters of public interest insofar as a prompt clarification or correction had been made with adequate prominence. The Joint Committee on Human Rights rejected this approach, citing two reasons.³⁵⁰ First, it contended that such a defence may promote irresponsible journalism if publishers were willing to simply publish and correct as necessary. More tellingly, it emphasised that barring access to damages if a correction or retraction sometimes may not be sufficient to rectify the harm suffered by the plaintiff, and so the defence would risk breaching the Article 8 right to reputation. The unremedied harm envisaged was particular harm caused in the interim between the times when publication and correction occurred.

³⁴⁸ The publisher might also simply ignore the complaint in respect of meaning (A), thereby inviting the plaintiff to sue. The expectation would be that a judge would in any event strike out the meaning early on capability grounds.

³⁴⁹ Notably, in those circumstances, the plaintiff would have to be able to explain why he or she considered that any significant harm had been caused by meaning (C) when that impliedly attributed by him or her to meanings (A) and (B) had been taken off the table. This would itself introduce an incentive for plaintiffs to “go in low”, or perhaps “realistically”, in the original letter of complaint.

³⁵⁰ [2012-13] *Seventh Report: Legislative Scrutiny - Defamation Bill* (HL Paper 84/HC 810), at [29]-[34].

5.41 In response to the first of these concerns – which would apply equally to the bar on claims envisaged above – it can be recalled that giving up space to highlight errors is not “cost-free” for media organisations, either in financial or reputational terms. This would be particularly the case if the publication of corrections became more commonplace. Moreover, for clear abuses the claim for malicious falsehood would remain available. The second concern regarding susceptibility to challenge under Article 8 suggests that a prompt and prominent correction or retraction should not create a bar to proceedings where the plaintiff intends to prove special damages.

5.42 A further issue arises on account of the approach adopted towards the determination of whether any serious harm could be shown given the correction and apology that had been made in the case of *Cooke v Mirror Group Newspapers*.³⁵¹ In light of that decision, it might reasonably be asked whether the scheme outlined above would be necessary or desirable were an equivalent to section 1 to be adopted.

5.43 In response, it can be noted that the scheme proposed is intended to take an element of defamation law that generates significant complexity out of the legal forum, and thereby to reduce the cost and associated chilling effect of the law. The discursive remedy and bar to proceedings element is desirable, first, because it delivers to plaintiffs what they most desire when ambiguity in and misinterpretation of publications occurs, while providing defendant-publishers with the incentives necessary to engage with the remedial process. The scheme overall should also make it more financially more feasible for relatively impecunious plaintiffs to pursue intractable disputes through the courts.

5.44 In contrast, the practice under section 1 remains uncertain. The circumstances in *Cooke* were relatively straightforward, yet even then, the plaintiff was left with a measure of dissatisfaction over the correction rendered. The difficulty in properly correcting what has been published will be substantial in cases where there is ambiguity of language and hence real questions over the determination of meaning. Many publishers will likely not be motivated to correct at all, especially when a plaintiff is not wealthy.³⁵² More broadly, the contention posited above assumes that the adoption of section 1 in Northern Ireland is desirable in itself.

5.45 Aside from questions of concept, there would also be practical matters to be addressed before any introduction of a scheme such as that outlined in this chapter. There is clearly room for debate, for example, on how the concepts of “promptness” and “prominence” should be understood. These would almost certainly be matters ultimately to be decided by the court in

³⁵¹ [2014] EWHC 2831 (QB).

³⁵² Fetiveau, ‘Defamation Act 2013: Serious Harm, a win for the press?’, *Inform*, 12 September 2014.

the light of the specific circumstances of particular disputes. This is not to say that rules of thumb could not be established by law in advance.

5.46 In European jurisdictions that deploy discursive remedies, it is generally considered that these should be available very soon after the original publication. The potential value of this can be seen in the recent libelling of the late Lord McAlpine as a paedophile. Within days of the publications occurring, retractions and apologies published by broadcasters and social media commentators could have left few people unclear that the allegations had been mistaken. As a starting point, we would suggest that a correction or retraction should be made within seven days of the receipt of a complaint regarding the original publication insofar as the complaint set out the complained of meanings in an intelligible fashion.³⁵³ We would be happy to receive comment on this theme in consultation responses.

5.47 The issue of “prominence” may be more problematic. First, in some cases there is limited capacity to provide an adequate correction or retraction. An example might be where the defamatory statement was published in a book. In this scenario, the publisher may be compelled to make expansive use of social media and/or to make a statement in open court.³⁵⁴ This latter option would require a change to the rules of the High Court in Northern Ireland to permit such statements to be made prior to the issuing of proceedings.

5.48 More often, it should be immediately possible for a publisher to make a correction or retraction in equivalent form to that in which the original defamation appeared. There is a perennial complaint, however, about the use of such remedies: that they can add insult to injury should the publisher be left to determine what is said, and how it will be presented.³⁵⁵ As a starting point, we would suggest – for example – that a correction or retraction in a newspaper should be made either on the front page or a well-signposted editorial column; a correction in an online platform should be on a website’s homepage or prominently-linked there from. The correction should note the nature of the mistaken representation, as well as introducing correct details (if appropriate). All such discursive interventions could also be supported by appropriate references on social media. Again, we would be happy to receive comment on this theme in consultation responses. Ultimately, however, a publisher who was found by a judge not to have

³⁵³ The process for interaction between the prospective plaintiff and the defendant-publisher and the requirements of each party could be set out easily in a pre-action protocol for defamation.

³⁵⁴ One possible advantage of the availability of the statement in open court option is that the onward reporting of the statement is then protected by qualified privilege. If such protection is necessary or desirable, then it might be emulated for the practice of making corrections and retractions generally by the introduction of an equivalent reporting privilege concerning the publication of discursive remedy. This theme was highlighted to us only shortly before publication of this consultation paper. Hence, we have been unable to take a considered view on whether it is a necessary or desirable feature of the scheme set out in this chapter. We would be most interested in further comment on this point.

³⁵⁵ Consider, for example, the recent complaint made by the parents of the abducted child Madeleine McCann in respect of the handling of their dispute with the *Sunday Times* – see McCann, ‘Leveson has changed nothing: the media still put “stories” before the truth’, *Guardian*, 2 October 2014.

published with sufficient prominence would face a straightforward defeat before the court as all uncorrected errors on all capable meanings would be actionable.

Other discursive remedies

5.49 The centrality of damages as the remedy in English and Northern Irish defamation law has been noted above. There have been long-standing arguments that other, discursive remedies would be more suitable in this context. Over time, statutory reforms have seen some such remedies introduced, either as a gateway to privileges or as part of mechanisms designed to accelerate the settlement of claims. The Defamation Act 2013 includes two new powers that fall within this area: the section 12 power for a court to order a summary of its judgment to be published, and the section 13 power to order the “take-down” of a defamatory statement. There is a wider range of discursive remedies available. A small number are noted briefly here, and respondents to the consultation are invited to advise the Commission as to whether more effort should be dedicated to these options.

Sections 12 and 13 of the 2013 Act: summary of judgment and take down orders

5.50 Section 12 and 13 of the 2013 Act provides English courts with new powers to make orders following the determination of defamation cases, although it is arguable that such powers may have been available in the common law in any event. Section 12 provides that:

- (1) Where a court gives judgment for the claimant in an action for defamation the court may order the defendant to publish a summary of the judgment.
- (2) The wording of any summary and the time, manner, form and place of its publication are to be for the parties to agree.
- (3) If the parties cannot agree on the wording, the wording is to be settled by the court.
- (4) If the parties cannot agree on the time, manner, form or place of publication, the court may give such directions as to those matters as it considers reasonable and practicable in the circumstances.
- (5) This section does not apply where the court gives judgment for the claimant under section 8(3) of the Defamation Act 1996 (summary disposal of claims).

Section 13 of the Act provides that:

- (1) Where a court gives judgment for the claimant in an action for defamation the court may order—
 - (a) the operator of a website on which the defamatory statement is posted to remove the statement, or

(b) any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement.

(2) In this section “author”, “editor” and “publisher” have the same meaning as in section 1 of the Defamation Act 1996.

(3) Subsection (1) does not affect the power of the court apart from that subsection.

5.51 These powers were not raised by any of our pre-consultation discussants. They would appear to be sensible additions to the law.

Other discursive remedy options

5.52 A number of other options within the category of discursive remedies were mentioned and in some cases advocated to us in the course of our pre-consultation discussions. These include the declaration of falsity available under Irish law, and variants on rights of reply. We do not make any specific request for comment on any of these options, but would be interested to receive any information and argument thereon.

5.53 The Irish Defamation Act 2009 does not contain a right of reply provision, but does contain two discursive remedies that do not involve the award of damages. The first is set out in section 28 of the Defamation Act 2009. This provides that a person who claims to be the subject of a defamatory statement may apply to the Circuit Court for a declaratory order that the statement is false and defamatory. The court will make an order to that effect if the statement is defamatory, the publisher has no arguable defence, and the publisher has failed to make, at the aggrieved person’s request, an apology, correction or retraction. The applicant for the order is not required to prove that the statement was false. Should an order be made, the applicant may not bring any other proceedings in respect of any cause of action arising out of the statement. The parallel with the scheme described above is clear, albeit that court sanction is required to achieve the outcome.

5.54 The second power in the Defamation Act 2009 is set out in section 30. Under that provision, the court may, on the application of a successful plaintiff in a defamation action, make direct the publication of a correction in such a manner as will ensure ‘that it is communicated to all or substantially all of those persons to whom the defamatory statement was published’. Such an order may also be made in a Circuit Court application for a declaratory order under section 28.

5.55 An additional option may be the introduction of a general right of reply. Such remedies are commonplace in continental legal systems, but have generally been considered ill-fitting in common law jurisdictions on account of the obligation they entail for publishers to dedicate space to the speech of others. There are interesting arguments to be had on the Convention-compliance of mandating or failing to mandate such opportunities.³⁵⁶ In line with the general tenor of the scheme outlined above, we have contemplated the specific option of introducing a cap on damages – not a bar to proceedings – in circumstances where the defendant-publisher offers a prompt and prominent right of reply to the aggrieved subject of a story.³⁵⁷ A right of reply cannot be treated in the same way as a correction or retraction as it does not involve any recognition or highlighting of an error in what was alleged by the publisher.³⁵⁸

5.56 One option may be for a cap of £30,000 to be placed on damages in defamation cases in which a right of reply has been offered, and for the £3,000 limit for defamation actions in the County Court in Northern Ireland to be raised to £30,000 in line with civil proceedings generally. This would mean that such cases would then be processed by the County Court and not the High Court. At present, the County Court is generally seen as an inappropriate forum in which to hear any but the most straightforward defamation proceedings due to the complexity of the issues normally involved. With the removal of the single meaning rule and the homing of issues before court that this should entail, however, it becomes conceivable that the county court could determine cases competently.

Consultation questions

Q 4 redux: Irrespective of whether the 2013 Act is adopted in whole or in part, would it be desirable to introduce into Northern Irish law a measure withdrawing the “single meaning rule” in combination with the introduction of a bar on claims where a publisher has made a prompt and prominent correction or retraction?

Q 24: Irrespective of whether the 2013 Act is adopted in whole or in part, would it be desirable for remedial powers of court equivalent to those set out in sections 12 and 13 of the Act to be introduced into Northern Irish law?

Q 25: Would it be desirable for any other “discursive remedies” to be introduced into Northern Irish law?

³⁵⁶ On the development of a Convention jurisprudence on the right of reply, see Ó Fathaigh, ‘The Recognition of a Right of Reply under the European Convention’ (2012) *Journal of Media Law*, 4(2), 322-332. See also, Koltay, *Freedom of Speech: The Unreachable Mirage* (Budapest: CompLex, 2013), ch.2.

³⁵⁷ Clearly, the same queries regarding the practical meaning of promptness and prominence discussed above apply here.

³⁵⁸ *Television New Zealand Ltd v Ah Koy* [2002] 2 N.Z.L.R. 616, NZCA.

CHAPTER 6: SECTION 75 OF THE NORTHERN IRELAND ACT 1998 EQUALITY SCREENING

Part 1. Policy scoping

Information about the policy

Name of the policy

The title of this policy is “The Law of Defamation”.

Is this an existing, revised or new policy?

This is an existing policy which the Commission has considered in order to make recommendations for reform.

What is it trying to achieve? (Intended aims/outcomes)

As part of the Northern Ireland Law Commission’s (“the Commission”) Second Programme of Law Reform, the Department of Justice requested that the Commission considered the law relating to defamation in Northern Ireland. The Commission duly accepted the reference. The intended aims are:

- To review the existing law of defamation within Northern Ireland in light of the recent changes brought about in England and Wales by the introduction of the Defamation Act 2013;
- To assess the strengths and weaknesses of the current system;
- To develop proposals which are tailored to the particular context of Northern Ireland and which address the problems arising in this jurisdiction.

Are there any Section 75 categories which might be expected to benefit from the intended policy? If so, explain how.

It is envisaged that this policy will create a positive impact generally for all those affected by the law of defamation. Moreover, due to the nature of defamation law, under which any person can bring forward an action, cases are generally not viewed as impacting upon equality or diversity issues. Therefore, no specific benefits or detriments have been identified for any of the section 75 categories.

Nevertheless, whilst early examination of the available evidence has identified no specific benefits or detriments for any of the section 75 categories. The Commission remains open to receiving evidence during the Consultation period of any potential equality impact any proposed change may have, and the Commission will take these into consideration while formulating its final recommendations.

Who initiated or wrote the policy?

The Northern Ireland Law Commission is responsible for devising the policy.

Who owns and who implements the policy?

The Northern Ireland Law Commission will make recommendations to government, who will decide whether to adopt the recommendations and, if thought fit, implement them.

Implementation factors

Are there any factors which could contribute to/detract from the intended aim/outcome of the policy/decision?

There are no foreseeable factors which could contribute to or detract from the intended aim or outcome of the policy.

Main stakeholders affected

Who are the internal and external stakeholders (actual or potential) that the policy will impact on?

There are a number of stakeholders who are potentially affected by the policy. For example: litigants (including potential litigations); academics; legal practitioners; government officials; media organisations and individual media practitioners; non-governmental organisations; interested voluntary sector organisations and the general public.

Other policies with a bearing on this policy

There are no other policies which have a direct bearing on this policy.

Available evidence

There is very limited statistical information available in respect of defamation cases in civil proceedings in Northern Ireland. The Commission was, however, provided some relevant data from the Northern Ireland Courts and Tribunal Service. The number of defamation cases issued in the High Court and County Court in Northern Ireland are outlined below.

Table 1: High Court Libel Proceedings

	2008	2009	2010	2011	2012	2013
Cases Received	55	46	54	31	31	27
Non-Court Disposals	20	196	55	17	6	10
Found for Plaintiff	ND	1	4	ND	3	2
Found for Defendant	1	ND	ND	ND	-	-
Damages	ND	£75,000	£57,001	£31,001	£112,505	£68,000

Table 2: County Court Libel/Slander proceedings

	2008	2009	2010	2011	2012	2013
Cases Received	-	3	1	1	1	3
Court Disposals	1	-	3	1	1	1
Found for Plaintiff	-	-	1	-	-	-
Found for Respondent	1	-	2	1	-	-
Damages	ND	-	£1,000	ND	-	-

Data for 2013 should be treated as provisional

O’Kane, ‘Northern Ireland: defamation claims in 2013, numbers stabilise’, *Inform*, 21 March 2014.

What evidence/information (both qualitative and quantitative) have you gathered to inform this policy? Specify details for each of the Section 75 categories.

Section 75 category	Details of evidence/information
Religious belief	There is no available evidence which provides a breakdown of those who initiated or defended defamation claims based on religious belief.
Political opinion	There is no available evidence which provides a breakdown of those who initiated or defended defamation claims based on political opinion.
Racial group	There is no available evidence which provides a breakdown of those who initiated or defended defamation claims based on racial groups.
Age	There is no available evidence which provides a breakdown of those who initiated or defended defamation claims based on age.
Marital status	There is no available evidence which provides a breakdown of those who initiated or defended defamation claims based on marital status.
Sexual orientation	There is no available evidence which provides a breakdown of those who initiated or defended defamation claims based on sexual orientation.
Men and women generally	There is no available evidence which provides a breakdown of those who initiated or defended defamation claims based on gender.
Disability	There is no available evidence which provides a breakdown of those who initiated or defended defamation claims based on disability.
Dependants	There is no available evidence which provides a breakdown of those who initiated or defended defamation claims based on those who have or do not have dependants.

Needs, experiences and priorities

Taking into account the information referred to above, what are the different needs, experiences and priorities of each of the following categories, in relation to the particular policy/decision? Specify details for each of the Section 75 categories.

Section 75 category	Details of needs/experiences/priorities
Religious belief	There is no evidence that people of differing religious beliefs have any particular needs, experiences and priorities in relation to this policy.
Political opinion	There is no evidence that people of differing political opinion have any particular needs, experiences and priorities in relation to this policy.
Racial group	There is no evidence that people of different racial groups have any particular needs, experiences and priorities in relation to this policy.
Age	There is no evidence that people of various ages have any particular needs, experiences and priorities in relation to this policy.
Marital status	There is no evidence that people of varying marital status' have any particular needs, experiences and priorities in relation to this policy.
Sexual orientation	There is no evidence that people of differing sexual orientation have any particular needs, experiences and priorities in relation to this policy.
Men and women generally	There is no evidence that people of differing genders have any particular needs, experiences and priorities in relation to this policy.
Disability	There is no evidence that people of differing disabilities have any particular needs, experiences and priorities in relation to this policy.
Dependants	There is no evidence that people with or without dependants have any particular needs, experiences and priorities in relation to this policy.

Part 2. Screening questions

1. What is the likely impact on equality of opportunity for those affected by this policy, for each of the Section 75 categories?

Section 75 category	Details of policy impact	Level of impact? minor/major/none
Religious belief	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different religious beliefs.	None.
Political opinion	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different political opinions.	None.
Racial group	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different racial groups.	None.
Age	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different ages.	None.
Marital status	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different marital status.	None.
Sexual orientation	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different sexual orientation.	None.
Men and women generally	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different genders.	None.
Disability	The Northern Ireland Law Commission does not consider that the policy has an impact on people living with a disability.	None.
Dependants	The Northern Ireland Law Commission does not consider that the policy has an impact on people who have or do not have dependants.	None.

2. Are there opportunities to better promote equality of opportunity for people within the section 75 equality categories?

Section 75 category	If Yes , provide details	If No , provide reasons
Religious belief		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better promote equality of opportunity for people of different religious beliefs.
Political opinion		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better promote equality of opportunity for people of different political opinions.
Racial group		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better promote equality of opportunity for people of different racial groups.
Age		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better promote equality of opportunity for people of different ages.
Marital status		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better promote equality of opportunity for people of different marital status.
Sexual orientation		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better promote equality of opportunity for people of different sexual orientation.
Men and women generally		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better promote equality of opportunity for people of different genders.
Disability		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better promote equality of opportunity for people living with a disability.
Dependants		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better promote equality of opportunity for people who have or do not have dependants.

3. To what extent is the policy likely to impact on good relations between people of different religious belief, political opinion or racial group?

Good relations category	Details of policy impact	Level of impact minor/major/none
Religious belief	The Commission does not consider that this policy is likely to impact on good relations between people of different religious beliefs.	None.
Political opinion	The Commission does not consider that this policy is likely to impact on good relations between people of different political opinion.	None.
Racial group	The Commission does not consider that this policy is likely to impact on good relations between people of different racial groups.	None.

4. Are there opportunities to better promote good relations between people of different religious belief, political opinion or racial group?

Good relations category	If Yes , provide details	If No , provide reasons
Religious belief		No, the subject matter of this policy does not per se or specifically provide an opportunity to better promote good relations between people of different religious beliefs.
Political opinion		No, the subject matter of this policy does not per se or specifically provide an opportunity to better promote good relations between people of different political opinion.
Racial group		No, the subject matter of this policy does not per se or specifically provide an opportunity to better promote good relations between people of different racial groups.

Additional considerations

Multiple identity

Generally speaking, people can fall into more than one section 75 category. Taking this into consideration, are there any potential impacts of the policy/decision on people with multiple identities?

(For example; disabled minority ethnic people; disabled women; young Protestant men; and young lesbians, gay and bisexual people).

The NILF is not aware of any evidence to suggest that there are any potential impacts of the policy on people with multiple identities.

Provide details of data on the impact of the policy on people with multiple identities. Specify relevant section 75 categories concerned.

Not applicable.

Part 3. Screening decision

If the decision is not to conduct an equality impact assessment, please provide details of the reasons.

The Commission has decided that it is necessary to conduct an Equality Impact Assessment in relation to this policy. Any proposals for the reform of defamation law and practice would seem to have no potential impact on any of the section 75 groups, given that proceedings can be brought forward by any member of the public, with the main barrier being a financial one (which applies to everyone, regardless of gender, age, race, etc.)

If the decision is not to conduct an equality impact assessment the public authority should consider if the policy should be mitigated or an alternative policy be introduced.

Not applicable – no negative impacts have been identified.

If the decision is to subject the policy to an equality impact assessment, please provide details of the reasons.

Not applicable.

Mitigation

Can the policy/decision be amended or changed or an alternative policy introduced to better promote equality of opportunity and/or good relations?

No, although as stated above, the Commission remains open, as part of its consultation process, to hearing evidence to the contrary and to taking it into account while formulating its final recommendations.

Timetabling and prioritising

Factors to be considered in timetabling and prioritising policies for equality impact assessment.

If the policy has been “screened in” for equality impact assessment, then please answer the following questions to determine its priority for timetabling the equality impact assessment.

On a scale of 1-3, with 1 being the lowest priority and 3 being the highest, assess the policy in terms of its priority for equality impact assessment.

Priority criterion	Rating (1-3)
Effect on equality of opportunity and good relations	1
Social need	1
Effect on people’s daily lives	1
Relevance to a public authority’s functions	1

Part 4. Monitoring

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Part 5. Approval and Authorisation

Screened by:	Position/Job Title	Date
Andrew Scott	Legal Adviser, Defamation Law Project	29 th September 2014
Approved by:		
Ken Miller	Acting Chief Executive	29 th September 2014

APPENDIX A

LIST OF PRE-CONSULTATION STAKEHOLDERS

Title	First name(s)	Surname	Position	Organisation
Ms	Olivia	O' Kane	Lawyer and facilitator of the NI Editors Liaison Group	Carson & McDowell Solicitors
Mr	Paul	Tweed	Solicitor	Johnson's Solicitors
Ms	Kathy	Matthews	Solicitor	Johnson's Solicitors
Hon Mr	Justice	Gillen	High Court Judge	Chair of the Defamation Law Committee
MLA	Mike	Nesbitt	Party Leader, MLA	UUP
Ms	Jo	Glanville	Director	English PEN
Mr	Mike	Harris	Campaigns Director	Index on Censorship
Mr	Paul	McDonnell	Solicitor	McKinty & Wright
Mr	Paul	Spring	Solicitor	Mills Selig
Mr	Alan	McAlister	Solicitor	Cleaver, Fulton, Rankin Solicitors
Mr	Colin	Caughey	Policy Officer	NI Human Rights Commission
Mr	Paul	Connolly	Editor	Belfast Telegraph
Mr	Billy	Foley	Editor	Irish News
Mr	Ben	Lowry	Deputy Editor	Belfast Newsletter
Mr	Mark	Mahaffy	Managing Director	Downtown Radio
Mr	Nicholas	Hanna	QC	The Bar of Northern Ireland
Mr	Brian	Fee	QC	The Bar of Northern Ireland
Mr	David	Ringland	QC	The Bar of Northern Ireland
Mr	Brett	Lockhart	QC	The Bar of Northern Ireland

SURVEY OF QUB AND UU FACULTY

NI Law Commission: questionnaire on experiences of defamation law

We would be grateful if you could complete the following short questionnaire, and ask that you provide as much information as possible subject to the proviso that any response you provide will not be privileged as a matter of law and may be released under the freedom of information regime if requested by a third party. We would be happy to receive responses directly from individual researchers, although it may be more practical for a collated or collective response to be returned by each Department. Our purpose at this stage is not to obtain robust empirical data, but rather to garner as much insight as possible into the nature of the problems for academic and scientific discourse that are generated by defamation laws.

Name:

Department:

Contact details:

Q1. Have you, or any other person with whom you are associated, had personal experience of defamation laws in the course of your work? Such 'experience' may have taken the form, for example, of defending legal action, receipt of a threat of legal action, or pre-emptive amendment of research outputs required by journal editors or publishers.

1a. If you have personal experience of defamation laws in the course of your work, was this in respect of Northern Irish defamation law, English defamation law, or the law of some other jurisdiction?

Q2. To what extent are you aware of the constraints imposed on the publication of research outputs by defamation laws? Has your appreciation of defamation law ever prompted you to revise, amend or bowdlerise the form in which you ultimately published research outputs or otherwise communicated about your work?

Q3. The legal reform embodied in the Defamation Act 2013 has not been extended in its application to Northern Ireland. Do you envisage that this discrepancy will have any bearing on your research or wider academic activities in future?

Q4. Would you be willing to meet in person with staff of the NI Law Commission involved in preparing the consultation on the reform of defamation law?

Below are the Departments of Queens University Belfast and University of Ulster to which the questionnaire was sent.

School of English and History
School of Biomedical Sciences
School of Environmental Sciences
School of Health Sciences
School of Pharmacy and Pharmaceutical Sciences
School of Criminology, Politics and Social Policy
School of Law
School of Computing and Information Engineering
School of Computing and Intelligent Systems
School of Computing and Mathematics
School of Engineering
School of Nursing
School of Psychology
School of Communication
Department of Accounting, Finance and Economics
Department of Business and Enterprise
Department of Hospitality and Tourism Management
Department of International Business
Department of Management and Leadership
Department of Marketing, Entrepreneurship and Strategy
School of History and Anthropology
School of Law
School of Biological Sciences
School Medicine, Dentistry and Biomedical Sciences
School of Pharmacy
School of Politics, International Studies and Philosophy
Centre for Biomedical Sciences Education
School of Chemistry and Chemical Engineering
School of Electronics, Electrical Engineering and Computer Science
School of Geography, Archaeology and Palaeoecology
School of Mathematics and Physics
School of Mechanical and Aerospace Engineering
School of Nursing and Midwifery
School of Psychology
School of Planning, Architecture and Civil Engineering
School of Sociology, Social Policy and Social Work
Queen's University Management School



Defamation Act 2013

CHAPTER 26

Explanatory Notes have been produced to assist in the understanding of this Act and are available separately

£5.75



Defamation Act 2013

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Defamation Act 2013

CHAPTER 26

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Defamation Act 2013

2013 CHAPTER 26

An Act to amend the law of defamation.

[25th April 2013]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Requirement of serious harm

1 Serious harm

- (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
- (2) For the purposes of this section, 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.

Defences

2 Truth

- (1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.
- (2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.
- (3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.
- (4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed.

3 Honest opinion

- (1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
- (2) The first condition is that the statement complained of was a statement of opinion.
- (3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.
- (4) The third condition is that an honest person could have held the opinion on the basis of—
 - (a) any fact which existed at the time the statement complained of was published;
 - (b) anything asserted to be a fact in a privileged statement published before the statement complained of.
- (5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.
- (6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person (“the author”); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.
- (7) For the purposes of subsection (4)(b) a statement is a “privileged statement” if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—
 - (a) a defence under section 4 (publication on matter of public interest);
 - (b) a defence under section 6 (peer-reviewed statement in scientific or academic journal);
 - (c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);
 - (d) a defence under section 15 of that Act (other reports protected by qualified privilege).
- (8) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.

4 Publication on matter of public interest

- (1) It is a defence to an action for defamation for the defendant to show that—
 - (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
 - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
- (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
- (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission

of the defendant to take steps to verify the truth of the imputation conveyed by it.

- (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.
- (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.
- (6) The common law defence known as the Reynolds defence is abolished.

5 Operators of websites

- (1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.
- (2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.
- (3) The defence is defeated if the claimant shows that—
 - (a) it was not possible for the claimant to identify the person who posted the statement,
 - (b) the claimant gave the operator a notice of complaint in relation to the statement, and
 - (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.
- (4) For the purposes of subsection (3)(a), it is possible for a claimant to “identify” a person only if the claimant has sufficient information to bring proceedings against the person.
- (5) Regulations may—
 - (a) make provision as to the action required to be taken by an operator of a website in response to a notice of complaint (which may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal);
 - (b) make provision specifying a time limit for the taking of any such action;
 - (c) make provision conferring on the court a discretion to treat action taken after the expiry of a time limit as having been taken before the expiry;
 - (d) make any other provision for the purposes of this section.
- (6) Subject to any provision made by virtue of subsection (7), a notice of complaint is a notice which—
 - (a) specifies the complainant’s name,
 - (b) sets out the statement concerned and explains why it is defamatory of the complainant,
 - (c) specifies where on the website the statement was posted, and
 - (d) contains such other information as may be specified in regulations.
- (7) Regulations may 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 purposes of this section or any provision made under it.
- (8) Regulations under this section—

- (a) may make different provision for different circumstances;
 - (b) are to be made by statutory instrument.
- (9) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.
- (10) In this section “regulations” means regulations made by the Secretary of State.
- (11) The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice in relation to the posting of the statement concerned.
- (12) The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.

6 Peer-reviewed statement in scientific or academic journal etc

- (1) The publication of a statement in a scientific or academic journal (whether published in electronic form or otherwise) is privileged if the following conditions are met.
- (2) The first condition is that the statement relates to a scientific or academic matter.
- (3) The second condition is that before the statement was published in the journal an independent review of the statement’s scientific or academic merit was carried out by—
 - (a) the editor of the journal, and
 - (b) one or more persons with expertise in the scientific or academic matter concerned.
- (4) Where the publication of a statement in a scientific or academic journal is privileged by virtue of subsection (1), the publication in the same journal of any assessment of the statement’s scientific or academic merit is also privileged if—
 - (a) the assessment was written by one or more of the persons who carried out the independent review of the statement; and
 - (b) the assessment was written in the course of that review.
- (5) Where the publication of a statement or assessment is privileged by virtue of this section, the publication of a fair and accurate copy of, extract from or summary of the statement or assessment is also privileged.
- (6) A publication is not privileged by virtue of this section if it is shown to be made with malice.
- (7) Nothing in this section is to be construed—
 - (a) as protecting the publication of matter the publication of which is prohibited by law;
 - (b) as limiting any privilege subsisting apart from this section.
- (8) The reference in subsection (3)(a) 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.

7 Reports etc protected by privilege

- (1) For subsection (3) of section 14 of the Defamation Act 1996 (reports of court proceedings absolutely privileged) substitute—
 - “(3) This section applies to—
 - (a) any court in the United Kingdom;
 - (b) any court established under the law of a country or territory outside the United Kingdom;
 - (c) any international court or tribunal established by the Security Council of the United Nations or by an international agreement;
 and in paragraphs (a) and (b) “court” includes any tribunal or body exercising the judicial power of the State.”
- (2) In subsection (3) of section 15 of that Act (qualified privilege) for “public concern” substitute “public interest”.
- (3) Schedule 1 to that Act (qualified privilege) is amended as follows.
- (4) For paragraphs 9 and 10 substitute—
 - “9 (1) A fair and accurate copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of—
 - (a) a legislature or government anywhere in the world;
 - (b) an authority anywhere in the world performing governmental functions;
 - (c) an international organisation or international conference.
 - (2) In this paragraph “governmental functions” includes police functions.

10 A fair and accurate copy of, extract from or summary of a document made available by a court anywhere in the world, or by a judge or officer of such a court.”
- (5) After paragraph 11 insert—

“11A 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.”
- (6) In paragraph 12 (report of proceedings at public meetings)—
 - (a) in sub-paragraph (1) for “in a member State” substitute “anywhere in the world”;
 - (b) in sub-paragraph (2) for “public concern” substitute “public interest”.
- (7) In paragraph 13 (report of proceedings at meetings of public company)—
 - (a) in sub-paragraph (1), for “UK public company” substitute “listed company”;
 - (b) for sub-paragraphs (2) to (5) substitute—
 - “(2) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company—
 - (a) by or with the authority of the board of directors of the company,
 - (b) by the auditors of the company, or

- (c) by any member of the company in pursuance of a right conferred by any statutory provision.
- (3) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company which relates to the appointment, resignation, retirement or dismissal of directors of the company or its auditors.
- (4) In this paragraph “listed company” has the same meaning as in Part 12 of the Corporation Tax Act 2009 (see section 1005 of that Act).”
- (8) In paragraph 14 (report of finding or decision of certain kinds of associations) in the words before paragraph (a), for “in the United Kingdom or another member State” substitute “anywhere in the world”.
- (9) After paragraph 14 insert—
 - “14A A fair and accurate—
 - (a) report of proceedings of a scientific or academic conference held anywhere in the world, or
 - (b) copy of, extract from or summary of matter published by such a conference.”
- (10) For paragraph 15 (report of statements etc by a person designated by the Lord Chancellor for the purposes of the paragraph) substitute—
 - “15 (1) A fair and accurate report or summary of, copy of or extract from, any adjudication, report, statement or notice issued by a body, officer or other person designated for the purposes of this paragraph by order of the Lord Chancellor.
 - (2) An order under this paragraph shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.”
- (11) For paragraphs 16 and 17 (general provision) substitute—
 - “16 In this Schedule—
 - “court” includes—
 - (a) any tribunal or body established under the law of any country or territory exercising the judicial power of the State;
 - (b) any international tribunal established by the Security Council of the United Nations or by an international agreement;
 - (c) any international tribunal deciding matters in dispute between States;
 - “international conference” means a conference attended by representatives of two or more governments;
 - “international organisation” means an organisation of which two or more governments are members, and includes any committee or other subordinate body of such an organisation;
 - “legislature” includes a local legislature; and
 - “member State” includes any European dependent territory of a member State.”

*Single publication rule***8 Single publication rule**

- (1) This section applies if a person—
 - (a) publishes a statement to the public (“the first publication”), and
 - (b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.
- (2) In subsection (1) “publication to the public” includes publication to a section of the public.
- (3) For the purposes of section 4A of the Limitation Act 1980 (time limit for actions for defamation etc) any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.
- (4) This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.
- (5) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters)—
 - (a) the level of prominence that a statement is given;
 - (b) the extent of the subsequent publication.
- (6) Where this section applies—
 - (a) it does not affect the court’s discretion under section 32A of the Limitation Act 1980 (discretionary exclusion of time limit for actions for defamation etc), and
 - (b) the reference in subsection (1)(a) of that section to the operation of section 4A of that Act is a reference to the operation of section 4A together with this section.

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

- (1) This section applies to an action for defamation against a person who is not domiciled—
 - (a) in the United Kingdom;
 - (b) in another Member State; or
 - (c) in a state which is for the time being a contracting party to the Lugano Convention.
- (2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.
- (3) 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.

- (4) For the purposes of this section—
- (a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation;
 - (b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention.
- (5) In this section—
- “the Brussels Regulation” means Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended from time to time and as applied by the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ No L299 16.11.2005 at p 62);
- “the Lugano Convention” means the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30th October 2007.

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

- (1) 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 the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.
- (2) In this section “author”, “editor” and “publisher” have the same meaning as in section 1 of the Defamation Act 1996.

Trial by jury

11 Trial to be without a jury unless the court orders otherwise

- (1) In section 69(1) of the Senior Courts Act 1981 (certain actions in the Queen’s Bench Division to be tried with a jury unless the trial requires prolonged examination of documents etc) in paragraph (b) omit “libel, slander,”.
- (2) In section 66(3) of the County Courts Act 1984 (certain actions in the county court to be tried with a jury unless the trial requires prolonged examination of documents etc) in paragraph (b) omit “libel, slander,”.

Summary of court judgment

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

- (1) Where a court gives judgment for the claimant in an action for defamation the court may order the defendant to publish a summary of the judgment.

- (2) The wording of any summary and the time, manner, form and place of its publication are to be for the parties to agree.
- (3) If the parties cannot agree on the wording, the wording is to be settled by the court.
- (4) If the parties cannot agree on the time, manner, form or place of publication, the court may give such directions as to those matters as it considers reasonable and practicable in the circumstances.
- (5) This section does not apply where the court gives judgment for the claimant under section 8(3) of the Defamation Act 1996 (summary disposal of claims).

Removal, etc of statements

13 Order to remove statement or cease distribution etc

- (1) Where a court gives judgment for the claimant in an action for defamation the court may order—
 - (a) the operator of a website on which the defamatory statement is posted to remove the statement, or
 - (b) any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement.
- (2) In this section “author”, “editor” and “publisher” have the same meaning as in section 1 of the Defamation Act 1996.
- (3) Subsection (1) does not affect the power of the court apart from that subsection.

Slander

14 Special damage

- (1) The Slander of Women Act 1891 is repealed.
- (2) The publication of a statement that conveys the imputation that a person has a contagious or infectious disease does not give rise to a cause of action for slander unless the publication causes the person special damage.

General provisions

15 Meaning of “publish” and “statement”

In this Act—

“publish” and “publication”, in relation to a statement, have the meaning they have for the purposes of the law of defamation generally;
“statement” means words, pictures, visual images, gestures or any other method of signifying meaning.

16 Consequential amendments and savings etc

- (1) Section 8 of the Rehabilitation of Offenders Act 1974 (defamation actions) is amended in accordance with subsections (2) and (3).

- (2) In subsection (3) for “of justification or fair comment or” substitute “under section 2 or 3 of the Defamation Act 2013 which is available to him or any defence”.
- (3) In subsection (5) for “the defence of justification” substitute “a defence under section 2 of the Defamation Act 2013”.
- (4) Nothing in section 1 or 14 affects any cause of action accrued before the commencement of the section in question.
- (5) Nothing in sections 2 to 7 or 10 has effect in relation to an action for defamation if the cause of action accrued before the commencement of the section in question.
- (6) In determining whether section 8 applies, no account is to be taken of any publication made before the commencement of the section.
- (7) Nothing in section 9 or 11 has effect in relation to an action for defamation begun before the commencement of the section in question.
- (8) In determining for the purposes of subsection (7)(a) of section 3 whether a person would have a defence under section 4 to any action for defamation, the operation of subsection (5) of this section is to be ignored.

17 Short title, extent and commencement

- (1) This Act may be cited as the Defamation Act 2013.
- (2) Subject to subsection (3), this Act extends to England and Wales only.
- (3) The following provisions also extend to Scotland –
 - (a) section 6;
 - (b) section 7(9);
 - (c) section 15;
 - (d) section 16(5) (in so far as it relates to sections 6 and 7(9));
 - (e) this section.
- (4) Subject to subsections (5) and (6), the provisions of this Act come into force on such day as the Secretary of State may by order made by statutory instrument appoint.
- (5) Sections 6 and 7(9) come into force in so far as they extend to Scotland on such day as the Scottish Ministers may by order appoint.
- (6) Section 15, subsections (4) to (8) of section 16 and this section come into force on the day on which this Act is passed.

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