
Review of Defamation Law in Northern Ireland

Introduction

1. The Bar Council is the regulatory and representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court.
2. The Bar of Northern Ireland (the Bar) welcomes the opportunity to contribute to the Review of Defamation Law in Northern Ireland. This is an issue of public interest - the intersection of freedom of speech and protection of one's reputation from defamation has, and almost always will be, a complex problem to solve in any democratic jurisdiction.
3. Free speech is a vital component of a free and just democratic society speech, yet, concurrently, we must prevent false speech from inflicting harm on others.
4. The purpose of defamation law is to promote accuracy in public discourse by providing a means for individuals to vindicate their reputations and obtain an appropriate remedy should they have been harmed by false and defamatory publications.

How do you think the 2022 Act is currently performing and how do you think the changes it has introduced might work out in the coming years? In particular, what is your view of the actual and potential impact of: (i) the ending of the presumption in favour of trial by jury; (ii) the three statutory defences?

5. The Bar of Northern Ireland acknowledges that Section 11 of The Defamation Act 2022 commits the Department of Finance to review defamation law in Northern Ireland and other jurisdictions and report its findings to the Northern Ireland Assembly by June 2024. The Bar also acknowledges the detailed consideration given to this Act by elected representatives before it was enacted.
6. The statutory obligation to review the Act is constructive and the process affords a useful opportunity to observe and assess the operation of the Act and consider policy recommendations where appropriate.
7. It is the general position of the Bar in participating in this review that given the limited application of the legislation to date, it is too soon to provide a complete

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assessment of the performance of the Act or to provide a prediction on how the changes the legislation introduced may “work out in the coming years”.

Are there any further policy developments that the Department should consider that would improve upon the provisions in the Act?

8. Please see previous point.

Do we need further policy development regarding online defamation or is existing defamation law sufficient?

9. There can be no doubt that anonymous online speech poses new challenges to existing defamation law. The challenge centers on the balance between the right to freedom of speech and a person’s right to protect their reputation. However, in practice, it can be exceptionally difficult to identify anonymous accounts and commence action. Online publication platforms and technology are developing at a rapid rate, and review processes and the law must keep pace with these changes.
10. The Bar also notes that the single publication rule was not included in the Defamation Act 2022 by the legislature. Section 7 of the Defamation Act 2013 provides that the limitation period of 12 months runs from the date of first publication to the public, notwithstanding any subsequent publication of a statement which is substantially the same. It, effectively, ended the indefinite liability for online publications, which are ‘published’ each time they are accessed (previously ‘resetting’ the limitation period each time). Although there are a range of views as to this provision, it could be considered as part of the review process.

Should policy be considered: (i) making it easier to obtain a takedown order in respect of defamatory online comment and (ii) making takedown orders more effective?

11. It is the experience of the Bar of Northern Ireland that it can be difficult to compel online sites and platforms to remove defamatory online content. Social media platforms, for example, have procedures for filing a takedown request. These requests can often be challenging and compelling sites to remove content can be difficult for individuals without legal assistance.

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- 12.** Courts can issue takedown orders when online comment is found to be defamatory. The nature of online comment, however, is trans jurisdictional and rapidly evolving, and this poses certain challenges.

Should website operators, hosts and other similar be required to name people who post defamatory comment anonymously/pseudonymously on the services they provide?

- 13.** The Bar acknowledges that defamation laws are necessary to protect our society and the people within it. However, such laws should always be balanced with the right to freedom of expression as outlined in Article 10 of the European Convention on Human Rights.
- 14.** The Bar recognises that there is currently a procedure whereby such information can be sought through a Court Order. A simpler procedure requiring website operators to name people who post defamatory comment anonymously would require primary legislation.

Is it reasonable to consider the online version of a newspaper or magazine, the online website of a broadcast news service, and online only publications equivalent to conventional print and broadcast media? Should they be treated as equivalent for the purposes of defamation law?

- 15.** The Bar considers it appropriate to consider online and print publications in the same way for the purposes of the Defamation Act 2022. It makes no material difference whether a defamatory comment is published online or via traditional print media.
- 16.** It is also worth noting that the reach of online publications has grown exponentially in recent times, while the traditional print media is experiencing a general downward trend in circulation and reach.

Do you agree that social media hosts and those who host and facilitate online comments are not equivalent to conventional print publishers or conventional broadcasters?

- 17.** Yes – they are not exactly equivalent. Online hosts can become liable in certain circumstances as secondary publishers of defamatory content.

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Do you agree that aside from online statements in online publications and broadcasts, the person who posted a statement online is usually responsible for that statement? Are they solely responsible?

18. The Bar is satisfied that the person who posted the statement is responsible for it. However, in terms of defamatory statements, others who host, endorse, or share that statement may have responsibility as well.

What is your view regarding people who endorse and/or share a defamatory online comment in a way that could make it more likely to be read and/or taken seriously. Have they contributed to the harm caused by the statement and, if so, would it be legitimate to take a defamation case against them?

19. It is important to consider the facts of a situation as described in this question. For example, how has any amplification of a defamatory comment occurred in practice or how has the defamatory comment been endorsed? However, the Bar answers that, in principle, it would be legitimate to take such a defamation case if the endorsement of the defamatory statement contributed to the harm.

Do you believe that libel tourism still has the potential to become a problem in Northern Ireland or are existing protections, including Section 6 of the 2022 Act, adequate?

20. It is the view of the Bar that while the potential for libel tourism attracts much commentary and attention, in practical terms, it is not a common feature within this jurisdiction. Again, it remains to be seen over time whether libel tourism will emerge, but the Bar is not concerned that this will be an issue of concern under the Defamation Act 2022.

Do you consider that SLAPPs are a distinct development relevant to defamation law?

21. It should be recognised that there are several ways by which strategic litigation may be used as an improper means by which to stifle public participation. While defamation law may be used in this way, other areas of law may be invoked for the same purposes.

Are existing procedures for screening out defamation actions that lack merit sufficient to deal with SLAPPs or do we need new legislation?

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22. The Bar is content that the current Rules of Court permit the Court to dispose of actions which it deems to be an abuse of process, as recently occurred in Kelly v O'Doherty.

What are your thoughts on the Ontario Protection of Public Participation Act 2015 described above? Would you welcome a similar initiative in Northern Ireland?

23. As set out above, the Bar does not see the need for such legislation in Northern Ireland. Indeed, there is a risk that anti SLAPP legislation, such as the Ontario Act, could add an unwanted layer of complexity and cost to proceedings.

To what extent would anti-SLAPP legislation reduce the alleged chilling effect of defamation law?

24. Please see previous answer. There is also the risk that genuine defamation proceedings could be adversely affected by unmeritorious SLAPP objections.

Do you agree that cost is an important factor limiting access to justice in defamation cases.

25. The Bar's starting point is that access to justice should be as wide as is practicable in all matters and that cost should not be a barrier to claimants accessing justice and ensuring that their reputation is protected or indeed, ensuring their freedom of speech is protected.

26. It should be noted, however, that in comparison with England and Wales, litigation costs in Northern Ireland are significantly lower. This protects access to justice and promotes equality of arms. Furthermore, the Taxing Master acts as an effective break on any possible excessive fees.

Do you have any suggestions as to how the cost of defamation action might be made more manageable?

27. The Bar of Northern Ireland is concerned that access to justice is as wide as possible and that costs do not act as a barrier to protecting reputation. As outlined above, the Bar considers that the legal system in Northern Ireland is cost effective. Recent developments in relation to the Pre-Action Protocol for Media and Communication Claims, case management and greater efficiencies in the early stages of litigation are also of assistance in managing costs.

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What are your thoughts on the use of ADR in defamation cases as an alternative to a full legal process?

28. Alternative Dispute Resolution (ADR) can often be a useful means by which to resolve disputes, and that can often be the case with defamation where the parties are amenable. However, ADR should not be perceived as a panacea, and it should be recognized that ADR is not appropriate in every instance.

Should be parties in a defamation action be obliged to pursue ADR before conventional litigation?

29. The Bar is unconvinced of the merits of compulsory ADR in defamation proceedings. There is the risk that requiring parties to mediate could create a situation where unnecessary time delay and cost is built into the system. ADR is not compulsory in other civil claims and there is no obvious reason why defamation claims should be singled out.