From: Raimo Niskanen
Sent: 12 February 2015 19:34
To: info@nilawcommission.gov.uk.
Subject: Response to Consultation Paper - Defamation Law in Northern Ireland

Dear Northern Ireland Law Commission.

As a citizen of the European Union, I am deeply concerned about Northern Ireland maybe not reforming it's libel laws. The laws has to be modernized to not jeopardise free speech in the whole of the EU, allowing financially stronger parties to silence opposition.

On the details of the matter I trust the Libel Reform Campaign to be vastly more knowledgeable, and I fully support their response to your Consultation Paper:

http://www.libelreform.org/latest-news/libel-reform-northern-ireland/568-shortened-response-to-northern-ireland-law-commission-consultation

Best Regards

Raimo Niskanen

From: David Crowther
Sent: 12 February 2015 20:10
To: info nilawcommission
Subject: Consultation response: Defamation Law in Northern Ireland

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

Yes.
The legislation was written by the Ministry of Justice and scrutinised in Parliament on the basis that the legislation would apply to Northern Ireland. The legislation is therefore ready to be applied to the Northern Ireland jurisdiction in full.

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?

N/A.

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?

It is the position of the Libel Reform Campaign that adopting the Defamation Act unrevised is the most desirable public policy outcome due to the efficacy of this procedure.
Additional provisions could be considered by the Law Commission, as follows:

1. A modified public interest defence (as set out below);
2. A statutory Derbyshire defence inserted into section 1 (2), preventing the state (or corporate bodies delivering services with public money) from suing third parties for libel.
3. An amendment to section 9 to prevent “libel tourists” abusing the High Court after making claims but without the resources to do so.
4. Early Neutral Evaluation and mediation incentivised by changes to the Civil Procedure Rules, in line with the English PEN and Index on Censorship Alternative Libel Project.

These provisions could also be achieved by post-legislation scrutiny by the Assembly after the adoption of the Defamation Act.

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?

Potentially. This proposal has merit.
Consideration would need to be given to the possibility this measure could be abused by vexatious litigants. Such a litigant could call on a small publisher to rule out a number of meanings, close to the original intention of the publication, using the threat of litigation as a chill on their ability to defend these meanings. This may act to

narrow the original intention of the publication to a point at which it bears little meaning.

That noted, the proposal has similar outcomes to the policy recommendations in the English PEN and Index on Censorship Alternative Libel Project which noted that early determination of meaning in a non-legal (or quasi-legal) setting such as mediation could significantly reduce costs and the chill from legal bullying.

The nature of the correction or clarification by the publisher should not be set out in statute but based on a “reasonable” test of editorial judgment. Forced or mandatory apologies could be in breach of Article 10 of the European Convention.

This proposal would need to be combined with the availability of statutory defences as set out in the Defamation Act, in particular section 3 and section 4, to give the publisher the confidence to defend their actual stated intention (even after it has been narrowed thanks to this procedure).

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

Yes. The consultation should consider incentivising alternative dispute resolution through the civil procedure rules as set out in the Alternative Libel Project.

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?

Yes.

The Libel Reform Campaign agrees with the analysis (3.19 - 3.28) contained in the consultation document that consideration should be given to extending the defence of honest opinion to comment on facts that an average person “reasonably believes” to be true.

If the Bill is not applied by an Order of the Assembly, and subject to a scrutiny process, we would recommend this amendment is adopted.

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?

Yes. Section 3 of the Act should be applied as it is set out in the Defamation Act 2013.

It would not be preferable to continue with the common law approach. The common law approach was considered in the pre-legislative scrutiny of the Bill and found inadequate to protect honest opinion. A number of cases demonstrated the inadequacy of the common law approach.

We also agree with 3.31 that echoes the opinions of the Joint Committee on the Draft Defamation Bill that the removal of the public interest dimension takes out “an unnecessary complication”.

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

We disagree with the analysis of the Law Commission in 3.32 and 3.33 that allowing a defendant publisher to rely on facts that existed at the time of publication would in the words of Lord Phillips “radically alter” the defence. The formulation set out in section 3, 4(a), removes the need for argument at trial as to whether the fact was known to the defendant (a complex and time-consuming process). Allowing the fact to have existed (which the defendant would need to prove) reduces the complexity of the defence from the defendant having to prove they knew the fact, to a mere statement that the fact existed. The alternative to this, we believe, could complicate this defence unnecessarily.

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?

Yes.

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?

Yes. As an extension of the defence, this proposal has merit. Particularly in commentary around political debates (see Q 15).

Amending subsection 7 to include opinions published contemporaneously with privileged statements would also support potential libel claimants, allowing them to “reply to attack”. This would give the victims of defamatory statements published with privilege, the right to reply (without incurring the possibility of a libel action).

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’?

No. This is an unnecessary complication for the reasons set out under Q8.

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?

Yes.

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?

No. In pre-legislative scrutiny it was felt by politicians considering this issue that the common law approach had failed. This was backed up by a statement calling for a new statutory public interest defence signed by leading authors, scientists and entertainers presented to Parliament on 11 March 2011.

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?

Yes.

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?

Yes.

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?

Yes.
We heard evidence that there was uncertainty around what was considered to be privileged in Northern Ireland.

The Libel Reform Campaign would extend section 7 to explicitly mention the Northern Ireland Assembly and councils and all units of local government in Northern Ireland under 4 (a).

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?

Yes.

If so, should this include an obligation for website operators to append a notice of complaint alongside statements that are not taken down?

No. This was considered by Parliament and rejected. The Libel Reform Campaign believes that vexatious claimants may use notices of complaint to place doubt around publication which is true, honest comment or in the public interest. This doubt would impact on the author's right to freedom of expression (and may, as a procedure act as a form of defamation on the author whose editorial judgement is called in question).

There are also practical reasons to consider as a significant amount of publication is on platforms that are domiciled in the US. The Libel Reform Campaign considers alternative dispute resolution such as mediation a better procedure.

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?

Yes.

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?

Yes.

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 Libel Reform Campaign has consulted on this issue. Alone among the sections in the Defamation Act, this has caused the most concern within civil society in Northern Ireland though it is worth noting that 77% of respondents to Mike Nesbitt MLA's consultation on libel law reform in Northern Ireland agreed with the position in the Defamation Act that trial by jury should be abolished unless specifically authorised by the Court.

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?

Yes.
The serious harm test not only puts new obligations on claimants: it offers an extremely strong incentive to the media to act quickly to correct errors.

The precedent set by Cooke vs MGN (the first case in which the s.1 serious harm hurdle was tested) is noteworthy in this regard. The judgement was that serious harm had not been caused by the article, primarily because the newspaper had made a prompt correction and removed the piece from its website. The Cooke judgement has therefore introduced a 'discursive' remedy into the s.1 case law: if a media outlet acts quickly to publish a correction and to remove or amend online versions of an article, they at once give the complainant (the potential claimant) a

vindication of their reputation, while making it unlikely that they will then have to face a libel action.

Would it instead be preferable to rephrase the statutory test so as better to reflect the stated intention of the authors of the Act?

This is perhaps worth consideration, but it would need to provide the same level of protection as set out in caselaw from Cooke vs MGN.

Would it instead be preferable to continue with the common law approach reflected in Jameel v Dow Jones?

No.

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?

Yes.

Would it instead be preferable to introduce a bar on corporate claims equivalent to that introduced under the Australian Uniform Defamation Acts?

Yes.

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?

Yes

Would it preferable instead to retain the multiple publication rule, or to introduce an alternative defence requiring the attaching of a notice of complaint?

No. The multiple publication rule, a principle developed in the nineteenth century, is entirely inappropriate in the Internet age.

Consensus on this point was one of the first aspects to be achieved during the process that lead to the Defamation Act 2013. The Libel Working Group convened in 2009 recommended change. The Ministry of Justice then consulted on the same point, and in light of the responses received concluded that it was appropriate in principle to introduce a single publication rule.

The single publication rule was present in Lord Lester's private member's Defamation Bill in 2010 (clause 10) and in the Ministry of Justice's Draft Defamation Bill published in 2011 (clause 6). The clause that became section 8 of the

Defamation Act 2013 was not amended at all during the legislative process and is exactly the same wording at that presented in the Draft Defamation Bill.

Section 8(6) of the Defamation Act 2013 makes explicit that the court's discretion regarding limitation periods under the Limitation Act 1980 is not affected.

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?

Yes.

Consideration should be given to our amendment to section 9 as stated above and also the inclusion of subsection 13 (2) of Lord Lester's Defamation Bill in Clause 1 requiring the court to strike out claims where there has been no real or substantial tort in this jurisdiction.

Section 9 may not be as robust in section 9 (2) in preventing libel claims by those domiciled, or part-domiciled, in the European Economic Area (EEA). While the government intended for section 1 to strike out claims by foreign claimants if publication is not serious and substantial in this jurisdiction, this could be clarified further.

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?

Yes.

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

Forcing defendants to make corrections or clarifications is an infringement of the right to freedom of expression.

It is desirable for publishers to make reasonable corrections or clarifications, where there is mutual agreement that an honest mistake has been made.

Consideration could be given to whether discursive remedies could provide an additional defence beyond those available under the Defamation Act 2013. This is likely to be of most use to ordinary social media users, who are not publishers in the traditional sense, who could retract, delete or edit online publication in order to qualify for this defence.

From: Poulter, Mark
Sent: 12 February 2015 23:42
To: info nilawcommission
Subject: Defamation Act 2013 - Consultation

I wish to express my wish that the Defamation Act 2013 be adopted in whole in Northern Ireland.

I also wish to express my view that the questions asked of academics in your survey appear to me to be an attempt at deception – by giving the appearance of having asked relevant questions when, in reality, the questions are irrelevant and designed to give weight to those who wish the status quo to be maintained.

Asking about past experience of libel legislation is no longer particularly relevant in the current situation. This is because the past is significantly different from the present in relation to libel law. Whereas, in the past, it was possible for certain libel actions to be taken/held in England, these same certain actions have effectively now been legislated against in the Defamation Act 2013. However, these same actions can still be held in NI. So, just because one hasn't had experience of such actions here in NI, that may well have been because such actions were held over in GB. Now that the English courts are less easily used in this way, these certain cases are more likely to come over to NI. In summary: it is not a valid comparison to compare the past (when legislation was readily available in GB) with the present/future (where the place where it is now readily available is NI).

Either the author of the questions was ignorant of this, or disingenuous in asking the questions in that way. Neither option is particularly creditable.

Mark Poulter

Mark Poulter BA Hons BSc Hons MSc CMP DipOrthMed MCSP FCHERP
Course Director, BSc Hons Physiotherapy

Sent: 13 February 2015 09:44
To: info nilawcommission
Subject: Libel law in N.I. Consultation

Dear Sir,

I believe that the recently amended UK Libel laws should be applied to Northern Ireland without revision or alteration. Simple and straightforward!

Yrs ,

Dr S.E.Barnes

From: Alwyn Lewis
Sent: 12 February 2015 20:52
To: info nilawcommission
Subject: TRIM: Northern Ireland Law Commission's consultation on libel law reform

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

Yes.

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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?

N/A.

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It is the position of the Libel Reform Campaign that adopting the Defamation Act unrevised is the most desirable public policy outcome due to the efficacy of this procedure.

Additional provisions could be considered by the Law Commission, as follows:

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Consideration would need to be given to the possibility this measure could be abused by vexatious litigants. Such a litigant could call on a small publisher to rule out a number of meanings, close to the original intention of the publication, using the threat of litigation as a chill on their ability to defend these meanings. This may act to narrow the original intention of the publication to a point at which it bears little meaning.

That noted, the proposal has similar outcomes to the policy recommendations in the English PEN and Index on Censorship Alternative Libel Project which noted that early determination of meaning in a non-legal (or quasi-legal) setting such as mediation could significantly reduce costs and the chill from legal bullying.
The nature of the correction or clarification by the publisher should not be set out in statute but based on a "reasonable" test of editorial judgment. Forced or mandatory apologies could be in breach of Article 10 of the European Convention.
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Yes

Would it preferable instead to retain the multiple publication rule, or to introduce an alternative defence requiring the attaching of a notice of complaint?
No. The multiple publication rule, a principle developed in the nineteenth century, is entirely inappropriate in the Internet age.
Consensus on this point was one of the first aspects to be achieved during the process that lead to the Defamation Act 2013. The Libel Working Group convened in 2009 recommended change. The Ministry of Justice then consulted on the same point, and in light of the responses received concluded that it was appropriate in principle to introduce a single publication rule.
The single publication rule was present in Lord Lester's private member's Defamation Bill in 2010 (clause 10) and in the Ministry of Justice's Draft Defamation Bill published in 2011 (clause 6). The clause that became section 8 of the Defamation Act 2013 was not amended at all during the legislative process and is exactly the same wording at that presented in the Draft Defamation Bill.
Section 8(6) of the Defamation Act 2013 makes explicit that the court's discretion regarding limitation periods under the Limitation Act 1980 is not affected.

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Yes.
Consideration should be given to our amendment to section 9 as stated above and also the inclusion of subsection 13 (2) of Lord Lester's Defamation Bill in Clause 1 requiring the court to strike out claims where there has been no real or substantial tort in this jurisdiction.
Section 9 may not be as robust in section 9 (2) in preventing libel claims by those domiciled, or part-domiciled, in the European Economic Area (EEA). While the government intended for section 1 to strike out claims by foreign claimants if publication is not serious and substantial in this jurisdiction, this could be clarified further.

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From: Dinsdale, David (Dr.)
Sent: 13 February 2015 13:42
To: info nilawcommission
Subject: Defamation Act 2013

Dear Sirs

I will always be grateful for my training and qualification in Northern Ireland and I feel that it would be a disgrace for the province to become a haven for those using the present law to impede the proper evaluation of medical and scientific progress.
I plead with you to ensure that the Assembly adopts the Defamation Act 2013 through a Legislative Consent Motion.

Yours faithfully

David

Dr D Dinsdale FRCPath
Head of Imaging/Pathology
MRC Toxicology Unit

From: Robin Gape
Sent: 13 February 2015 15:26
To: info@nilawcommission.gov.uk.
Subject: Consultation on Defamation Law in Northern Ireland

Dear colleague,

please note that I am in agreement with, and fully endorse, the **well thought-out and careful response** from **The Libel Reform Campaign**, which I understand is dated 12th February 2015.

For me, the key issue is that **Libel Law** should be **essentially identical**, and balanced towards **freedom of expression**, in all the countries of the United Kingdom. Otherwise, there is a very strong risk of so-called *Libel Tourism*.

The simplest solution for all parties would be the **full adoption of the Defamation Act 2013** in Northern Ireland.

Many thanks for your attention,

Robin Gape, resident in England

From: Ben North
Sent: 13 February 2015 15:42
To: info nilawcommission
Subject: TRIM: Consultation: Reform of Defamation Law

Dear Sir/Madam,

I write with reference to your public consultation on defamation law, described at

http://www.nilawcommission.gov.uk/index/current-projects/reform_of_defamation_law_.htm

I am a UK citizen, living in the Republic of Ireland. I have been following with interest this topic for some time; in particular I have been dismayed at cases where important scientific discussions of matters of public interest have been chilled by threats of, or actual, libel claims.

In this regard it was encouraging that the Defamation Act 2013 in England and Wales addressed many of these concerns, and I would urge you to extend it to Northern Ireland.

Unfortunately I am not a legal expert and so feel unable to respond in full detail to the questions in your document. I would like, therefore, for my response to be counted as being in support of the response of the Libel Reform Campaign (http://www.libelreform.org/).

Many thanks for your consideration of this response.

Yours faithfully,

Ben North.

From: Ish-Horowicz, David
Sent: 13 February 2015 16:59
To: info nilawcommission
Subject: Extending the Defamation Act 2013 to Northern Ireland.

I am writing to urge the Law Commission to strongly recommend that the Defamation Act 2013 is extended to cover Northern Ireland. This bill has provided an urgently needed overhaul of outdated libel laws to allow fair comment on matters of major public interest, especially scientific debate on medical matters, and to deter trivial and vexatious claims. The need for informed, public scientific discourse and comment is no less necessary in Northern Ireland, and so I very much hope that you will implement rapid reform of the old, outdated legislation by recommending that the 2013 law also apply in Northern Ireland..

Yours sincerely

Professor David Ish-Horowicz, PhD FRS
MRC Lab for Molecular Cell Biology, University College London

From: David Murray
Sent: 13 February 2015 17:33
To: info nilawcommission
Subject: Response to Northern Ireland Law Commission's consultation

My response to the Northern Ireland Law Commission's consultation is as follows

Our responses to the consultation questions

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

Yes.
The legislation was written by the Ministry of Justice and scrutinised in Parliament on the basis that the legislation would apply to Northern Ireland. The legislation is therefore ready to be applied to the Northern Ireland jurisdiction in full.

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?
N/A.

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?
It is the position of the Libel Reform Campaign that adopting the Defamation Act unrevised is the most desirable public policy outcome due to the efficacy of this procedure.

Additional provisions could be considered by the Law Commission, as follows:

1. A modified public interest defence (as set out below);

2. A statutory Derbyshire defence inserted into section 1 (2), preventing the state (or corporate bodies delivering services with public money) from suing third parties for libel.

3. An amendment to section 9 to prevent “libel tourists” abusing the High Court after making claims but without the resources to do so.

4. Early Neutral Evaluation and mediation incentivised by changes to the Civil Procedure Rules, in line with the English PEN and Index on Censorship Alternative Libel Project.

These provisions could also be achieved by post-legislation scrutiny by the Assembly after the adoption of the Defamation Act.

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?

Potentially. This proposal has merit.

Consideration would need to be given to the possibility this measure could be abused by vexatious litigants. Such a litigant could call on a small publisher to rule out a number of meanings, close to the original intention of the publication, using the threat of litigation as a chill on their ability to defend these meanings. This may act to narrow the original intention of the publication to a point at which it bears little meaning.

That noted, the proposal has similar outcomes to the policy recommendations in the English PEN and Index on Censorship Alternative Libel Project which noted that early determination of meaning in a non-legal (or quasi-legal) setting such as mediation could significantly reduce costs and the chill from legal bullying.

The nature of the correction or clarification by the publisher should not be set out in statute but based on a "reasonable" test of editorial judgment. Forced or mandatory apologies could be in breach of Article 10 of the European Convention.

This proposal would need to be combined with the availability of statutory defences as set out in the Defamation Act, in particular section 3 and section 4, to give the publisher the confidence to defend their actual stated intention (even after it has been narrowed thanks to this procedure).

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

Yes. The consultation should consider incentivising alternative dispute resolution through the civil procedure rules as set out in the Alternative Libel Project.

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?

Yes.
The Libel Reform Campaign agrees with the analysis (3.19 - 3.28) contained in the consultation document that consideration should be given to extending the defence of honest opinion to comment on facts that an average person "reasonably believes" to be true.

If the Bill is not applied by an Order of the Assembly, and subject to a scrutiny process, we would recommend this amendment is adopted.

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?

Yes. Section 3 of the Act should be applied as it is set out in the Defamation Act 2013.

It would not be preferable to continue with the common law approach. The common law approach was considered in the pre-legislative scrutiny of the Bill and found inadequate to protect honest opinion. A number of cases demonstrated the inadequacy of the common law approach.

We also agree with 3.31 that echoes the opinions of the Joint Committee on the Draft Defamation Bill that the removal of the public interest dimension takes out "an unnecessary complication".

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

We disagree with the analysis of the Law Commission in 3.32 and 3.33 that allowing a defendant publisher to rely on facts that existed at the time of publication would in the words of Lord Phillips "radically alter" the defence. The formulation set out in section 3, 4(a), removes the need for argument at trial as to whether the fact was known to the defendant (a complex and time-consuming process). Allowing the fact to have existed (which the defendant would need to prove) reduces the complexity of the defence from the defendant having to prove they knew the fact, to a mere statement that the fact existed. The alternative to this, we believe, could complicate this defence unnecessarily.

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?

Yes.

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?

Yes. As an extension of the defence, this proposal has merit. Particularly in commentary around political debates (see Q 15).

Amending subsection 7 to include opinions published contemporaneously with privileged statements would also support potential libel claimants, allowing them to "reply to attack". This would give the victims of defamatory statements published with privilege, the right to reply (without incurring the possibility of a libel action).

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'?

No. This is an unnecessary complication for the reasons set out under Q8.

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?

Yes.

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?

No. In pre-legislative scrutiny it was felt by politicians considering this issue that the common law approach had failed. This was backed up by a statement calling for a new statutory public interest defence signed by leading authors, scientists and entertainers presented to Parliament on 11 March 2011.

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?

Yes.

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?

Yes.

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?

Yes.

We heard evidence that there was uncertainty around what was considered to be privileged in Northern Ireland.

The Libel Reform Campaign would extend section 7 to explicitly mention the Northern Ireland Assembly and councils and all units of local government in Northern Ireland under 4 (a).

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?

Yes.

If so, should this include an obligation for website operators to append a notice of complaint alongside statements that are not taken down?

No. This was considered by Parliament and rejected. The Libel Reform Campaign believes that vexatious claimants may use notices of complaint to place doubt around publication which is true, honest comment or in the public interest. This doubt would impact on the author's right to freedom of expression (and may, as a procedure act as a form of defamation on the author whose editorial judgement is called in question).

There are also practical reasons to consider as a significant amount of publication is on platforms that are domiciled in the US. The Libel Reform Campaign considers alternative dispute resolution such as mediation a better procedure.

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?

Yes.

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?

Yes.

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 Libel Reform Campaign has consulted on this issue. Alone among the sections in the Defamation Act, this has caused the most concern within civil society in Northern Ireland though it is worth noting that 77% of respondents to Mike Nesbitt MLA's consultation on libel law reform in Northern Ireland agreed with the position in the Defamation Act that trial by jury should be abolished unless specifically authorised by the Court.

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?

Yes.

The serious harm test not only puts new obligations on claimants: it offers an extremely strong incentive to the media to act quickly to correct errors.

The precedent set by Cooke vs MGN (the first case in which the s.1 serious harm hurdle was tested) is noteworthy in this regard. The judgement was that serious harm had not been caused by the article, primarily because the newspaper had made a prompt correction and removed the piece from its website. The Cooke judgement has therefore introduced a 'discursive' remedy into the s.1 case law: if a media outlet acts quickly to publish a correction and to remove or amend online versions of an article, they at once give the complainant (the potential claimant) a vindication of their reputation, while making it unlikely that they will then have to face a libel action.

Would it instead be preferable to rephrase the statutory test so as better to reflect the stated intention of the authors of the Act?

This is perhaps worth consideration, but it would need to provide the same level of protection as set out in caselaw from Cooke vs MGN.

Would it instead be preferable to continue with the common law approach reflected in Jameel v Dow Jones?

No.

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?

Yes.

Would it instead be preferable to introduce a bar on corporate claims equivalent to that introduced under the Australian Uniform Defamation Acts?

Yes.

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?

Yes

Would it preferable instead to retain the multiple publication rule, or to introduce an alternative defence requiring the attaching of a notice of complaint?

No. The multiple publication rule, a principle developed in the nineteenth century, is entirely inappropriate in the Internet age.

Consensus on this point was one of the first aspects to be achieved during the process that lead to the Defamation Act 2013. The Libel Working Group convened in 2009 recommended change. The Ministry of Justice then consulted on the same point, and in light of the responses received concluded that it was appropriate in principle to introduce a single publication rule.

The single publication rule was present in Lord Lester's private member's Defamation Bill in 2010 (clause 10) and in the Ministry of Justice's Draft Defamation Bill published in 2011 (clause 6). The clause that became section 8 of the Defamation Act 2013 was not amended at all during the legislative process and is exactly the same wording at that presented in the Draft Defamation Bill.

Section 8(6) of the Defamation Act 2013 makes explicit that the court's discretion regarding limitation periods under the Limitation Act 1980 is not affected.

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?

Yes.

Consideration should be given to our amendment to section 9 as stated above and also the inclusion of subsection 13 (2) of Lord Lester's Defamation Bill in Clause 1 requiring the court to strike out claims where there has been no real or substantial tort in this jurisdiction.

Section 9 may not be as robust in section 9 (2) in preventing libel claims by those domiciled, or part-domiciled, in the European Economic Area (EEA). While the government intended for section 1 to strike out claims by foreign claimants if publication is not serious and substantial in this jurisdiction, this could be clarified further.

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?

Yes.

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

Forcing defendants to make corrections or clarifications is an infringement of the right to freedom of expression.

It is desirable for publishers to make reasonable corrections or clarifications, where there is mutual agreement that an honest mistake has been made.

Consideration could be given to whether discursive remedies could provide an additional defence beyond those available under the Defamation Act 2013. This is likely to be of most use to ordinary social media users, who are not publishers in the traditional sense, who could retract, delete or edit online publication in order to qualify for this defence.

David Murray

From: Dick Willis
Sent: 16 February 2015 14:38
To: info nilawcommission
Subject: Consultation response: Defamation Law in Northern Ireland

I am writing to you to support, in full, the response of the Libel Reform Campaign to your current consultation on the defamation law in N.Ireland. I see no reason why the law of libel should be different in N. Ireland and would urge that the Defamation Act 2013 is adopted by the Assembly through a Legislative Consent Motion.

Yours

Dick Willis
Bristol

From: Peter Thompson
Sent: 16 February 2015 16:28
To: info nilawcommission
Subject: Extension of the Defamation Act 2013 to Northern Ireland

My responses to the consultation questions:

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

Yes.

The legislation was written by the Ministry of Justice and scrutinised in Parliament on the basis that the legislation would apply to Northern Ireland. The legislation is therefore ready to be applied to the Northern Ireland jurisdiction in full.

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?

N/A.

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?

I support the position of the Libel Reform Campaign that adopting the Defamation Act unrevised is the most desirable public policy outcome due to the efficacy of this procedure.

Additional provisions could be considered by the Law Commission, as follows:

1. A modified public interest defence (as set out below);
2. A statutory Derbyshire defence inserted into section 1 (2), preventing the state (or corporate bodies delivering services with public money) from suing third parties for libel.
3. An amendment to section 9 to prevent “libel tourists” abusing the High Court after making claims but without the resources to do so.
4. Early Neutral Evaluation and mediation incentivised by changes to the Civil Procedure Rules, in line with the English PEN and Index on Censorship Alternative Libel Project.

These provisions could also be achieved by post-legislation scrutiny by the Assembly after the adoption of the Defamation Act.

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?

Potentially. This proposal has merit.

Consideration would need to be given to the possibility this measure could be abused by vexatious litigants. Such a litigant could call on a small publisher to rule out a number of meanings, close to the original intention of the publication, using the threat of litigation as a chill on their ability to defend these meanings. This may act to narrow the original intention of the publication to a point at which it bears little meaning.

That noted, the proposal has similar outcomes to the policy recommendations in the English PEN and Index on Censorship Alternative Libel Project which noted that early determination of meaning in a non-legal (or quasi-legal) setting such as mediation could significantly reduce costs and the chill from legal bullying.

The nature of the correction or clarification by the publisher should not be set out in statute but based on a "reasonable" test of editorial judgment. Forced or mandatory apologies could be in breach of Article 10 of the European Convention.

This proposal would need to be combined with the availability of statutory defences as set out in the Defamation Act, in particular section 3 and section 4, to give the publisher the confidence to defend their actual stated intention (even after it has been narrowed thanks to this procedure).

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

Yes. The consultation should consider incentivising alternative dispute resolution through the civil procedure rules as set out in the Alternative Libel Project.

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?

Yes.

The Libel Reform Campaign, which I support, agrees with the analysis (3.19 - 3.28) contained in the consultation document that consideration should be given to extending the defence of honest opinion to comment on facts that an average person "reasonably believes" to be true.

If the Bill is not applied by an Order of the Assembly, and subject to a scrutiny process, I would recommend this amendment is adopted.

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It would not be preferable to continue with the common law approach. The common law approach was considered in the pre-legislative scrutiny of the Bill and found inadequate to protect honest opinion. A number of cases demonstrated the inadequacy of the common law approach.

I also agree with 3.31 that echoes the opinions of the Joint Committee on the Draft Defamation Bill that the removal of the public interest dimension takes out "an unnecessary complication".

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Yes

Would it preferable instead to retain the multiple publication rule, or to introduce an alternative defence requiring the attaching of a notice of complaint?

No. The multiple publication rule, a principle developed in the nineteenth century, is entirely inappropriate in the Internet age.

Consensus on this point was one of the first aspects to be achieved during the process that lead to the Defamation Act 2013. The Libel Working Group convened in 2009 recommended change. The Ministry of Justice then consulted on the same point, and in light of the responses received concluded that it was appropriate in principle to introduce a single publication rule.

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Yes.

Consideration should be given to the amendment to section 9 as stated above and also the inclusion of subsection 13 (2) of Lord Lester's Defamation Bill in Clause 1 requiring the court to strike out claims where there has been no real or substantial tort in this jurisdiction.

Section 9 may not be as robust in section 9 (2) in preventing libel claims by those domiciled, or part-domiciled, in the European Economic Area (EEA). While the government intended for section 1 to strike out claims by foreign claimants if publication is not serious and substantial in this jurisdiction, this could be clarified further.

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From: Jeffrey Dudgeon
Sent: 17 February 2015 11:30
To: info nilawcommission
Subject: Libel law consultation response

To the Northern Ireland Law Commission

I was involved in the initial campaign to get the 2013 Defamation Act extended to Northern Ireland, ultimately by means of a private member's bill at Stormont. To aid the process, a local barrister and solicitor worked with me to produce a draft northernirelandised version of the Defamation Act which I have attached for your information and assistance.

It would be my view, as publications are normally available throughout the United Kingdom, and ever more so by virtue of the internet, that the law here should be identical or similar, as far as possible.

Improvements in the 2013 Act could however be considered so long as they did not encourage litigation to travel to and occur in this jurisdiction.
In this instance, some recognition of genuine and sufficiently prominent retraction as a defence might be incorporated in the new law here.

I remain concerned because of unfortunate costly case 'settlements' in recent months that it is necessary to proceed with haste on this matter. Such settlements can and will bankrupt local newspapers, at great cost to our democracy.

Jeffrey Dudgeon (Cllr)
Belfast City Hall
17 February 2015

From: Cath Rostron
Sent: 17 February 2015 17:52
To: info nilawcommission
Subject: Libel reform

I support the Campaign for Libel Reform's responses to the consultation. The changes that have been made in the UK are a great improvement to the previous framework. I think the people of Northern Ireland also deserve to benefit from these improvements,

Yours faithfully,

Catherine Rostron
London

Consultation Paper
Defamation Law in Northern Ireland

The News Media Association represents national and local news media companies which publish national, regional and local newspapers and whose print, online and broadcast news and information services attract and serve ever increasing audiences.

The NMA's members include the publishers of daily and weekly newspaper titles circulating in Northern Ireland. These include: Derry News, Belfast - Sunday Life, Belfast Telegraph, Irish News (Belfast), Ballymena & Antrim Times, Belfast News, Coleraine Times, Derry Journal, Dromore & Banbridge Leader, Larne Times, Lisburn Echo, Londonderry Sentinel, Lurgan Mail, Mid Ulster Mail Series, Portadown Times, Tyrone Times, News Letter, Ulster Star, Impartial Reporter and The Irish Times. The Law Commission will be well aware of the strong support of the Belfast Telegraph and other publications for the immediate extension of the Defamation Act 2013 in its entirety to Northern Ireland.

All the NMA's members have a common interest in the implementation in England, Wales and Northern Ireland of the reforms achieved by the Defamation Act 2013, making some much needed improvements to the antiquated and complex libel regime which had made London notorious as the libel capital of the world. The 2013 Act did not address all our concerns, nor did we support all its provisions (see section 12 below). However, we submit that extension of the 2013 Act to Northern Ireland would ensure consistency of the law and consequent general benefit.

An unaltered regime would have a chilling effect beyond Northern Ireland, upon our members located outside Northern Ireland, in England, Wales or Scotland, in respect of any significant publication within that jurisdiction. It would allow claims to succeed against such publications in the Northern Ireland courts, even if no claim could be brought or succeed in the courts of England and Wales . Leave of the court would not even be required for writs to be served against those located outside Northern Ireland for proceedings commenced in Northern Ireland.

The NMA's members therefore have a direct and strong interest in libel law reform in Northern Ireland.

The NMA also supports the cogent submission of the Media Lawyers Association. We refer you to its detailed legal analysis in support of its views on extension of the Defamation Act 2013 to Northern Ireland. We would also draw your attention to the very strong reasons that it puts forward against withdrawal of the single meaning rule

NMA Response to the Consultation Questions.

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

Yes. The NMA and its members strongly support the extension of the Defamation Act 2013 in full to the Northern Irish jurisdiction and its implementation as soon as possible.

Defamation reform is rare and the Act resulted from considerable discussion and consultation, ensuring consideration of all perspectives. Its implementation would benefit freedom of expression, whilst facilitating better understanding of the legal limits upon it. Its extension to Northern Ireland would avert the detrimental consequences of legal inconsistency in such an important area, which could increase legal complexity and uncertainty, deepening the chill upon debate of matters of public interest. Its implementation could also t lead to swifter determination of defamation claims., instead of adding to the length and costs of actions.

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?

The NMA strongly considers that the Act should be extended in full.
The most important provisions to extend in their application to Northern Ireland in any other event are sections 1, 3, 4,5,7,8 and 11.

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?

No. The Defamation Act 2013 should be extended in its application to Northern Ireland in whole and as soon as possible. There is no evidence of any particular problem arising from the Act's implementation in England or Wales to give grounds for delay consequent upon revision.

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?

No. The NMA is strongly opposed to withdrawal of the 'single meaning rule'. This would be hugely damaging to freedom of expression and create a deeply chilling effect upon press freedom, especially upon local newspapers and smaller publishers who would not be able tot afford to defend legitimate publication through the costly and protracted litigation that it would generate. It would be open to unjustified cynical exploitation simply to prevent any unwanted publicity and curb inquiry. Investigation and publication could be deterred by the mere threat of legal action made more complicated and more costly by the introduction of any such legal change. Claimants would threaten legal action, suggesting a wide range of meanings, demand a proliferation of corrections and apologies (which might engender claims from others) and embark upon protracted and costly litigation.

It is also unnecessary. The Defamation Act 1996 established the offer of amends procedure. Early determination or ruling upon meaning speed the resolution of

complaints and claims in defamation. There have already been helpful decisions to date upon serious harm and role of prompt correction and apology under the Defamation Act 2013.

Whilst a bar on claims where a publisher has made a prompt and prominent apology might merit consideration as a wholly independent reforming measure, (though not enough to delay extension and commencement of the full Defamation Act 2013 in its entirety in the meantime in Northern Ireland) it would certainly not counterbalance the very harmful consequence of ending the single meaning rule.

The NMA refers you to the submission of the Media Lawyers Association which deals in detail with the reasons against exploration and introduction of any such changes to the law. The NMA strongly supports and adopts the MLA's submission.

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

Priority should be given to the extension of the Defamation Act 2013 in full as soon as possible. Adherence to the Pre-action Protocol for Defamation should also be encouraged.

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?

Yes. Section 2 should be adopted. This is a key defence and the law in Northern Ireland should be consistent with England and Wales. However, we would prefer that the 2013 Act should be adopted in its entirety.

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?

Section 3 of the 2013 Act should be adopted in addition to section 2. This defence is crucial to freedom of expression. However, we would prefer that the Act should be adopted in its entirety.

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

The defence under section 3 encompasses such inferences.

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?

The NMA has no objection to a proposal conducive to freedom of expression, but it considers that priority must be given to the immediate extension of the Defamation Act 2013 in its entirety to Northern Ireland.

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?

The NMA has no objection to a proposal conducive to freedom of expression, but it considers that priority must be given to the immediate extension of the Defamation Act 2013 in its entirety to Northern Ireland.

Q 11: If it is desirable for a rule equivalent to section 3 of the 2013 Act to be introduced into Northern Ireland 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 he or she reasonably believed to be true at the time the statement complained of was published?

The NMA has no objection to a proposal conducive to freedom of expression, but it considers that priority must be given to the immediate extension of the Defamation Act 2013 in its entirety to Northern Ireland.

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?

Yes. It is vital that section 4 defence is extended immediately to Northern Ireland, in addition to section 2 and 3 if that were the case. This is vital to the work of our members in investigating and reporting matters of public interest. However, we would stress yet again our support for extension of the 2013 Act in its entirety as soon as possible.

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?

No. Section 4 should be adopted in its entirety.

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?

Yes. This section is important to counteract the greater chilling effect of the unreformed regime both upon academic and scientific research and debate, and upon any wider coverage given to the subject matter and such debate upon it.. These could raise issues of the highest importance and real public interest. The section should be adopted in its entirety in addition to sections 2, 3, 4. Obviously, we would prefer that the Act should be adopted in tis entirety and implemented as soon as possible.

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?

Yes, section 7 should be introduced into Northern Irish Law, in addition to the sections considered above. These provisions are of immense importance to newspapers (in print, online etc.) enabling reports on matters of public interest to the communities that they serve. All defences of privilege are particularly important to the day to day reporting work of the local and regional press. Again, we hope that the section can be implemented by extension of the 2013 Act in its entirety to Northern Ireland.

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?

Section 5 of the 2013 Act should be introduced into Northern Irish law. There should not be any obligation for website operators to append a notice of complaint alongside statements that are not taken down. The section adapts the law to the demands of 21st century communication, but was not intended to allow complainants to coerce censorship by website operator, rather than informed court determination of their claim.

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?

Yes. The new defence for secondary publishers set out in section 10 of the 2013 Act should be introduced in addition to sections 2, 3, 4, 5, 6 and 7, although our preference is for adoption of the 2013 Act in its entirety.

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?

Yes. The reform and update of the law of slander should be introduced into Northern Irish law, although our preference is for the 2013 Act to be adopted in its entirety.

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?

Yes. Section 11 should be introduced into Northern Irish law in addition to the sections set out above. The reversal of the presumption that defamation claims will be heard by a jury is vital. This is a very important reform which must be implemented as soon as possible. Experience of trial by judge rather than jury has suggested no grounds for objection on freedom of expression/protection of reputation. It also reduces the time and complexity of defamation litigation and the spiralling attendant costs borne by either party, which otherwise increase the chilling effect of unreformed libel law and process upon freedom of expression.
Again, our preference would be for immediate extension of the whole 2013 Act in its entirety.

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?

Yes. The test in section 1(1) of the 2013 Act should be introduced into Northern Irish law, in addition to the sections above. It is a much needed reform, given the Act's avoidance of any change to the burden of proof and the consequent relative ease of satisfying the requirements for initiation of a claim in defamation, to the undue detriment of freedom of expression.

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?

Yes. Section 1(2) of the 2013 Act should be introduced into Northern Irish law, in addition to the sections above if our preferred option of adoption of the Act in its entirety were not taken.

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 preferable instead to retain the multiple publication rule, or to introduce an alternative defence requiring the attaching of a notice of complaint?

The introduction of the single publication rule is a vital update of defamation law, necessary for adaptation for current communications technology – and to the policy objective of prompt vindication of reputation and adherence to the statutory limitation periods set with that objective, without detriment to the complainant. Section 8

should be implemented, in addition to the other sections above, although our preference would be for the whole Act to be extended in its entirety.

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?

Yes, section 9 should be introduced in to Northern Irish law, in addition to the sections above. We are well aware of the concerns of publishers and editors of the effect of the unreformed law which will continue if the 2013 Act is not extended to Northern Ireland. Consistency of application of these important measures to counter libel tourism and, as importantly, the wider chilling effect otherwise engendered is very important. Again, we would prefer that the 2013 Act were extended in its entirety.

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?

The NMA strongly opposed section 12 of the 2013 Act during the passage of the Bill because of the concerns that it raises about the court as editor .. We would strongly object to the selection and adoption of only these two sections of the 2013 Act in Northern Irish law, as opposed to the extension of the entire 2013 Act to Northern Ireland..

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

No. There are a sufficient range of remedies.

SR/NMA 19 February 2015

Response to Consultation

Defamation Law in Northern Ireland

Author: Eamonn Kennedy

Submitted to: info@nilawcommission.gov.uk

Date: 20 Feb 2015

Contact details: eamonn.kennedy@gmail.com

Q1. Should the Defamation Act 2013 be extended in its application, in full, to the Northern Ireland jurisdiction?

Introduction

Privacy and free expression (note, not freedom of the press) are important aspects of international and domestic law. They are enshrined in Articles 8 and 10 respectively of the European Convention on Human Rights and, since the Human Rights Act 1998, are justiciable in UK courts. Contrary to much of the literature and debate on the Defamation Act 2013, they are not, however, the essence of defamation law.

Provision is made for protection against unlawful attacks on reputation in Article 17 of the International Covenant on Civil and Political Rights although Article 19(3)b effectively subordinates this protection of reputation to the right to freedom of expression. Caught between a rock and a hard place, the socially important tort of defamation is one that lacks the established rights-based solidity of privacy or free expression.

This response will endeavor to focus on defamation without undue resort to narratives on privacy or free expression. The first section examines the background to and provisions in the 2013 Act while the second section develops a range of arguments in support of and against inclusion of the Act in Northern Ireland. An overriding objective is to avoid the kind of polemical discourse that all too often characterizes the debate on defamation generally and the 2013 Act specifically. It is hoped that this adds to the gravity of the conclusion that Northern Ireland should include the 2013 Act, in full, on its statute book.

The Act

Although welcomed by Hooper et al (2013) as a 'long overdue reform of the law of defamation', the extent of reform is limited.[1] A close reading of the Act alongside the explanatory notes and the Defamation Act 1996 makes clear that the only sections to introduce genuinely new law are Sections 5 (operators of websites), 6 (peer-reviewed statements), 8 (single publication rule), 9 (foreign domiciled persons), 10 (non-primary publishers), 11 (trial by jury), 12 (summary of court judgment), and 13 (removal of statements).

The other substantive provisions in the Act clarify, restructure or modernize existing statute or common law provisions. The explanatory notes identify three judgments as the basis for the s. 1 test of 'serious harm'[2]; the s. 2 and 3 defences of 'truth' and 'honest opinion' replace existing common law defences of 'justification' and 'fair comment' respectively; s. 4 is a codification of the *Reynolds* privilege; s. 7 updates the various forums identified in the 1996 Act that are protected by privilege; and s. 14 applies a special damage requirement to statements regarding chastity and disease that were previously exempted.

Key Reform Objectives

The government's consultation paper in preparation for the 2013 Act identified the following areas of particular concern:

> *'…that the threat of libel proceedings is not used to frustrate robust scientific and academic debate, or to impede responsible investigative journalism and the valuable work undertaken by nongovernmental organisations. We also wish to reduce the potential for trivial or unfounded claims and address the perception that our courts are an attractive forum for libel claimants with little connection to this country…'*[3]

In the first sentence above, the objectives are (1) to protect three publication sources (scientific and academic debate, investigative journalism and nongovernmental sources) and (2) that the protection should be from the 'threat of legal proceedings', which implies an inequality of arms between plaintiff and defendant. In the second sentence, the objectives are (3) to reduce the potential for vexatious claims generally and (4) to address the perception that English defamation law attracts libel tourists.

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[1] David Hooper, Kim Waite, Oliver Murphy, 'Defamation Act 2013 – what difference will it really make?'(2013)
[2] The judgments on which s. 1 is based are *Thornton v Telegraph Media Group Ltd* [2009] EWHC 2863 (QB), *Sim v Stretch* [1936] 2 All ER 1237, and *Jameel v Dow Jones & Co* [2005] EWCA Civ 75.
[3] Draft Defamation Bill Consultation, Ministry of Justice, Consultation Paper CP3/11, March 2011, Cm 8020 - Ministerial Foreword p. 3.

Each of these four objectives is examined in turn below with a particular focus on the new law introduced by the 2013 Act.

Special protection

In *NMT Medical v Wilmshurst*, the US-based corporate claimant brought four claims of libel against Dr Wilmshurst over a period of four years.[4] Having been one of the principal investigators conducting a trial of a new medical device developed by NMT, he 'criticised the device's American manufacturer, NMT Medical, for the way they were handling data from the clinical trial'.[5] The basis for the various defamation claims lodged by NMT included a report of the criticism by a Canadian website and a later interview that Dr Wilmshurst gave to BBC Radio.

Although Section 6 of the 2013 Act includes significant protections for scientific and academic statements, this is irrelevant in *NMT Medical v Wilmshurst* as the publications complained of were not in a peer-reviewed journal. The circumstances that section 6 envisages are at odds with the *Wilmshurst* case. Section 6 would only have provided Dr Wilmshurst with a viable defence if he had waited for his findings to be successfully published in a peer-reviewed journal, and only if his subsequent statements were 'a fair and accurate copy of, extract from, or summary of' the peer-reviewed publication.[6]

The provision in the 2013 Act most relevant to the *Wilmshurst* case is section 4, which establishes a defence for publications on matters of public interest. As mentioned briefly above however, this section is not a new addition to the law on defamation. The explanatory notes make clear that this section 'is based on the existing common law defence established in *Reynolds v Times Newspapers* and is intended to reflect the principles established in that case and in subsequent case law.'[7]

Similar reasoning applies to other cases championed by the Libel Reform Campaign such as *Rath v Guardian News and Media*[8] and *British Chiropractic Association v Singh.*[9]

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[4] Unreported. Discussion of the case can be found in Peter Wilmshurst, 'The effects of the libel laws on science – a personal experience' (2011) Radical Statistics, Issue 104 and on the Sense About Science website: <http://www.senseaboutscience.org/pages/british-cardiologist-sued-by-american-company-for-a-canadian-article.html#Background> accessed 10 January 2015.

[5] n. 4.

[6] s 6(5) of the 2013 Act extends the section 6 privilege to subsequent statements that are narrowly consistent with the original peer-reviewed publication.

[7] [2001] 2 AC 127; [1999] 3 WLR 1010 [29].

[8] *Matthias Rath v Guardian News and Media Limited, Ben Goldacre* [2008] EWHC 398 (QB).

Inequality of arms

That the consultation document refers to the 'threat' of libel proceedings implies that an unequal financial standing between parties is problematic. *Wilmshurst* again is just such a case. Three years into the case, Dr Wilmshurst's costs were reported to be £250,000 and he was at risk of losing his home.[10]

Section 1(2) is where the 2013 Act attempts to deal with such a case by explicitly extending the serious harm requirement to require bodies that trade for profit to demonstrate actual or likely 'serious financial loss'. Given that the *Wilmshurst* case only ceased when NMT Medical went out of business having experienced a period of financial difficulty, it would likely have been able to satisfy this requirement.

While the serious harm test in section 1 is a welcome clarification of common law[11], none of the innovations in the 2013 Act deal in a meaningful way with the potential for injustice arising from well-resourced claimants threatening defamation proceedings against defendants of more limited means.

Vexatious Claims

The serious harm threshold in Section 1 is welcome here but again is not an innovation per se. One important innovation of relevance is the single publication rule in Section 8, which updates the rule dating from the 1849 *Duke of Brunswick* case for the age of online publishing.[12]

This is an area that the courts were becoming more activist in anyway. In *Jameel v Dow Jones*, the Court of Appeal stayed an otherwise viable defamation case in part because of the trivial nature of damage involved.[13]

The Northern Ireland Courts have also acted to identify and stay unmeritorious defamation claims. In *Ewing v Times Newspapers,* Gillen J handed down a comprehensively argued

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[9] *British Chiropractic Association v Singh* [2010] EWCA Civ 350; [2011] 1 W.L.R. 133.
[10] 'Libel doctor Peter Wilmshurst could lose his house' <http://www.pressgazette.co.uk/node/46370> accessed 10 January 2015.
[11] Section 1 is described in the explanatory notes as one that 'builds on the consideration given by the courts in a series of cases to the question of what is sufficient to establish that a statement is defamatory.' Three example cases are cited, see n. 2.
[12] *Duke of Brunswick v Harmer*, 117 E.R. 75; (1849) 14 Q.B. 185. See also Hooper et al (n. 1 at pp. 6-7). It should be noted that the Duke of Brunswick rule was already disregarded as 'no longer English law' in a 2010 speech by Lord Hoffman: <http://southeastcircuit.org.uk/education/ebsworth-lecture-libel-tourism> accessed 12 January 2015.
[13] 'The game will not merely not have been worth the candle, it will not have been worth the wick.' *Jameel v Dow Jones* [2005] EWCA Civ 75 [69].

judgment detailing not only the desirability of dismissing such a claim but also the precedent and rules available to support such actions:

> *'In my view it would be manifestly unfair to the defendant and an unedifying spectacle which would bring the administration of justice into disrepute amongst right thinking people to allow the plaintiff to continue to bring these proceedings in Northern Ireland.'*[14]

> *'I am satisfied that these proceedings constitute a paradigm of an abuse of process under Order 18 Rule 19(1)(d), that they are vexatious proceedings under Order 18 Rule 19(1)(b) and that in any event it would be appropriate under my inherent jurisdiction to dismiss that action as an abuse of the procedure of the court.'*[15]

While legislation can certainly discourage vexatious claims, a determined litigant will likely find a basis for making a claim. In the context of defamation, the pertinent question regards the stage at which a vexatious claim can be identified and treated as such. This is more a question of pre-trial procedures than legislation.

Libel Tourism

"Hostile articles combined with zillionaires seeking respectability makes for happy lawyers' was how the Economist described the causes and consequences of libel tourism.[16] Facilitated by law that had not kept pace with the internationalization of publishing, cases such as *Berezovsky v Forbes* [2000], *Bin Mahfouz v Ehrenfeld* [2005] and *Mardas v New York Times* [2008] tested the jurisdictional boundaries.[17]

The claimant's success in *Ehrenfeld* led to state and federal legislation in the US.[18] This enhanced the contention that libel tourism was a UK problem.

The main innovation in the 2013 Act is s. 9 on actions against a person not domiciled in the UK or a member state. Two cases in 2013 however, suggest that the courts were already beginning to be more discerning on this point. Although described as an important but not determinative consideration for the striking out, in *Karpov v Browder* [2013] Simon J observed that there was '"a degree of artificiality" about [the claimant's] seeking to protect

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[14] [2011] NIQB 63 [41].
[15] n. 14 [50].
[16] 'Shuddup' *The Economist* (13 March 2003) <http://www.economist.com/node/1632864> accessed 2 February 2015).
[17] *Berezovsky v Forbes* [2000] UKHL 25 (notably, the issue of England and Wales as the appropriate forum was a three to two majority decision), *Bin Mahfouz v Ehrenfeld* [2005] EWHC 1156 (QB), *Mardas v New York Times* [2008] EWHC 3135 (QB).
[18] Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act was passed by the 111th United States Congress. The Libel Terrorism Protection Act was passed in New York State.

his reputation in this country'.[19] In *Subotic v Knezevic* [2013] the action was dismissed as 'a Jameel abuse of process'.[20] Section 9 in the 2013 Act is a welcome clarification but, again, it appears to reflect as much as it directs considerations in the courts.

Privacy

During its passage through Parliament, a concerted attempt was made to include privacy within the remit of the defamation bill.[21] In hindsight, leaving privacy outside the remit of the Act was a remarkable and important achievement.

With the role of the press central to many narratives about defamation, it is certainly relevant that the Leveson Inquiry was underway during the bill's drafting and debate stages. Additionally, the ECtHR has been handing down judgments that were advancing the status of Art 8.

The danger that was averted by shielding the 2013 Act from privacy is one of introducing a privacy trump card that would effectively hijack the law of defamation.

Inclusion in Northern Ireland

On 27 June 2013 a short debate was introduced by Lord Lexden in the House of Lords regarding the status of the 2013 Act in Northern Ireland.[22] Responding on behalf of the government, Baroness Randerson outlined the undesirability of interfering with an area of devolved law, accepted the point that Northern Ireland law must comply with the European Convention on Human Rights and stated a view that libel tourism to Northern Ireland would be unlikely. [23] Sounding a note of optimism, Baroness Randerson noted 'the potential

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[19] *Karpov v Browder* [2013] EWHC 3071 (QB) [139].
[20] *Subotic v Knezevic* [2013] EWHC 3011 (QB) [82].
[21] This argument garnered considerable support; Lord Puttnam was among its main proponents (HL Deb, 5 Feb 2013, col 140). See also David Allen Green 'The Defamation Bill does not need this "Leveson amendment"' *New Statesman* (5 March 2013) <http://www.newstatesman.com/politics/2013/03/defamation-bill-does-not-need-leveson-amendment> accessed 13 January 2015.
[22] HL Deb, 27 Jun 2013, Column GC330 – GC346. In comparison to the geniality of the second reading of Lord Lester's draft bill, this was a combative and harshly worded affair. For example, Lord Empey (via Lord Lexden) spoke about how devolution should not 'be at the expense of the integrity of the nation' (Column GC332); Lord Lester referred to the 'stain on the reputation of Northern Ireland' if it were to replace London as the libel tourist capital by clinging to archaic, unbalanced and uncertain common law' (Column GC334); Viscount Colville was 'dismayed that the Northern Ireland Executive have not been prepared to adopt the Act's principal measures and reform the Province's libel laws' (GC334); Lord Black of Brentwood spoke of negative economic consequences and how Northern Ireland 'could become a pariah' (Column GC336-337).
[23] n. 22 cols GC342-344.

importance of Mike Nesbitt's Private Member's Bill on defamation' and expressed confidence 'that this debate will run in Northern Ireland'.[24]

To date, no draft bill has been introduced in the Northern Ireland Assembly. The extension of the 2013 Act to Northern Ireland is now being examined by the Northern Ireland Law Commission.

The Northern Ireland Law Commission's public consultation is due to close on 20 February 2015 with the analysis of responses due by 31 March 2015. Assuming the Commission meets that deadline, it will be just in time as that is also the date that the Commission is being closed down.[25]

The case for

Statutory consistency with rest of UK

Jeffrey Dudgeon, who worked on the drafting of Mike Nesbitt MLA's intended draft defamation bill, expressed his belief that 'there should be a "standardised libel law" throughout the UK unless there was "a good reason to make an exception".'[26] On the face of it, this appears to be a common sense perspective and one that is echoed in the views of Lord Lexden who more accurately decried the fact that 'for the first time in our history, Northern Ireland is to be severed from England and Wales in this wide area of law.'[27]

Including the 2013 Act would maintain long-held consistency in the law of defamation between Northern Ireland and England and Wales. In the absence of sound reasoning to the contrary – and none has been forthcoming because there has been no substantive official debate – this is an argument that by default comes down in favour of inclusion.

Real and perceived economic costs

The consistency argument outlined above also has an economic interpretation. Lord Browne, questioning the reaction of international investors, betrayed a Westminster-centric view when he stated in the Lexden debate that '[w]e are investing substantial amounts of

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[24] n. 22 col GC344.

[25] Responding to concerns as to what the Commission's closure means for the review of defamation law in Northern Ireland, the Finance Minister was non-committal as to whether a finding of a need for legislation would be matched with a delivery of such legislation: Northern Ireland Assembly Official Report (2 December 2014) Volume 100, No 2, pp. 35-37 (AQO 7205/11-15).

[26] 'Full text of Mike Nesbitt's draft Defamation (Northern Ireland) Bill' *News Letter* (14 May 2013) <http://www.newsletter.co.uk/news/politics/latest/full-text-of-mike-nesbitt-s-draft-defamation-northern-ireland-bill-1-5087360> accessed 8 January 2015.

[27] n. 22, col GC330. Lord Lexden's comment is more accurate that that of Mr Dudgeon as it recognizes the fact that Scotland already had a different law on defamation.

money in Northern Ireland to ensure that its economy moves from depending on the public sector to the private sector'.[28] Leaving aside the faint traces of economic coercion implied in such a statement, Lord Black speculated as to the impact on an estimated 6,000 existing media jobs in Northern Ireland whose employers have become accustomed to statutory consistency. He also suggested that a negative assessment would be made by firms such as Google or Twitter in considering whether to establish a presence in what he described as 'an out-of-date, repressive libel jurisdiction'.[29]

Ironically, Northern Ireland's reputation as a welcoming destination for business investment could be hampered by real and perceived transaction costs associated with a defamation regime that has diverged further from England and Wales. In one of the few Assembly sessions that dealt with the 2013 Act, the Minister of Finance and Personnel agreed that this would be an area 'that we want to look at in undertaking any review' although he personally doubted that it would lead to a negative impact on investment. [30]

Compliance with international law obligations

One factor that encouraged the original review of defamation law in England and Wales was the degree to which it conformed to relevant international law. In 2008 the Human Rights Committee that monitors implementation of the International Covenant on Civil and Political Rights (to which the United Kingdom is a State Party) reported that the impact on scholars, libel tourism, the advent of the internet and high litigation costs were all areas of concern with the practical application of libel law in the United Kingdom.[31] To greater and lesser degrees, the 2013 Act addresses these points within the jurisdiction of England and Wales.[32] Northern Ireland, by contrast, is left with the same legislative arrangements as when that criticism was made.

The other main international statute of relevance to defamation law in the UK is the European Convention on Human Rights, the relevant provisions of which were given effect under UK statute law by the Human Rights Act 1998. In particular, Article 8 on the right to respect for private and family life and Article 10 on freedom of expression are the most

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[28] n. 22, col GC341.
[29] n. 22, col GC336.
[30] Northern Ireland Assembly Official Report (1 July 2013) Volume 86, No 7, pp. 36.
[31] CCPR/C/GBR/CO/6, para 25.
[32] Progress of the Bill's passage through Parliament and implementation of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 comprised the main thrust of the Government's 2013 report to the Human Rights Committee in response to the 2008 criticisms. CCPR/C/GBR/7 paras. 1032-1033.

commonly cited in relation to defamation. Article 6 on the right to a fair trial and Article 13 on the right to an effective remedy were additionally cited by Lord Lester in his contribution to the Lexden Debate wherein he outlined how preparation of the 2013 Act included a positive review that it complies with these international obligations.[33]

An invitation for intervention from Westminster

Extending the point immediately above, omitting to ensure Northern Ireland's law on defamation is compliant with international obligations could create the circumstances in which the Secretary of State for Northern Ireland would unilaterally direct the Assembly to adopt relevant provisions. Lord Lester observed that such an eventuality is provided for in Section 26(2) of the Northern Ireland Act 1998:

> 'If the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland department is required for the purpose of giving effect to any international obligations, of safeguarding the interests of defence or national security or of protecting public safety or public order, he may by order direct that the action shall be taken.'[34]

Retain role in future development of defamation law

By distinguishing itself from England and Wales defamation law, Northern Ireland effectively excludes itself from benefitting from future developments in that jurisdiction's law on defamation. The statutory differences introduced by the 2013 Act will presumably result in common law divergences over time also.

If Northern Ireland was well resourced to pursue an independent course on legislative development that may not be such a disadvantage. However, with the disbandment of the Northern Ireland Law Commission, which was established as the province's independent source of legislative scrutiny, this is not the case. Additionally, the Assembly's activities to date on progressing the topic of defamation law do not encourage optimism as to its ability to efficiently introduce new statute law. In these circumstances, separating Northern Ireland from the resources that England and Wales has at its disposal appears to be a retrograde step in terms of ensuring that Northern Ireland's statute book develops in line with this evolving area of law.

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[33] n. 22, col GC333. Although Article 13 ECHR is not included in the Human Rights Act 1998, *R.K. and A.K. v. the United Kingdom* (Application no. 38000(1)/05) is an example of a case wherein the European Court of Human Rights has demonstrated its willingness to find the United Kingdom in violation of this Article.

[34] n. 33.

The case against

Procedural inconsistency with England and Wales

As noted above, the question regarding a lack of consistency must be framed in the context of divergence from the law of England and Wales. Until the 2013 Act, Northern Ireland law on defamation was largely the same as in England and Wales. Substantive differences existed and continue to exist however in terms of costs and procedures. Tweed (2012) has highlighted the impact of conditional fee arrangements and the recovery of after the event insurance premiums not being available in Northern Ireland.[35] Gillen (2012) highlights the procedural discrepancies procedures such as offers of amends, alternative dispute resolution and case management.[36] Phillipson (2012) has drawn both these perspectives together: 'perhaps the key thing missing from the [Draft Defamation] Bill are the kinds of real reforms to costs and procedure that nearly all agree are a pre-requisite for realizing real change on the ground.'[37]

A summary of the observations immediately above is that problems arising from defamation law are not solely caused by statute or common law. Rules regarding costs and procedures have a major impact. Assuming Northern Ireland is to retain its particular approach to supporting rules and procedures, it follows that Northern Ireland should not automatically include the 2013 Act that was drafted with reference to the distinct rules and procedures that apply in England and Wales.

Northern Ireland does not need new defamation legislation

To the limited extent that the relevant Assembly Ministers have engaged in debate about the 2013 Act, several statements effectively argue that such a statute is not required in Northern Ireland.

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[35] Paul Tweed, 'Funding defamation litigation' in David Capper (ed), *Modern defamation law: balancing reputation and free expression* (Belfast: School of Law, Queen's University Belfast 2012).
[36] Mr Justice Gillen, ''Everything should be as simple as possible but not simpler': practice and procedure in defamation proceedings' in David Capper (ed), *Modern defamation law: balancing reputation and free expression* (Belfast: School of Law, Queen's University Belfast 2012).
[37] Gavin Phillipson, 'The 'global pariah', the Defamation Bill and the Human Rights Act' in David Capper (ed), *Modern defamation law: balancing reputation and free expression* (Belfast: School of Law, Queen's University Belfast 2012).

> *'It would appear that, in Northern Ireland, the law on defamation operates in a different way to that in England and Wales and there are no plans to review that law.'*[38]

> *'Our law of defamation is largely covered by the common law, rather than statute, and it could be argued that the flexibility which the common law offers is an advantage in that it allows the law to be quickly adapted or developed to address new issues, including any issues which may arise on foot of the proposed changes to the law in England and Wales.'*[39]

Defamation is within the Northern Ireland Assembly's legislative competence

Section 6 of the Northern Ireland Act 1998 outlines the areas of competence for the Northern Ireland Assembly. Defamation law falls within the legislative competence of the Assembly. It follows, therefore, that there should be no automatic assumption that Northern Ireland should enact legislation just because Parliament does so for England and Wales. That would only serve to undermine legislative initiative as an integral aspect of devolution.

Further to this point, there is some justification for claiming that the responsible approach for Assembly Ministers to take is one of wait-and-see:

> *'With the passing of the Defamation Act 2013, there have been a number of far-reaching changes in the law in England and Wales. In my view, it would be prudent to see how those changes work through before deciding how we want to progress the issue in Northern Ireland.'*[40]

The obvious drawback to this approach is the delay incurred in the event that the anticipated benefits do materialize. The advantage gained is one of increased confidence that eventual changes to Northern Ireland legislation will be based on lessons learned from the changes taking effect in England and Wales.

Libel tourism is overstated

Ian Paisley MLA has argued that the elevated serious harm threshold in the 2013 Act 'raises the bar so high that the ordinary citizen will never go into the libel courts to defend themselves' and that 'the accusation of libel tourism amounts only to about a dozen cases over past years and it really is not as big a problem as some people are suggesting'.[41]

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[38] Letter from Department of Finance and Personnel to the Committee in response to issues highlighted by the Libel Reform Campaign, 30 May 2013. <www.niassembly.gov.uk/globalassets/documents/finance/defamation-act/dfp-papers/30-05-2013.pdf> accessed 15 January 2015.
[39] Northern Ireland Assembly Official Report (29 March 2013) Volume 83, No WA3 (AQW 21117/11-15).
[40] Northern Ireland Assembly Official Report (1 July 2013) Volume 86, No 7 (AQO 4429/11-15).
[41] HC Deb, 12 Jun 2012, cols 178-182.

Thus far all references to libel tourism have been pejorative. While it is by no means clear that Northern Ireland courtrooms will soon be hosting an array of international, well-resourced claimants taking advantage of a lower threshold for defamation, such a development could generate fee income for appropriately positioned lawyers as well as business for miscellaneous local services.

At least in the early stages before Northern Ireland case law establishes just what the impact of not including the 2013 Act will be, it is worth recalling that libel tourism does not have to take the form of cases going to court. The threat of proceedings can be sufficient to achieve the claimant's desired ends. The Northern Ireland courts do not necessarily have to bear the burden of an eventual windfall for libel lawyers.

Evolution of a democracy

> *'He was sentenced to be disbarred and deprived of his university degrees; to stand twice in the pillory, and to have one ear cut off each time; to be fined £5,000; and to be perpetually imprisoned without books, pen, ink, or paper'.*[42]

Such was the sentence handed down in 1632 to William Prynne for libel. Jonathan Swift, Thomas Paine and Daniel Defoe may be considered classical authors today respected for Gulliver's Travels, The Rights of Man and Robinson Crusoe respectively. In their day however, each experienced the defendant's perspective of libel.[43]

Much has changed in the law of libel since the days when the Star Chamber saw fit to have guilty defendants mutilated for maligning the government or the King. That said, the common law offence of seditious libel was only abolished in England and Wales and in Northern Ireland with the passage of the Coroners and Justice Act 2009.[44]

It is possible to make a case that the development of defamation law goes hand in hand with the development of democratic principles. Navigating a legislative path between the various powers and interests involved is a formative experience for the broadly defined legal system and creates a forum in which the government must win support for an acceptable accommodation of competing rights.

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[42] Stephen JF, *A history of the criminal law of England* (Routledge 1996; 1883) (vol 1, pp. 341).
[43] Thomas Paine was convicted of libel in 1792; Edward Waters, the publisher of Jonathan Swift's pamphlet, A Proposal for the Universal Use of Irish Manufacture, was prosecuted but not convicted for seditious libel (Keith Crook, A Preface to Swift, Routledge 2013 pp. 95-96); Daniel Defoe was convicted of seditious libel for his pamphlet The Shortest-Way with the Dissenters (Paula R. Backscheider, Daniel Defoe: His Life, 1989 The Johns Hopkins University Press).
[44] s. 73.

Conclusion

If one's expectations of defamation statute law is to create a clear playing field on which claimants' reputations can be protected while taking due account of adjacent interests such as privacy and free expression, then the 2013 Act is a disappointment.

On the other hand, if one has more pragmatic expectations that defamation statute law can only go so far and that it requires complementary common law flexibility to stay alive to the multitude of circumstances that can arise in a given case, then the 2013 Act is an acceptable albeit undramatic enhancement of defamation law. Real improvements to the law on defamation require appropriate rules of procedure and case management policies that emphasise the practical consequences outside and inside the courtroom.

The 2013 Act is more evolutionary than revolutionary. Northern Ireland should include the Defamation Act 2013. The arguments against inclusion are weak and unrealistic from a practical viewpoint. Further, Northern Ireland should actively engage in the non-legislative developments that can bring defamation law closer to the ideals of the Rule of Law.

GOOGLE'S RESPONSE TO NORTHERN IRELAND LAW COMMISSION CONSULTATION PAPER ON DEFAMATION LAW

Google welcomes the opportunity to contribute to the Law Commission's consultation on reform of defamation law in Northern Ireland.

As new technology dissolves borders and empowers individuals with more robust free expression tools and greater access to information, we believe that governments, companies, and individuals must work together to ensure that the correct balance is achieved between the right of people that have been defamed to take action to protect their reputation where appropriate, and the right of people to speak and express themselves freely without being unjustifiably impeded by actual or threatened defamation proceedings.

Within this context, Google believes that Northern Ireland's defamation laws are ripe for reform. Defamation law as it currently stands, was established at a time when there were high barriers to publication. Content typically was submitted by authors to editors and editors then selected only the best content for publication. The internet has changed this and today we have a plethora of free, easy to use tools such as blogging and video platforms and social media networks. Today, anyone can be a publisher at no cost and each of us navigates the consequent mass of information using tools such as search engines and the recommendations of friends. We believe, therefore, that Northern Ireland should develop a legal framework that facilitates free expression online whilst giving individuals the tools to enable them to protect their reputation, and that helps educate the new generation of empowered authors that they remain responsible for the content that they produce.

Google has a distinctive position in the debate by virtue of its role as an online intermediary – that is to say that in many cases, Google is neither the primary nor secondary publisher of content, nor its author or editor. Google provides tools and platforms for users to create and share their own content (be it audio, video, text or photographic) and search for information online. These tools could not exist today without legal protection. Our specific position in the internet ecology is underpinned by the legal framework governing e-commerce in the EU (the E-Commerce Directive, Directive 2000/31/EC), which provides clarity to companies such as Google about the legal protection regime that applies to activity on our services where we are acting as an intermediary.

Google welcomes and supports all efforts by the Law Commission to engage with stakeholders in considering the desirability of reform in the area of defamation law in Northern Ireland.

We would like to take this opportunity to outline our views on a number of the issues raised in the Law Commission's Consultation Paper. Informing Google's view is our knowledge and experience of the practical implications associated with these issues.

Adoption of the UK Defamation Act 2013

The Law Commission has indicated that the primary purpose of its consultation is to consider whether the reforms in the the Defamation Act 2013 of England and Wales (the "2013 Act") should be extended to Northern Ireland, either in part or wholesale, and whether any element recommended for adoption should first be revised in minor or more significant ways.

The current defamation laws in Northern Ireland are made up of a complex myriad of case law and statute. The 2013 Act has introduced significant reforms to a number of important aspects of defamation law, thereby providing welcomed legal clarity and codification of the law defining the boundaries of free speech, protecting an individual's reputation from harm caused by the publication of defamatory statements, and recognising the need to educate those who create content that they remain responsible for that content.

We believe that the 2013 Act has made significant progress in improving the defamation law of England and Wales, but that there are also areas in the Act which can be further improved by Northern Ireland's reforms so that that it can become known as a benchmark for other common law jurisdictions.

Consistency with European Legal Frameworks

We believe it is essential that any amendments or new legislative provisions made to the law on defamation in Northern Ireland are consistent with the requirements of the E-Commerce Directive.

Unlike traditional print media, the internet allows for a multiplicity of content types on a single page or within a single service. A website or webpage may contain content authored or edited by the website owner, along with material licensed from third parties and user-generated content, which the website is hosting as an intermediary. It is essential that any legislative reform pay attention to these different activities to ensure that the law properly recognises the unique role of online intermediaries (as opposed to a publisher or editor) and that liability is attributed appropriately and in line with the E-Commerce Directive.

We note that the Consultation Paper uses various terms concerning the internet, often interchangeably (such as website operators, online publishers, hosts, service providers, platforms), but makes limited reference to "*online intermediaries*" and "*information society services*", as defined by the E-Commerce Directive.

It is essential that Northern Irish law be consistent with EU law – including those frameworks that specifically concern the internet, such as the E-Commerce Directive, but also relevant frameworks in other relevant fields, such as privacy and data protection, jurisdiction and applicable law. In particular, we would highlight the need for national legislation to reflect the 'notice and takedown' procedures specifically envisaged by the E-Commerce Directive and E-Commerce Regulations for information society service providers (ISSPs) in addressing notifications of allegedly unlawful information; this system strikes a careful balance between the interests of persons affected by unlawful information, ISSPs and internet users.

Online intermediaries should be afforded at least as much protection under domestic law as under European law. With that goal in mind, consistency of terminology is a crucial attribute. We would therefore recommend that any legislative reform in this area use the language and terminology already used in the E-Commerce Directive, or at least explains clearly how the legislative language relates to the E-Commerce Directive language (for example, by adopting a definition of "Internet Service Provider" that expressly includes, but is not limited to, those providing the services covered in Articles 12-14 of the E-Commerce Directive). Doing so will not deprive claimants of a cause of action, and will help to ensure that the legally responsible party in defamation cases (e.g. the author of the content) can be correctly identified and pursued, and reduce the potential for conflict between domestic and international law.

Also important in this context is the principle of technology neutrality and maintaining the same thresholds for defamation, whether committed online or offline. We do not believe that new rules in this area should seek to differentiate between conduct that occurs in different media; rather these should be drafted in a technology neutral fashion focusing on the defendant's conduct, and not the tools that are employed. This will also ensure that legislation does not become outdated but continues to work effectively as technology continues to evolve.

Freedom of Expression:

We believe that any reform of the law on defamation must be carefully implemented in order to avoid undue interference with the right to freedom of expression, including the right to seek, receive and impart information online.

Google welcomes the Law Commission's recognition that there is a need for the law to strike a proper balance between protecting the Article 8 ECHR right to the protection of one's reputation whilst guaranteeing the exercise of Article 10 ECHR rights to freedom of expression.

Google takes the issue of online defamation seriously and appreciate that there is a delicate balancing act to be done in seeking to protect an individual's reputation from harm caused by the publication of false statements whilst preventing a "chilling effect" on freedom of expression with the censorship of meritorious communications for fear of potential claims.

The challenges of striking this balance have been discussed at length by the UN Special Rapporteur on Freedom of Expression, who has noted that the internet has become a key means by which individuals can exercise their right to freedom of opinion and expression, as guaranteed by Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The latter provides that:

> *(a) Everyone shall have the right to hold opinions without interference;*
>
> *(b) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice;*
>
> *(c) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *(d) for respect of the rights or reputations of others;*
>
> *(e) for the protection of national security or of public order (ordre public), or of public health or morals.*

The right to freedom of opinion and expression is as much a fundamental right on its own accord as it is an "enabler" of other rights, including economic, social and cultural rights, such as the right to education and the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications, as well as civil and political rights, such as the rights to freedom of association and assembly.

Any reform of the law of defamation must therefore be carefully implemented in order to avoid imposing undue restrictions on freedom of expression which go further than is necessary to achieve the desired objective of vindicating one's reputation when defamatory statements have been published.

Single Publication Rule:

As the law currently stands in Northern Ireland, every publication of defamatory material gives rise to a separate cause of action which is subject to its own limitation period (the multiple publication rule).

The Law Commission has asked if it would it be desirable for a rule equivalent to section 8 of 2013 Act, the single publication rule, to be introduced into Northern Irish law, or whether it would be preferable to retain the multiple publication rule (Question 22).

We believe that the introduction of the single publication rule into Northern Irish law is highly desirable and indeed important to prevent, amongst other things, indefinite

liability for online publications. Without the single publication rule, publishers are at risk of being sued perpetually, years or even decades, after first publication. By this time, the authors of the material in question may not be able to adequately defend what they have written because the evidence may no longer be available for them to establish a defence of truth or responsible publication.

The effect of the multiple publication rule in relation to online defamatory material is that each time a webpage is accessed it creates a new publication, potentially giving rise to a separate cause of action subject to its own limitation period. We are of the opinion that the multiple publication is incompatible with the way in which the internet works, because it effectively abolishes the limitation period. It is also out of date with the modern age of how we seek to communicate information.

Limitation periods are critical to ensure that cases are initiated within a reasonable time. They apply to all civil claims and exist to fulfill public policy objectives. In 1996, a decision was taken in Northern Ireland to reduce the limitation period for defamation claims to one year. Given this acceptance of a one year limitation period for defamation, we believe that it would be incorrect as a matter of principle to allow a rule to continue that effectively overrides it.

With the introduction of a single publication rule into Northern Irish law, claimants would no longer be able to rely upon continuing publication on the internet to circumvent the one year limitation period. However, the claimant would still be allowed to bring a new claim if the original material was republished by a new publisher or if the manner of publication was otherwise materially different from the first publication. In this regard, the court's discretion under the *Limitation (NI) Order 1989* to dis-apply the limitation period should also be preserved, in a manner equivalent to the retention of the UK courts' discretion under the *Limitation Act 1980* to extend the time period.

We would therefore welcome and encourage the introduction of a single publication rule into Northern Irish law, equivalent to section 8 of the Defamation Act 2013, as a means to remove the potentially perpetual liability for content published online, whilst at the same time safeguarding the right to reputation by maintaining the court's discretion to extend the one year time period whenever it is just to do so.

Requirement to show Serious Harm

The Consultation Paper poses the following questions:

1. would it be desirable for a rule equivalent to section 1(1) of the 2013 Act, the "serious harm" test, to be introduced into Northern Irish law? (Question 20)

1. would it be desirable to introduce a rule that 'bodies that trade for profit' must show 'serious financial loss' if they are to bring a claim in defamation or would it instead be preferable to introduce a bar on corporate claims equivalent to that introduced under the Australian Uniform Defamation Acts? (Question 21)

We would support the adoption of equivalent serious harm thresholds into Northern Irish defamation law as we believe these will create a better balance between the interests of claimants and defendants with regard to free speech and the protection of reputation.

We believe that the codification of a threshold test that focuses on the seriousness of the allegation raises the bar in defamation cases in a meaningful way and to an appropriate level which should not deter potential claimants from bringing legitimate defamation claims to vindicate their rights but will help discourage trivial or vexatious claims from being brought before the Northern Irish courts, or at the very least ensure they are dismissed promptly before unnecessary time and money is expended.

We are also supportive of the introduction of the serious financial loss threshold relating to bodies that trade for profit. This provides added protection to those that fairly or honestly opine on corporate products and/or services and should lessen the likelihood of corporate claimants attempting to intimidate critics into silence in circumstances where there is an inequality of financial means and where there is no realistic prospect of serious financial loss occurring to the business as a result of the publication of the defamatory material.

However, we do not believe that corporations should lose the right to bring an action for defamation altogether. Rather, we favour the approach which limits defamation claims to situations where the corporation can demonstrate that they have experienced, or are likely to experience, serious financial loss.

Section 5 - Website Operators Defence

The Law Commission has asked if it would be desirable for the new defence for website operators set out in section 5 of the 2013 Act to be introduced into Northern Irish law (Question 16).

We strongly support the adoption of the section 5 defence into Northern Irish defamation law as an added protection for website operators against claims brought in respect of third-party content hosted on their websites. Where an action is brought against a website operator (for example an operator of an online forum, blog site, social media site or a site which facilitates the posting of user-generated video content) in respect of a statement posted on the website, it will be a defence under section 5 for the website operator to show that it did not post that statement itself. In circumstances where the actual poster of an offending statement is identifiable, section 5 of the 2013 Act therefore provides a complete defence for website operators and is a welcomed reform on that basis. The existence of such a defence should discourage vexatious claims which target website operators instead of targeting the source of the defamatory content, i.e. its known author. The defence should thus help remove one of the barriers that may discourage new businesses from entering the internet economy.

However, in England and Wales in order for website operators to avail themselves of this defence where the poster is anonymous, they must comply with the onerous procedures set out in the *Defamation (Operators of Website) Regulations 2013*. In practice, these labyrinthine procedures place a complex and disproportionate administrative burden on website operators, and need to be carried out within unreasonably short timeframes if the defence is to be relied on (instead of simply requiring the operator to act "expeditiously" as per the E-Commerce Directive). In some instances, the procedures are simply impracticable, such as the requirement to anonymise a complaint, at the complainant's option, before sending it on to the original author. This makes it impossible for the author to determine who has submitted the complaint, and, correspondingly, makes it impossible for the author to determine whether the complainant truly has any rights to assert (assuming that the complaint remains intelligible in such circumstances).

The difficulty of meeting the short timeframes associated with the steps in this process (e.g. 48 hours), whilst handling the large volume of complaints often received by larger website operators, and, the inevitable time differences associated with operations of multinational companies being spread across multiple jurisdictions (for instance, with legal, compliance and removals functions being located in several jurisdictions) means that website operators' compliance with these procedures is, in reality, exceedingly difficult and burdensome.

As a result, many website operators may prefer to avoid the impracticable procedures set out in the Regulations in respect of the section 5 defence and continue to rely on the existing defences available under Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002, or indeed, under section 1 of the Defamation Act 1996.

Accordingly, whilst we would support the introduction of the section 5 website operator defence in any event, we would strongly encourage a full review and redrafting of the implementing procedures to be adopted in Northern Ireland in order to provide website operators with a balanced and viable defence.

We welcome the recognition under section 5(12), that moderation by the operator of a website of statements posted on it by others, does not invalidate the defence. Far from punishing website operators for exercising responsible online citizenship, responsible moderation should be rewarded by the maintenance of the defence.

Section 10 - Action against a person who was not the Author, Editor or Publisher

The Law Commission has asked if it would be desirable for the new defence for secondary publishers set out in section 10 of the 2013 Act to be introduced into Northern Irish law (Question 17).

Section 10 provides that the 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.

We strongly support an approach that encourages and facilitates the allocation of responsibility for defamatory material being placed on individual internet users themselves who have posted content online. This encourages individuals to be responsible online citizens and ensures that individuals will be held accountable for their online misconduct. The introduction of section 10 into Northern Irish law would encourage claimants to pursue the individual directly responsible for posting offending content online (where such an individual is identifiable), and as such is a welcomed additional safe-harbour for internet intermediaries.

Publishing Notices Online

We note that in its analysis of the 2013 Act's section 5 defence for website operators, the Law Commission has indicated it was perhaps regrettable that the UK Parliament did not impose on website operators an obligation to append a notice of complaint alongside statements that they choose to leave up pending determination of any claims brought against the author. The Law Commission say that this would have had the merit of alerting readers to the fact that the statements were contested.

In this regard, the Law Commission has asked if the section 5 defence was introduced into Northern Irish law, should this also include an obligation for website operators to append a notice of complaint alongside statements that are not taken down (Question 16).

While we strongly support the premise that it is for the courts to adjudicate on whether content is defamatory and should therefore be removed for being unlawful, we do not support the idea of posting notices alongside allegedly defamatory material for a number of reasons.

First, we are concerned that adding notices to a third party's content on the basis of a mere allegation of defamation would result in undue interference with their freedom of expression. We can foresee circumstances in which someone would make a multitude of vexatious defamation allegations on dubious grounds, with intermediaries therefore being required to apply notices to significant amounts of content. This would result in labeling that content as inherently suspicious without any form of conclusive evidence that the content is indeed defamatory or whether a defence (such as truth) may apply.

Second, there are practical and technical considerations that make adding any such notice prohibitively complex and inappropriate. We cannot see how intermediaries would be in a position to add (and subsequently remove) notices to third parties' content. For example, if an intermediary's service is hosting a video that is the subject of an allegation of defamation, the intermediary does not have the contractual or technical ability to modify that video content to include such a notice. We are also unclear – given the complexity of the internet value chain – which party would be required to post such a notice. For example, in the case of a piece of UTV Player content that is embedded on the page of a blog or social media platform, where would the responsibility for applying (and removing) the notice lie?

Some online formats also make the business of attaching a notice uniquely challenging – for example applying a notice to a search engine result. Further, it should be noted that the internet is increasingly becoming a mobile experience, with internet users turning to phones, tablets and wearable devices to view content. Given the reduced screen sizes of mobile devices, it will be readily apparent that publishing notices will not be practicable in the mobile environment.

We are also unclear how long a notice (or multiple notices) would have to remain on a piece of content before it could reasonably be removed (for example, if the person making the claim decided at some point not to continue to pursue a take-down action in court). In addition, it would be very difficult to ensure that the notice was transferred across to any subsequent site on which the content might appear.

For these reasons, we do not support a proposal obliging website operators to attach notices to allegedly defamatory content. Our strong preference is to leave content accessible to users, in its original form, until a court process determines whether the material should be left up or taken down on a proper evaluation of the evidence. In our view, this strikes the appropriate balance between the rights of the multiple parties in this process.

Jurisdictional Issues and Defamation:

The Law Commission has asked whether it would be desirable for a rule equivalent to section 9 of the 2013 Act to be introduced into Northern Irish law (Question 23).

In England and Wales, 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.

We would have concerns with national defamation legislation being reformed to have extraterritorial effect, given the disparate views on what constitutes free speech in different jurisdictions and the difficulty that internet intermediaries have in navigating these conflicting legal rules.

The publication of material on the internet raises complicated jurisdictional issues. Material published online may be accessible to users in countries throughout the world. If the courts in a given jurisdiction can control what content can be seen by citizens in every other jurisdiction, then this must work reciprocally - it follows that if content were censored so that it complies with the laws of every country, the richness of content available online would be severely curtailed and may result in the "lowest common denominator" effect, whereby only content that is permissible under the most restrictive regulations world-wide is displayed on the internet. In fact, Internet users in Northern Ireland would find it a disproportionate interference with their freedom of expression if website operators were required to censor content on their sites so that they complied with certain countries' laws.

The same applies to residents of other countries in the world who may consider Northern Ireland's laws more restrictive of free speech than their own. It may be that,

in future, the liability of an intermediary for online content will adapt through EU-level harmonisation or international treaty. Consequently, if the proposed statutory test is introduced in Northern Ireland it should either be with the modifications suggested below, or made clear that the test is just one hurdle that claimants must pass, and that they are also required to satisfy any other tests imposed by common law or other sources. This will help to ensure that Northern Irish law remains "future proof" and adapts as the common law and international position changes.

We would be in favour of supporting the introduction of a rule equivalent to section 9 of the 2013 Act into Northern Irish law, in circumstances where a number of modifications to improve clarity were also adopted.

Firstly, the Northern Irish courts should only have jurisdiction over non-EU entities if the states in which those entities are based would provide the claimant with a remedy. By way of example, if an Australian website operator was sued for defamation in Northern Ireland the court would need to be satisfied of the following in order to have jurisdiction to hear the case:

(i) of all the places in which the statement has been published, Northern Ireland is clearly the most appropriate place in which to bring an action in respect of the statement; and

(ii) the Australian courts would provide a remedy to the claimant against the Australian website operator if the publication had been in Australia.

Secondly, any reform should make it clear that the country of origin principle applies in cases of defamation law. That principle, contained in Article 3(1) of the E-Commerce Directive, effectively provides that an information society service should follow the laws of the member state in which it is established, not the laws of each member state to which it provides its services. The E-Commerce Directive identifies a limited number of exceptions to that principle. Defamation is not among them and should thus be covered by the country of origin principle. We would therefore recommend that the application of the country of origin principle to defamation cases should be made clear in the reform of defamation law in Northern Ireland. This would give greater certainty to claimants and defendants and minimise the unnecessary cost to each party in the event that proceedings are founded upon the wrong choice of laws.

Power of Court to Order Publication of its Judgment & Removal of Defamatory Content

The Law Commission has asked if it would be desirable for remedial powers of court equivalent to those set out in sections 12 and 13 of the 2013 Act to be introduced into Northern Irish law (Question 24).

The introduction of section 12 into Northern Irish defamation law would extend the power of the court to order publication of a summary of its judgment well beyond its current, very limited circumstances, under the statutory summary relief procedure. Section 12 gives the court the power to order a summary of its judgment to be

published in defamation proceedings generally. The parties are to agree the wording of any summary and the time, manner, form and place of its publication. If they cannot agree, the court will give directions.

We would consider it contrary to public policy and the principle of freedom of speech for a court to be able to order a website operator to publish a summary of its judgment. However, if the decision is made to adopt section 12 into Northern Ireland law, we believe that it should not extend to intermediaries.

Intermediaries are rarely able to defend a defamation claim on the grounds of truth, because they do not know whether the material published is true or not. The same applies to defences like responsible publication. We feel strongly that in these circumstances it is wrong that an intermediary could be forced by the courts to publish material in circumstances where it has no knowledge of the facts underlying the claim.

Further, requiring an intermediary to publish material raises practical issues, for example:

- If a complaint is made about a blog posting, with the claimant choosing to sue only the website host, not the author of the underlying material, where would the website host be required to publish material? Presumably, in the same place as the words complained of. But if the author of the words was not himself sued, or given an opportunity to defend his position, why should the claimant be entitled to force the publication of material on his blog/website that the author might not agree with?

- If a complaint is made about a video-only site, how will the report of the judgment be displayed? A website host cannot be expected to make a video about the judgment, or to place text on a site that is used exclusively for video.

If the power to publish a summary of a judgment is introduced in Northern Ireland, it is suggested that this power be amended so that it only applies to claims against the primary publisher/author of material, and not against an intermediary.

In respect of section 13 of the 2013 Act, which concerns the power of the court to order removal of defamatory content, we believe that this provision should be revised prior to any adoption into Northern Irish law. In circumstances where a claimant has secured a final court ordered injunction to prevent publication of a statement by an author and the author has declined to remove such a statement from a website hosted by a website operator, we would not object to a statutory provision empowering the court to order a website operator to remove the statement made by the author on the web page complained of. Such an order may of course be unnecessary to the extent that some website operators would voluntarily remove on sight of the third party court order in any event.

However, it is wrong as a matter of principle that a website operator should be ordered to remove material in circumstances where the court either refuses to grant an injunction against the author of the defamatory material, or lacks the jurisdiction to do

so. Section 1(1) currently fails to make reference to the court granting any such injunction in an action for defamation and should therefore be amended to include reference to this prior to adoption.

It also follows that the onus for complying with any such injunction in section 1(1) should be placed on the author of the defamatory material in the first instance. Only if a defendant refuses to comply with a court order should website operators then be required to take material down, to the extent that it is directed to users in Northern Ireland.

Lastly, it is also essential that website operators are given precise details of the location of any material that they are being ordered to take down. Without this specific information, it is impracticable (and sometimes impossible) for many website operators to identify the material complained of, and there is a risk that the wrong material may be taken down. With websites, this will typically be a URL, although this will not necessarily be the case with other platforms so we would suggest that any order made against a website operator under section 1(1) "*must set out the specific location on the website of the defamatory statement to be removed*".

Libel Reform Campaign

Consultation response: Defamation Law in Northern Ireland

15 February 2015

Introduction

- 747 members of the public call for full adoption of the Defamation Act 2013 in Northern Ireland
- 552 reply to short-form consultation undertaken by the Northern Ireland Libel Reform Campaign

The Libel Reform Campaign is a civil society coalition of 100 organisations and 60,000 supporters including leading names from science, the arts and public life. The campaign called for legislation to reform the law of libel in December 2009 and successfully persuaded all three main political parties to commit to reform of the law of libel in their general election manifestos in 2010. The Defamation Bill 2013, enacted on 1 January 2014, is the culmination of 5 years campaigning and policy research by this grassroots coalition led by English PEN, Index on Censorship and Sense About Science.

During the campaign, it was always the intention that reform of the law of libel would apply equally to the people of England, Wales, Scotland and Northern Ireland.

We welcome the excellent and thorough consultation document produced by the Northern Ireland Law Commission. The insight and analysis outlined in this consultation and the depth of the questions provide significant pre-legislative scrutiny allowing the Northern Ireland Assembly to enact reform once the Commission has reported.

It is noteworthy that this consultation document was referenced by the Scottish Law Commission in its ninth programme of law reform. The Scottish Law

Commission will now also be assessing[1] whether reform is required in Scotland, a sign of the cross-jurisdictional nature of libel.

This introduction will outline our response to the narrative and observations on the law outlined in Chapter 1 and Chapter 2. The introduction will conclude with our preferred options for reform of the law in Northern Ireland and our explanation for this conclusion. Our response to the consultation has been guided by the Advisory Council of the Northern Ireland Libel Reform Campaign, the membership of which is outlined in Appendix A.

Our preferred option for reform of the law in Northern Ireland remains that the **Assembly adopts the Defamation Act 2013 through a Legislative Consent Motion.** This is not to say that a broader more comprehensive package of reforms would not be desirable and produce better public policy outcomes, but without a clear vehicle for this legislation including Assembly time, resources and additional scrutiny, this may not be viable.

We will explore the options in depth.

Our consultation document is enhanced by a short-form consultation undertaken by the Libel Reform Campaign. The results of our short-form consultation are included in Appendix B. Our consultation attracted 552 responses, a significant number, over 7 times higher than the response to the Ministry of Justice's short form consultation on the same issue. The Libel Reform Campaign's consultation asked 4 main questions that mirrored Q1, Q21, Q12, Q20 respectively. It was complemented by a petition calling for:

> "the Northern Ireland Assembly should apply the Defamation Act 2013 to Northern Ireland to better protect our free speech."[2]

This was signed by 747 individuals, of whom 65 live in Northern Ireland. The full text of this petition is outlined in Appendix C.

This short-form consultation showed a serious appetite for reform of the law. 95% of responses backed the application of the Defamation Act 2013 to Northern Ireland. 75% said no to the principle that corporations and the government

[1] http://www.scotlawcom.gov.uk/news/scottish-law-commission-launches-ninth-programme-of-law-reform/

[2] http://www.libelreform.org/northern-ireland-petition

should be allowed to sue citizens. 92% agreed that there should be a stronger public interest defence in Northern Ireland beyond the current defence in the law and 81% agreed that claimants should they have to prove that they have been seriously harmed before going to Court and in the process running up significant costs.

This evidence of strong support for libel reform in Northern Ireland should be considered by the Law Commission.

Why reform the law of libel in Northern Ireland?

> "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."

The libel law of Northern Ireland is substantially the same as the law in England and Wales prior to the enactment of the Defamation Act 2013 on 1 January 2014. The law of Northern Ireland has been shaped by the Defamation Act (Northern Ireland) 1955 which applied the Defamation Act (1952) of England and Wales to the province. The Defamation Act (1996) which superseded the previous act, fully came into force in Northern Ireland in 2009. This re-aligned the law of libel in Northern Ireland with the law in England and Wales. The notable exception to this alignment is that costs in recent years have been considerably lower in Northern Ireland due to the non-recoverability of CFAs (Conditional Fee Agreements) and ATE (After the Event) Insurance. With reforms to reduce costs after the Jackson Review, CFAs and ATE are both no longer recoverable in England and Wales.

The consultation paper recognises the inadequacy of the law in the executive summary in particular paragraphs 7 and 10.

Many of the criticisms made of the law in Northern Ireland are similar in scope to the criticisms made by a number of bodies of the law of libel in England and Wales prior to the Defamation Act 2013.

Criticisms of the law of libel

The case for reform of the law is undisputed in the consultation document. It is worth re-iterating the case for reform and the evidence base that leads to this conclusion. Reform of the law of libel was considered by the Ministry of Justice, the House of Common's Culture, Media and Sport Select Committee, Lord Lester of Herne Hill with input from other legal counsel, a joint scrutiny committee of both Houses of Parliament and by the United Nations.

There is a point of difference on the compatibility of the existing law of libel in Northern Ireland with international norms, as outlined by the Law Commission thus:

> "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."[3]

This is not consistent with the consideration given to this issue by the UN Committee on Human Rights, which criticised the libel laws in its 2008 report on the implementation of the International Covenant on Civil and Political Rights:

> "The Committee is concerned that the State party's practical application of the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as "libel tourism." The advent of the internet and the international distribution of foreign media also creates the danger that a State party's unduly restrictive libel law will affect freedom of expression world-wide on matters of valid public interest."[4]

The consultation document refers to Professor Gavin Phillipson's criticisms of the UN Human Rights Committee's call (in 1.32) for an extended public interest defence:

> "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

[3] xi., Consultation Paper: Defamation Law in Northern Ireland.
[4] CCPR/C/GBR/CO/6 at para 25

> make very little sense: if the UK were to follow their (tentative) proposals, it would probably place itself in breach of Article 8 ECHR."[5]

Yet, Phillipson arguably takes a restrictive view on the balance between Article 10 and Article 8 of the European Convention on Human Rights. When Phillipson's broader criticisms of the public interest defence (as drafted by Lord Lester) were considered by the Joint Committee on Human Rights they were rejected:

> We are not persuaded by the analysis of Professor Phillipson. We take the view that Lord Lester's proposal is Convention-compliant.

His legal analysis was rejected after evidence from Dr. Scott, the advisor to the Law Commission.[6]

The Northern Ireland Human Rights Commission agrees with the UN Human Rights Committee that the current law of libel in Northern Ireland fails to protect freedom of expression adequately in their submission to the Northern Ireland Assembly Finance and Personnel Committee.[7]

The report of the UN Human Rights Committee was important because after it made its recommendations, the UK government began to consider reform. In 2009, a working group was established by the then Secretary of State for Justice Jack Straw MP after the publication of the Free Speech Is Not For Sale report by the Libel Reform Campaign and the backing given to reform by over 60,000 people. The Report of the Libel Working Group identified a number of options for reform. A year later, this was followed by the House of Common's Culture, Media and Sport Select Committee report into Press Standards, Privacy and Libel that described efforts by politicians in the US to protect their citizens from the phenomenon known as libel tourism as a "national humiliation" and recommended action in a number of areas. These included measures to prevent libel tourism, corporations suing individuals and the possibility of a statutory public interest defence.

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[5] Prof. Gavin Phillipson, Memorandum to the Joint Committee on Human Rights: the Defamation Bill 2012, http://www.parliament.uk/documents/joint-committees/human-rights/Prof_Gavin_Phillipson.pdf

[6] Legislative Scrutiny: Defamation Bill - Human Rights Joint Committee: 2 Significant Human Rights issues raised by the Bill (28, Clause 4—Responsible publication in the public interest), http://www.publications.parliament.uk/pa/jt201213/jtselect/jtrights/84/8405.htm

[7] Northern Ireland Human Rights Committee submission to the Finance and Personnel Committee, http://www.niassembly.gov.uk/globalassets/documents/finance/defamation-act/written-submissions/submission-by-human-rights-commission.pdf

In July 2010, Lord Lester of Herne Hill tabled his Private Member's Bill which was adopted by the government to become the draft Defamation Bill. The Bill underwent significant consultation with 129 responses to the Ministry of Justice consultation paper on the draft Defamation Bill and a further 75 responses to a short-form questionnaire. The government then tabled its own Defamation Bill that underwent significant pre-legislative scrutiny by a joint committee of the House of Commons and the House of Lords. The final Defamation Act was subjected not just to pre-legislative scrutiny but extensive debate in the House of Commons and the House of Lords.

It is also the case that a number of independent surveys pointed to an unwarranted "chilling effect" on freedom of expression from the threat of a libel action. Pre-reform, the law was overly claimant friendly as demonstrated by evidence submitted to the Jackson Review of Costs. Of 154 libel proceedings in 2008 (of 259 taken to the High Court), none was won by the defendants. The Publisher's Association survey of members in 2010 found 100% of respondents had modified content or language of a book before publication to avoid the risks presented by current UK libel laws, a third had refused work from authors for fear of a libel action and 43% of respondents have withdrawn a publication as a result of threatened libel actions. In a 2010 survey by Pulse magazine 80% of GPs who had an opinion felt that libel was restricting open discussion of the potential risks of drug treatment.

Why legislate?

The above-stated reviews of the law of libel all considered the fundamental question as to the right balance between the evolution of the common law in contrast to legislation from Parliament. In particular, the debate hinged on whether codification of the range of defences available would improve the operation of the law and benefit freedom of expression.

This was considered time and time again by Parliament and by the Ministry of Justice.[8] Few objected to the principle of codification during scrutiny of both Lord Lester's draft Bill and the draft Defamation Bill. The benefits of codification were noted by the Joint Committee on the draft Defamation Bill:

[8] Just one example of this can be found in p.20, Joint Committee on the Draft Defamation Bill, 2 Substance of the draft Bill, http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20306.htm

> *"In our view, any period of uncertainty as the new law takes effect does not outweigh the potential long term gains of having many core aspects of defamation law established in one place, readily accessible to all."*[9]

It is also the case that the evolution of the common law, as criticised by the many bodies who reviewed the law of libel, has neither been as satisfactory or as quick as the law's critics and wider society have desired. The gap between what wider society considered the right balance between reputation and freedom of expression and the reality of a restrictive law led to a political impetus for reform.

After consultation with a wide range of stakeholders, the Libel Reform Campaign settled on codification of the law alongside new improved defences as part of a package of reforms on costs and early dispute resolution.

If Northern Ireland does not reform the law of libel, but instead relies on common law improvements based on the Defamation Act 2013, this would be detrimental to freedom of expression. Firstly, it is worth considering whether the majority of small publishers, NGOs, bloggers, academics, scientists would, on balance, be in a position to challenge the existing common law in court? The most notable developments to the public interest defence in case law (*Reynolds* v Times Newspapers Ltd, *Jameel* v The Wall Street Journal Europe) were cases that cost in excess of a million pounds. Secondly, it is worth assessing whether piecemeal challenges to the common law, when active consideration has been given to this issue by a series of inquiries that led to wholesale reform, is the optimum public policy approach. Thirdly, the divergence between the common law of Northern Ireland (based on the Defamation Act 1996, its predecessor acts, and subsequent case law) and the position in England and Wales of the Defamation Act 2013, will lead to uncertainty for major publishers (whether academic or media) who publish across the two jurisdictions. This point is rightly referenced in the consultation document (2.53) highlighting the comments of Lord Black, the executive director of the Telegraph Media Group.

Divergence between the law between jurisdictions creates risks. But, this is not to say that no assessment should be made as to whether Northern Ireland could

[9] Ibid.

improve the law of defamation further than the Defamation Act 2013. Further protections for free speech would not create uncertainty for publishers, author or editor, the likely defendant of a libel action. Extension of defences are likely to give them more certainty whether to publish, or not. The risk would be of an action in England and Wales, though this would be significantly mitigated by section 1 of the Defamation Act 2013. It is also the case that further protections for free speech would not adversely impact claimants. Clearer defences will benefit claimants deciding whether to pursue an action.

The process of reforming the law in Northern Ireland

In light of the scrutiny and consideration given to the Defamation Act 2013, the preferred option for reform of the Libel Reform Campaign is that the **Assembly adopts the Defamation Act 2013 through a Legislative Consent Motion.**

As the Libel Reform Campaign stated in our response to the final Defamation Act, [10] there is still room for improvement. Additional reforms that could improve access to justice and also better protect free speech include:

1. A modified public interest defence (as set out below);
2. A statutory *Derbyshire* defence, preventing the state (or corporate bodies delivering services with public money) from suing third parties for libel;
3. Early Neutral Evaluation and mediation incentivised by changes to the Civil Procedure Rules, in line with the English PEN and Index on Censorship Alternative Libel Project.[11]

In a choice between the adoption of the Defamation Act 2013 and a scrutiny process, over a number of years, that led to an improved Bill, our clear preference would be for adoption of the Defamation Act followed by post-legislative scrutiny that could strengthen the legislation while giving (in the interim) better support to freedom of expression and access to justice.

[10] Libel Reform Campaign, Initial summary analysis of the Defamation Act, http://www.senseaboutscience.org/data/files/Libel/Libel_Reform_Campaign_-_Initial_asssesment_of_the_Defamation_Act.pdf
[11] English PEN and Index on Censorship, Alternative Libel Project Final Report (March 2012), http://www.englishpen.org/campaigns/alternative-libel-project-final-report-launched/

Response to the consultation questions

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

Yes.

The legislation was written by the Ministry of Justice and scrutinised in Parliament on the basis that the legislation would apply to Northern Ireland. The legislation is therefore ready to be applied to the Northern Ireland jurisdiction in full.

This consultation offers an opportunity for those opposed to the application of the legislation to Northern Ireland to make their case. Critics of the Defamation Act 2013 failed to provide compelling reasons why the legislation was not a suitable balance between reputation and freedom of expression. We believe the onus is on the critics of the legislation to provide evidence why the Ministry of Justice Working Group, the Culture, Media and Sport Select Committee, the Joint Committee on Human Rights and the Joint Committee on the Draft Defamation Bill were mistaken in their analysis of the problem and their scrutiny of the Defamation Act.

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?

N/A.

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?

It is the position of the Libel Reform Campaign that adopting the Defamation Act unrevised is the most desirable public policy outcome due to the efficacy of this procedure.

If the Assembly were to consider this consultation document as adequate pre-legislative scrutiny, which in the view of the Libel Reform Campaign it is, then additional provisions could be adopted into the Defamation Act without the need for the Assembly to embark on a further round of legislative scrutiny.

In this scenario, additional provisions could be considered by the Law Commission, as follows:

1. A modified public interest defence (as set out below);
2. An additional defence inserted into section 1 (2) based on *Derbyshire County Council v Times Newspapers Ltd* to prevent the state (or corporate bodies delivering services with public money) from suing third parties for libel. An amendment to achieve this was tabled by Lord Browne, Baroness Hayter and Lord Lester during House of Lords report stage:[12]

   "Non-natural persons performing a public function do not have an action in defamation in relation to a statement concerning that function."

3. An amendment to section 9 to prevent "libel tourists" abusing the High Court after making claims but without the resources to do so. This clause was originally tabled by Lord Singh of Wimbledon during the passage of the Defamation Act.

   "Action against an individual domiciled in the UK

   (1) This section applies to an action for defamation against a person who is domiciled in the United Kingdom.

   (2) The organisation or individual bringing the action, in addition to satisfying the court of serious harm, must also provide evidence of funds in the UK to meet any costs arising from an unsuccessful action."

4. Early Neutral Evaluation and mediation incentivised by changes to the Civil Procedure Rules, in line with the English PEN and Index on Censorship Alternative Libel Project.[13]

[12] http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0075/amend/ml075-i.htm
[13] English PEN and Index on Censorship, Alternative Libel Project Final Report (March 2012), http://www.englishpen.org/campaigns/alternative-libel-project-final-report-launched/

These provisions could also be achieved by post-legislation scrutiny by the Assembly after the adoption of the Defamation Act.

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?

Potentially. This proposal has merit.

Consideration would need to be given to the possibility this measure could be abused by vexatious litigants. Such a litigant could call on a small publisher to rule out a number of meanings, close to the original intention of the publication, using the threat of litigation as a chill on their ability to defend these meanings. This may act to narrow the original intention of the publication to a point at which it bears little meaning.

For instance, a vexatious litigant could force a small local newspaper writing about corruption in the local council to publicly state it did not intend a number of meanings that it actually did intend, but could not afford to defend.

It should also be considered whether this is appropriate if a case gets to trial. One of the most significant factors behind the extraordinary costs of libel actions was the determination of meaning by juries at trial, even after the judge has decided a range of meanings under the "single meaning rule". Arguing the case on several fronts, may give the defendant a greater margin for arguing their case, but it can also drive up costs to the point where defending their case at trial is no longer a viable option.

That noted, the proposal has similar outcomes to the policy recommendations in the English PEN and Index on Censorship Alternative Libel Project which noted that early determination of meaning in a non-legal (or quasi-legal) setting such as mediation could significantly reduce costs and the chill from legal bullying.

The nature of the correction or clarification by the publisher should not be set out in statute but based on a "reasonable" test of editorial judgment. Forced or mandatory apologies could be in breach of Article 10 of the European Convention.

This proposal would need to be combined with the availability of statutory defences as set out in the Defamation Act, in particular section 3 and section 4, to give the publisher the confidence to defend their actual stated intention (even after it has been narrowed thanks to this procedure).

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

Yes. The consultation should consider the incentivisation of alternative dispute resolution through the civil procedure rules as set out in the Alternative Libel Project.

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?

Yes.

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?

Yes. Section 3 of the Act should be applied as it is set out in the Defamation Act.

The Libel Reform Campaign agrees with the analysis (3.19 - 3.28) contained in the consultation document that consideration should be given to extending the defence of honest opinion to comment on facts that an average person "reasonably believes" to be true.

In particular, the analysis set out in 3.26 that social media commentators should be able to rely on a defence when retweeting, re-posting or editing facts or opinions published elsewhere, is particularly useful. It is difficult to see why a social media commentator should be a defendant in a libel trial if they re-publish a statement or opinion from *The Guardian* which they believed in good faith to be true.

If the Bill is not applied by an Order of the Assembly, and subject to a scrutiny process, we would recommend this amendment is adopted.

It would not be preferable to continue with the common law approach. The common law approach was considered in the pre-legislative scrutiny of the Bill and found inadequate to protect honest opinion. A number of cases demonstrated the inadequacy of the common law approach including *Singh v BCA* (which is not referenced in the *Spiller v Joseph* Supreme Court judgement, even though it in part prompted the Libel Reform Campaign), the Owlstalk case, and defamation threats against Legal Beagles.

Legal Beagles: libel threats post-Spiller

Even after the *Spiller v Joseph* decision (but pre-Defamation Act), a number of serious libel threats were issued by lawyers placing the defendants in the position where they would rely on a common law defence, rather than a statutory defence.

A notable example of this was the libel letter issued by Schillings Solicitors to the website LegalBeagles.info. In the letter, Schillings argue the the Citizens Advice Bureau had been waging a campaign against its client:

“"For the past three years our client and its employees have been the victim of a sustained campaign of harassment and defamation by Mr Richard Dunstan, an employee of Citizen's Advice"

The letter called for Legal Beagles to take down posts from the Citizen Advice Bureau, remove content and users, and provide IP addresses of particular users.

In a House of Commons debate, Denis MacShane MP said:

“law firm Schillings is showering defamation writs on the citizens advice bureau—one of the most prestigious and respected of all the voluntary organisations that we all have relationships with—as well as the law firm Bates Wells and Braithwaite, the Justice Gap website and the consumer websites Legal Beagles and Consumer Action Group.”[14]

[14]http://www.publications.parliament.uk/pa/cm201213/cmpublic/defamation/120626/pm/120626s01.htm

He added of the practices discussed on the Legal Beagles website:

"This is a £15 million racket used by a lot of major companies—corporate groups—such as Boots, TK Maxx, Primark, Debenhams, Superdrug and Tesco. They are all shops that we use. These bodies corporate are going to another body corporate called Retail Loss Prevention and getting it to obtain money from very vulnerable people. When the CAB, also a body corporate, seeks to take up the cases, it then faces defamation writs from Schillings."[15]

We also agree with 3.31 that echoes the opinions of the Joint Committee on the Draft Defamation Bill that the removal of the public interest dimension takes out "an unnecessary complication".

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

We disagree with the analysis of the Law Commission in 3.32 and 3.33 that allowing a defendant publisher to rely on facts that existed at the time of publication would in the words of Lord Phillips "radically alter" the defence. The formulation set out in section 3, 4(a), removes the need for argument at trial as to whether the fact was known to the defendant (a complex and time-consuming process). Allowing the fact to have existed (which the defendant would need to prove) reduces the complexity of the defence from the defendant having to prove they knew the fact, to a mere statement that the fact existed. The alternative to this, we believe, could complicate this defence unnecessarily.

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?

Yes.

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

[15] Ibid.

be amended so as to allow opinions published contemporaneously with privileged statements to benefit from the defence?

Yes. As an extension of the defence, this proposal has merit. Particularly in commentary around political debates (see Q 15).

Amending subsection 7 to include opinions published contemporaneously with privileged statements would also support potential libel claimants, allowing them to "reply to attack". This would give the victims of defamatory statements published with privilege, the right to reply (without incurring the possibility of a libel action).

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'?

No. This is an unnecessary complication for the reasons set out under Q8.

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?

Yes.

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?

No. In pre-legislative scrutiny it was felt by politicians considering this issue that the common law approach had failed. This was backed up by a statement calling for a new statutory public interest defence signed by leading authors, scientists and entertainers presented to Parliament on 11 March 2011.[16] The common law approach as adopted in *Flood v Times*, which moved the public interest forward,

[16] Statement on a public interest defence signed by authors, scientists and entertainers, presented to Parliament (11 March 2011), http://www.senseaboutscience.org/data/files/Libel/Statement_for_champions_2011_Mar_11.pdf

is still more uncertain than the current statutory public interest defence as outlined in the Defamation Act.

We agree with the analysis in 3.53 of the consultation document that:

> "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."

We note the analysis in 3.58 that:

> "in the interests of constituency between Northern Ireland and England and Wales, it may be thought better simply to adopt the statutory version of the defence outright."

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?

Yes.

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?

Yes.

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?

Yes.

We heard evidence that there was uncertainty around what was considered to be privileged in Northern Ireland.

The Libel Reform Campaign would extend section 7 to explicitly mention the Northern Ireland Assembly and councils and all units of local government in Northern Ireland under 4 (a).

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?

Yes. The Libel Reform Campaign suggests, if the legislation requires pre-legislative scrutiny, that it is amended in line with the E-Commerce Regulations (as set out below).

The internet is the front line for free speech today. However, under the current common law in Northern Ireland internet intermediaries (including ISPs, search engines, web hosts, social networks and discussion boards) are not adequately protected.

The Libel Reform Campaign raised concerns the effectiveness of section 5 of the Defamation Act during the Lords committee stage. The wording of section 5 introduces confusion and undermines the existing protection of the E-Commerce Regulations (ECR) and the case law that flows from that. Unlike the defence under section 1 of the 1996 Act which is defeated when a website operator is given notice of 'defamatory' content, the 2002 Regulations and case law require the website operator to be given notice of 'unlawful' content. This is a higher threshold and has made section 1 of the 1996 Act increasingly unnecessary. The language of Clause 5 however reverts to the 'defamatory' term of the 1996 Act, which could result in website operators ignoring it (to rely on the ECRs) or (in ignorance of the ECR defence) wrongly believing they need to employ it. There is potential for considerable confusion, which will be exploited by reputation managers and vexatious lawyers.

Amendment to Clause 5 as suggested by the Libel Reform Campaign:
In subsection 1(c) of section 1 of the Defamation Act 1996, leave out "a defamatory" and insert "an unlawful" statement, replace 6(c) the use of "defamatory" with "unlawful".

If so, should this include an obligation for website operators to append a notice of complaint alongside statements that are not taken down?

No. This was considered by Parliament and rejected. The Libel Reform Campaign believes that vexatious claimants may use notices of complaint to place doubt around publication which is true, honest comment or in the public interest. This doubt would impact on the author's right to freedom of expression (and may, as a procedure act as a form of defamation on the author whose editorial judgement is called in question).

There are also practical reasons to consider particularly as a significant amount of publication is on platforms that are domiciled in the US (and therefore outside this jurisdiction). The Libel Reform Campaign considers alternative dispute resolution, such as mediation, a more efficient procedure.

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?

Yes.

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?

Yes.

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 Libel Reform Campaign has consulted on this issue. Alone among the sections in the Defamation Act, this has caused the most concern within civil society in Northern Ireland though it is worth noting that 77% of respondents to Mike Nesbitt MLA's consultation on libel law reform in Northern Ireland agreed with

the position in the Defamation Act that trial by jury should be abolished unless specifically authorised by the Court.[17]

Clause 11 of the Defamation Act does not change recent court practices which have moved away from the jury trial due to the additional expense involved. In 2010 in England and Wales there were no jury trials at all, and in 2008 and 2009 only three jury trials. Defamation jury trials are an anomaly within civil litigation, a point recognised by the pre-legislative scrutiny of the Defamation Act.

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?

Yes.

The serious harm test not only puts new obligations on claimants: it offers an extremely strong incentive to the media to act quickly to correct errors.

The precedent set by *Cooke vs MGN* (the first case in which the s.1 serious harm hurdle was tested) is noteworthy in this regard. The judgement was that serious harm had not been caused by the article, primarily because the newspaper had made a prompt correction and removed the piece from its website. The *Cooke* judgement has therefore introduced a 'discursive' remedy into the s.1 case law: if a media outlet acts *quickly* to publish a correction and to remove or amend online versions of an article, they at once give the complainant (the potential claimant) a vindication of their reputation, while making it unlikely that they will then have to face a libel action.

Would it instead be preferable to rephrase the statutory test so as better to reflect the stated intention of the authors of the Act?

No.

Would it instead be preferable to continue with the common law approach reflected in Jameel v Dow Jones?

[17] http://uup.org/news/2477/Nesbitt-reports-overwhelming-support-for-libel-reform#.VNiAW139Rz0

No.

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?

Yes.

Would it instead be preferable to introduce a bar on corporate claims equivalent to that introduced under the Australian Uniform Defamation Acts?

Yes.

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?

Yes.

Would it preferable instead to retain the multiple publication rule, or to introduce an alternative defence requiring the attaching of a notice of complaint?

No. The multiple publication rule, a principle developed in the nineteenth century, is entirely inappropriate in the Internet age.

Consensus on this point was one of the first aspects to be achieved during the process that lead to the Defamation Act 2013. The Libel Working Group convened in 2009 recommended change. The Ministry of Justice then consulted on the same point, and in light of the responses received concluded that it was appropriate in principle to introduce a single publication rule.

The single publication rule was present in Lord Lester's private member's Defamation Bill in 2010 (clause 10) and in the Ministry of Justice's Draft Defamation Bill published in 2011 (clause 6). The clause that became section 8 of

the Defamation Act 2013 was not amended at all during the legislative process and is exactly the same wording at that presented in the Draft Defamation Bill.

Section 8(6) of the Defamation Act 2013 makes explicit that the court's discretion regarding limitation periods under the Limitation Act 1980 is not affected.

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?

Yes.

Consideration should be given to our amendment to section 9 as stated above and also the inclusion of subsection 13 (2) of Lord Lester's Defamation Bill in Clause 1 requiring the court to strike out claims where there has been no real or substantial tort in this jurisdiction.

While the government intended for section 1 to strike out claims by foreign claimants if publication is not serious and substantial in this jurisdiction, this could be clarified further.

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?

Yes.

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

Forcing defendants to make corrections or clarifications is an infringement of the right to freedom of expression.

It is desirable for publishers to make reasonable corrections or clarifications, where there is mutual agreement that an honest mistake has been made.

Consideration could be given to whether discursive remedies could provide an additional defence beyond those available under the Defamation Act 2013. This is

likely to be of most use to ordinary social media users, who are not publishers in the traditional sense, who could retract, delete or edit online publication in order to qualify for this defence.

APPENDIX A: The Membership of the Northern Ireland Libel Reform Campaign Advisory Council

The Advisory Council is formed of:

Academics: Queen's Professor Colm Campbell and former Professor, Dr. Tom Woolley.

Journalists: Paul Connolly and Lyra McKee.

Lawyers Neil Faris, Brian Garrett.

Novelist Glenn Patterson.

Blogger Brian John Spencer.

Civil society representatives: Mike Harris, Jo Glanville and Sile Lane from the Libel Reform Campaign.

This submission has been endorsed by the following members of the Advisory Council:

Academics: former Professor, Dr. Tom Woolley.

Journalists: Paul Connolly and Lyra McKee.

Lawyers Brian Garrett.

Novelist Glenn Patterson.

Blogger Brian John Spencer.

Civil society representatives: Mike Harris, Jo Glanville and Sile Lane from the Libel Reform Campaign.

APPENDIX B: The results of the Northern Ireland Libel Reform Campaign short-form consultation

		Question 1	%	Question 2	%	Question 3	%	Question 4	%
		Should the Defamation Act 2013 be extended in its application, in full, to the Northern Ireland jurisdiction ?		Should corporations or the government be able to sue the citizens of Northern Ireland for libel?		Should there be a stronger public interest defence in Northern Ireland beyond the current defence in the law?		If people wish to sue for libel, should they have to prove that they have been seriously harmed before going to Court and in the process running up significant costs?	
	Don't Know	17	3.079	84	15.217	28	5.072	32	5.797
	No	8	1.449	416	75.362	8	1.449	63	11.413
	Yes	522	94.565	45	8.152	510	92.391	448	81.159
	No Response	5	0.905	7	1.268	6	1.086	9	1.63
	Total no. of responses	552	100	552	100	552	100	552	100

APPENDIX C: The text of the Northern Ireland Libel Reform Campaign petition

Free Speech Isn't Free In Northern Ireland

The Northern Ireland Libel Reform Campaign has brought together writers, journalists, scientists, academics, human rights advocates and civil society organisations to fight for reform of the law of libel in Northern Ireland.

The current law of libel in Northern Ireland is chilling open discussion about matters of public interest including academic and scientific research.

We believe that the Northern Ireland Assembly should apply the Defamation Act 2013 to Northern Ireland to better protect our free speech.

If the consultation shows support for reform, we call on Assembly members to apply the Defamation Act with immediate effect. The people of Northern Ireland should be allowed to enjoy the benefits of a reformed law that better balances free expression with reputation.

Defamation Law Reform in Northern Ireland

Response to the Consultation Paper of the Northern Ireland Law Commission
By Neil Faris, Solicitor, Belfast dated 19 February 2015

Introduction

I welcome the Defamation Law Reform Project of the Northern Ireland Law Commission ('NILC'). Although I do not agree with all of the approach or suggestions of the Consultation Paper (NILC 19 (2014)) ('CP') it is a helpful and well written document and I essay in this response to answer the questions raised.

First of all, however, I set out my overview and general thoughts and suggestions as to the approach to be taken.

Overview

1. It seems to me that the key issue is whether Northern Ireland should follow the defamation law reforms in England and Wales contained in the 2013 Act?
2. The argument for doing that is for reasons on 'consistency' - as set out at para 1.22 of the CP.
3. Of course if one agrees with that approach, does it then follow that the 'mirroring' should be as perfect as possible in order that there should be no discrepancy between the two jurisdictions?
4. That would, I understand, have been the case had the Northern Ireland Executive agreed to put a 'Legislative Consent Motion' to the Northern Ireland Assembly: in such case there would have been no 'stand-alone' Northern Ireland legislation. I presume there would have been an additional Part or Schedule to the 2013 Act to make the necessary consequential changes for Northern Ireland.
5. But, given the DFP Minister determined not to put forward any such proposal to the Northern Ireland Executive, that opportunity was lost.
6. Most people here I think would be receptive to the position that our defamation law merits reform, but that leads back to the question of mirroring the 2013 Act or 'other reform' and if 'other reform' the nature and extent of such reform?
7. However, I would not agree with NILC's 'red herring' view of the consistency argument (para 2.55). It could well be the case that there are some who may argue against consistency, seeking to preserve a niche area of Northern Ireland law? But that cannot be the determinant of the nature and scope of law reform in the overall interests of Northern Ireland.
8. Northern Ireland is a small jurisdiction and in particular I note the evidence in the CP para 2.07 that apparently in each of the past three years only some 30 defamation actions per year have progressed to the High Court. That imports that there cannot be counsel based in Belfast practising to a large extent in defamation, and there can be none who practise exclusively in the area. Similar reasons constrain our judiciary from becoming 'specialists' in this jurisprudential area. There may be a cadre of solicitors whose main practice may be in defamation, given their involvement in advisory work, and in related areas, as well as in

litigation as such but the numbers so exclusively practising must be in single figure?

9. All this imports that we do not enjoy a sufficient specialised base in defamation in the legal profession to contemplate going our own way in regard to legislation in the area.
10. In my view then, we should base new legislation for Northern Ireland, so far as possible, on the 2013 Act to gain all the benefits of consistency (to Northern Ireland society as a whole rather than any sectional interest) and we should only go further or have alternative provisions where there is an overwhelming case against 'consistency' or an overwhelming case for going beyond 'consistency'.
11. The test before adoption of any further or alternative provisions should be are they coherent and cogent to such an extent that the case for adopting them very clearly outweighs the desirability of consistency with the 2013 Act?
12. I note that the CP speaks in terms of whether the 2013 Act should be 'adopted' in Northern Ireland or whether the 2013 Act should be 'extended in its application' to Northern Ireland. But that, with respect, seems to me to be the wrong terminology: it would have applied had a Legislative Consent Motion gone through the Northern Ireland Assembly at the relevant time when the Defamation Bill was before Parliament. But now, as I understand, and already stated, any reform will have to be by way of Northern Ireland legislation, through the Northern Ireland Assembly.
13. In addition, Northern Ireland has under devolution long since had its own defamation legislation: so any reform will be a matter of new legislation tying in with the current Northern Ireland legislation, even if 'radical' law reform is proposed.
14. But in my view none of this is a constraint. Northern Ireland has the opportunity of defamation law reform by way of Northern Ireland legislation which in my view should closely mirror at least the main provisions of the 2013 Act but where there is clear case to adopt additional or alternative reforms then that can be done and I set out my views on those options as they are raised in the various following questions.
15. But having said all that in favour of mirroring provisions in new Northern Ireland legislation, the argument for that in my view applies with greater force to the substance of the law (which should keep step with the defamation law of England & Wales) and I follow through on that in my answers to Questions 1 to 18 which relate to the discussion in Chapter 3 of the CP 'Substantive Law and the Impact of the 2013 Act in England and Wales'.
16. Different considerations, at least to an extent, apply in my view to the jurisdiction and procedure questions raised in Chapter 4 of the CP 'Jurisdiction, Procedure and the impact of the 2013 Act in England and Wales'. This is because Northern Ireland is a separate jurisdiction and has (or had) a proud tradition of some considerable degree of independence on matters of procedure. I have to concede with regret that in more recent times we appear to have become more timid in venturing on any separate course from that in England & Wales: ironic in view of the devolution of policing and justice to Northern Ireland – but that is a deeper matter than can be addressed here. In addition, I treat the Chapter 5 questions on their own merits.

I turn now to the specific questions raised in the Consultation Paper.

Q 1

As already indicated, in my view the principle to be adopted is that we should seek in Northern Ireland legislation to mirror the provisions of the 2013 Act in as full application as possible but subject to any particular Northern Ireland provisions as may be discussed below. As already indicated above, I suggest it is more appropriate to discuss the matter in terms of Northern Ireland legislation which might 'mirror' the provisions of the 2013 rather than 'extending' the 2013 Act to Northern Ireland

Q 2

In my view it would be unwise to:

- seek to enact a peculiarly Northern Ireland piece of legislation that departs in major respects from the 2013 Act; or
- to decline to adopt the main provisions of the 2013 Act.

So I do not support the 'partial adoption' proposal, unless NILC would regard my proposal:-

- 'to mirror the provisions of the 2013 Act in as full application as possible but subject to any particular Northern Ireland provisions'
  to be
- in NILC terms 'partial adoption'?

In which case I concur with that version of 'partial adoption'!

Q 3

On the basis as already stated, that the provisions of the Northern Ireland legislation should mirror as far as possible the 2013 Act, there should be the minimum departure from the provisions of the 2013. I note that specific questions are raised below, so I answer each on its own merits.

Q 4

I suggest an approach as follows:

- An opening proposition that the perspective to be adopted should be that of the lay person, who should be reasonably enabled to form his or her own judgment on whether anything he or she might propose to publish is or is likely to be construed as being defamatory.
- In cases where there the lay person may be in some doubt as to whether or not what he or she wishes to publish may be safely published, it should be feasible for such lay person to go to his or her local solicitor – or at least any solicitor who is prepared to refresh as required his or her general knowledge of the law of defamation - and such solicitor should be able in most cases to

give properly informed advice to advise the client in the ordinary circumstances of most cases.

- In cases that may be genuinely 'border line', then the services of a specialist defamation solicitor or a barrister who practises extensively in defamation law may be required.

It is of course a chimera to seek law reform that will 'simplify' all issues – but the focus on the law reform effort should be for an outcome that allows for a cascading of means to resolve publication queries in the manner suggested - so that only the really difficult ones require any degree of specialised advice.

However, for the reasons I have already expressed, my view on this is that Northern Ireland legislation should mirror as closely as possible the 2013 Act.

Q 5

I would urge caution in regard to the proposition that the Northern Ireland law should include provision for 'discursive remedies' beyond those contained in the 2013 Act.

But I commend the final statement in para 5.31 of the CP:

> "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."

To me this entails that we have new Northern Ireland legislation that mirrors as closely as we can the 2013 Act and then seek to apply the new legislation in the spirit expressed in para 5.31 – rather than boldly going on a course of our own.

Q 6

I agree that new Northern Ireland legislation should follow the 2013 Act in this regard. It follows that the language of section 5 of the Defamation Act (Northern Ireland) 1955 be revised in a new provision which would mirror section 2 (2) to (4) of the 2013 Act.

Qs 7 - 11

I agree that Northern Ireland legislation should include provisions broadly equivalent to section 3 of the 2013, 'the defence of honest opinion' but with the clarifications suggested in paras 3.36 to 3.39 of the CP. I accept that the CP makes good case that there are some infelicities in the drafting of the provisions of section 3 of the 2013 Act, so here the balance swings against automatic mirroring of that section, provided that drafting care can be taken so that the Northern Ireland provisions can mirror so far as possible section 3, subject only to the amendments suggested in these paras of the CP.

Qs 12 – 13

In my view it is particularly important for Northern Ireland that the defence of 'responsible communication (publication on a matter of public interest)' is available. This is because the constitutional arrangements for 'power sharing' in the Northern Ireland Executive and Northern Ireland Assembly effectively preclude the formation of an 'opposition' party in the Assembly (as all the main parties have seats in the Executive). The point here is not to criticise these arrangements (which were hard won as the only basis on which there could be agreement on devolution in Northern Ireland). But that imports that independent, responsible media have a very significant role (in the absence of significant political opposition in the Northern Ireland Assembly) in raising issues which may be uncomfortable for the Executive (and thereby all the main parties in the Assembly).

I refer to para 3.58 and here for the reason, as already stated, of the desirability of consistency between England and Wales and Northern Ireland, I agree that it is better to mirror in Northern Ireland legislation the terms of section 4 of the 2013 Act.

Q 14

I agree that there should be provision in new Northern Ireland legislation for a rule equivalent to section 6 of the 2013 Act for qualified privilege for statements in peer-reviewed scientific or academic journals. I note that the CP supports this aim in principle but has certain criticisms (in paras 3.67 to 3.69) of the terms of section 6 of the 2013 Act. I agree with those criticisms but there is a large question as to the efficacy or the suggested alternative in para 3.70: 'a preferable way forward may be to ensure that such primary defences [of honest comment/honest opinion] are so readily usable as to deter attempts to bully through the threat of legal action'.

So I suggest we need in new Northern Ireland legislation:

- the belt of the primary defences – and hopefully they will prove duly effective to provide the necessary deterrence to legal bullying which stifles the free expression of opinion;

but also, and in case the belt for whatever reason proves ineffective,

- the braces of a new legislative provision to mirror section 6 of the 2013 Act to provide qualified privilege for statements in peer-reviewed scientific or academic journals.

Q 15

I agree that new Northern Ireland legislation should mirror the provisions in section 7 of the 2013 Act for the clarification and extension of the various privileges.

Q 16

I agree that new Northern Ireland legislation should mirror the provisions in section 5 of the 2013 Act for a new defence for website operators.

I would be opposed to the proposition as suggested in para 3.81 of the CP that there could be an obligation on website operators to post a notice of complaint alongside statements they chose to leave up.

I have seen a draft of the proposed Consultation Response of the Libel Reform Campaign and agree with the reasons they set out against this proposal.

In addition to what they say, it seems to me important that Northern Ireland is not seen as a jurisdiction that is 'hostile' to website operators as it so essential to our economic development that Northern Ireland takes full part in e-commerce, research and development.

This does not import a 'free for all' – but any regulation should clearly be on a United Kingdom basis, European basis or wider international basis. It would be ridiculous for Northern Ireland to shake a puny fist at the internet!

Q 17

I agree that new Northern Ireland legislation should mirror the provisions in section 10 of the 2013 Act for a defence for secondary publishers.

Q 18

I agree that new Northern Ireland legislation should mirror the provisions in section 14 of the 2013 Act for changes to the law of slander.

Q 19

Given that we no longer have jury trials in other categories of civil actions it does not seem to me that there is any case to retain them for defamation actions in particular.

I support the right to a jury in relevant categories of criminal trials because the liberty of the individual is there at stake but that is not a criterion in any category of civil action.

Accordingly, I agree that new Northern Ireland legislation should mirror the provisions in section 11 of the 2013 Act.

Q 20

I agree that new Northern Ireland legislation should mirror the provisions in section 1 (1) of the 2013 Act for a 'serious harm' test.

We should not depart from the terms of the drafting of section 1 (1) for the reason of the desirability of 'mirroring' which I have already set out. (Attempts to 'improve' the drafting are likely only to cause more difficulty!

We should not continue with a common law approach: it is in the public interest for defamation law to be codified as far as practical (for the reasons I have already set out in my answer to Q 4). There will still be proper place for the judiciary to resolve dubious points of law that no doubt will arise from the drafting of the new legislation but the zone of uncertainty should be reduced so far as possible.

Q 21

I agree that new Northern Ireland legislation should mirror the provisions in section 1 (2) of the 2013 Act that bodies that trade for profit must show 'serious financial loss' in bringing any claim for defamation.

This is an important provision to restrict bullying or suppressive litigation by businesses with large war chests for litigation which they may deploy to stifle individuals or groups who engage in peaceful protest in regard to business activities: groups such as environmental campaigning groups deserve in the overall public interest this degree of protection.

But for the reasons of consistency I would not support the introduction of a bar on corporate claims such as that in the Australian *Universal Defamation Acts* as referred to in para 4.32 of the CP.

Q 22

I agree that new Northern Ireland legislation should mirror the provisions in section 8 of the 2013 Act, the 'single publication' rule.

I note the criticisms of this in paras 4.38 to 4.40 but in my view these criticisms are not sufficiently cogent to justify departure from the significant virtues of consistency with the 2013 Act, as I have already explained.

For similar reasons I would oppose the alternatives suggested of retention of the multiple publication rule or of a 'notice of complaint' procedure as posited in para 4.41 of the CP.

Q 23

I agree that new Northern Ireland legislation should mirror the provisions in section 9 of the 2013 Act, the rule on 'libel tourism'.

In my view we must have mirroring in this important area of concern.

Q 4 Redux[1]

I have read with interest and appreciation the detailed arguments presented in chapter 5 arguing for a withdrawal of the 'single meaning' rule. It is very helpful for it all to be set out so clearly but in my view, to the extent that there is a case for change, it is not so compelling as to justify a departure from the consistency principle as I have already set out and so we should not depart from mirroring the 2013 Act in this regard.

Q 24

I agree that new Northern Ireland legislation should mirror the provisions in sections 12 & 13 of the 2013 Act, for remedial powers of the Court.

Q 25

- I would oppose any 'cut and paste' approach to law reform involving taking provisions from the *Defamation Act 2009* in the Republic of Ireland as set out in paras 5.53 and 5.54 of the CP;
- I would oppose the introduction of a 'general right of reply' as suggested in para 5.55 of the CP. I note with interests the CP's comment that this is a civil law remedy. But I suggest law reform in this jurisdiction must be very wary of bolting on to our common law system civil law remedies;
- I would not agree for any proposals to increase the jurisdiction of the County Courts in Northern Ireland in regard to defamation claims as suggested in para 5.56 of the CP: I refer back to my general comment *No. 8* in my introduction: the points there about lack of specialism in our jurisdiction are even more applicable to the County Courts.

In general, in my view there is no coherent case for any of these reforms.

In addition, for the reasons I have already set out, Northern Ireland does not have the sufficient degree of specialist expertise in defamation law to contemplate being the test bed for such novel propositions.

Neil Faris, Solicitor, Belfast *19 February 2015*

[1] Presumably question reserved for scholars of Latin

From: jackie.smyth **On Behalf Of** James OLeary
Sent: 20 February 2015 11:51
To: info nilawcommission
Subject: Northern Ireland Libel Reform

Dear Sirs

We fully support the submissions made by MLA in relation to the Defamation Act 2013.

Yours faithfully

_____
JAMES O'LEARY
Trinity Mirror

Society of Editors
www.societyofeditors.org

Response by the Society of Editors to the consultation on Defamation Law in Northern Ireland

The Society of Editors strongly supports detailed submissions by the Media Lawyers Association, the News Media Association and editors in Northern Ireland calling for the extension of the Defamation Act 2013 in full to be implemented in the Northern Irish jurisdiction as soon as possible.

The Society welcomed the long-awaited Defamation Act 2013 after years of campaigning which implemented sweeping changes to the law of libel. Not only did it have the support of all three of the main political parties, it was the subject of public consultation and careful scrutiny by a Joint Committee of both Houses.

The result was the introduction of a new "serious harm threshold" which was implemented to try and reverse the chilling effect previous libel laws have had on freedom of expression and legitimate debate and subsequently made Britain attractive to libel tourists. It also allowed the defence of honest opinion and public interest provided necessary corrections are printed. The reforms now have the effect of aiding freedom of expression for scientists, academics, authors, the media and the public while still protecting reputations. A failure to implement these reforms in full in Northern Ireland will run the risk of it becoming the new favoured resort for libel tourism.

The Society of Editors has more than 400 members in national, regional and local newspapers, magazines, broadcasting, digital media, media law and journalism education. It is the single largest organisation for editors and senior editorial executives. Its members are as different as the publications, programmes and websites and other platforms for the delivery of news that they create and the communities they serve. But they share the values that matter:

- The universal right to freedom of expression.
- The importance of the vitality of the news media in a democratic society.
- The promotion of press and broadcasting freedom and the public's right to know.
- The commitment to high editorial standards.

Bob Satchwell
Executive Director
Society of Editors

Response by the Ulster Unionist Party

“Defamation Law in Northern Ireland”

A Consultation Paper by the Northern Ireland Law Commission

Introduction and Overview

The Ulster Unionist Party believes that the right to freedom of speech is fundamental to our constitution.

In April 2013, The UK Government passed The Defamation Act, with cross-party support at Westminster, to update our statutory rights to freedom of speech, balanced by the need to protect against unjustified attacks on an individual's reputation.

We believed at the time and still do, that this reform was essential. The libel laws are so old, they do not recognise the existence of the Internet, which is the primary source of information for so many of our citizens.

Unfortunately the then local Finance & Personnel Minister, Sammy Wilson, dismissed the idea of extending the new law to Northern Ireland, without even consulting his Executive colleagues, never mind informing the Assembly. He did this despite the knowledge that the United Nations had been highly critical of the status quo.

The result was that Northern Ireland is currently a place apart within the United Kingdom, and not in a good way. Our people - all our people - are at a disadvantage, because of the far-reaching implications of operation different laws to England and Wales.

As a result our Party Leader Mike Nesbitt MLA, undertook consultation as preparation to reverse Mr Wilson's decision by way of a Private Members Bill at the Northern Ireland Assembly.

Mr Nesbitt’s Consultation

The consultation undertaken by Mr Nesbitt indicated that only 1% of the population agreed with Sammy Wilson in thinking the laws of defamation are as good as they can be.

Key results from the consultation indicated:

- 96% want a higher threshold before a defamation case can be brought. The proposal is that those claiming they have been defamed must prove serious harm, and in the case of bodies trading for profit, that there has been, or is likely to be, financial loss;
- 96% believe Northern Ireland's defamation laws should include a defence of publication on matters of public interest;

- 99% believe it is important to give academics and scientists greater protection for offering honest opinion on matters that are part of their areas of expertise. This would offer qualified protection, based on proper consultation and peer review in advance of publication, and will make it easier for professionals to take on well funded and resourced organisations such as multi-national drug companies;
- 97% believe the terms of the 2013 Defamation Act will protect Northern Ireland from the threat of so-called "Libel Tourism", which the few opponents of libel law reform in NI argue will result from any such reform;
- Over 90% believe the law should offer more clarity on the responsibility of website operators for comments posted on their sites, with operators required either to identify the author of defamatory remarks, or take responsibility for the publication.

The area where there was least clarity was regarding trial by jury for cases of defamation. That said, 77% supported a change in the law to the position where defamation cases are tried without jury unless otherwise ordered by a court.

This was the matter we thought might provoke most debate, and it did, as non-jury trials have a particular resonance in the recent history of Northern Ireland. We never proposed that Northern Ireland should simply 'cut and paste' the Westminster Act, any more than we would for Welfare Reform or any other legislation; there would be little point in funding such an expensive devolved government if we did not shape the law to reflect the best interests of our people. The question of whether or not jury trials are the best mechanism for defamation cases should be subject to further consideration.

The response to Mr Nesbitt's Consultation

The Ulster Unionist Party was impressed by the quantity and quality of responses to this consultation, with over 200 individuals and organisations responding to his survey, and dozens forwarding their own thoughts by email and post. Contributors included:

- Serving and retired medical professionals, who recognise the danger of multi-nationals, not least in the sphere of medical sciences, exploiting the current gap in legislation to protect their interests by attempting to restrict honest, expert opinion by those who wish to be critical;
- Serving and retired academics who fear the best researchers, lecturers, fellows and professors, will find Northern Ireland too cold a house, and avoid our local universities, in favour of England and Wales, where their research and opinions will be more warmly greeted and debated;
- Economists who fear the Number One objective of the Northern Ireland Executive, that of rebalancing and growing the private sector, will be hampered;
- Media outlets, who recognise the economic impact of not reforming Northern Ireland's laws, which, in brief, could result in organisations deciding not to publish in Northern Ireland;

- UK politicians, who recognise the negative impact on the economy

As Lord Black, Executive director of the Telegraph Newspaper Group put it at the launch of Mr Nesbitt's Consultation period:

"When politicians set their face against the future, investment and jobs suffer. Over 4,000 people work in publishing here, while another 2,000 work in the broadcast media. Some of those jobs will be at risk if media companies decide that it is now too dangerous to operate in a jurisdiction that stifles freedom of expression and move their operations."

Lord Black also warned the failure to reform our libel laws would deter inward investment from Foreign Direct Investors, the very companies we seek to create new high-end jobs - organisations like Google, Yahoo!, Facebook, AOL and Twitter - because of the commercial dangers of operating in a region where the laws of defamation are fifty years or more out of date.

He also highlighted how the lack of reform will expose our people - the "citizen journalists" - equipped with the smart phone technology that allows them to use social media to the chill factor of libel laws passed decades before the Internet was invented.

In media terms, Lord Black is stark in his assessment: "UK publishers will face a very difficult choice. They will either have to edit each edition of their newspapers separately for distribution in Northern Ireland, probably sanitising the copy in the process in order to protect themselves meaning that readers will never get the full story. Or else – perhaps for the simple commercial reason that this would be a very expensive job – they will have to withdraw their papers from sale here. I hope it will never come to that, but this is a decision that all UK publishers will have to confront if Mike Nesbitt's Bill does not proceed to the statute book."

Subsequent developments

After Mr Nesbitt stated his intention to start the process of introducing a Private Members Bill to the Assembly, Sammy Wilson's successor as Minister for Finance and Personnel, Simon Hamilton MLA, referred the matter of the reform of libel laws to the Northern Ireland Law Commission.

Mr Nesbitt accepted an invitation to discuss his interest in this matter with the Law Commission as his consultation was on-going. His plan was that his next step would be a second phase of engagement with "super consultees", in other words, bodies with a professional interest in defamation.

At that time, Mr Nesbitt said:

“Given the Law Commission are now committed to the same process, I see no sensible reason to replicate their process, so I have offered to hand over my Consultation results to the Law Commission and they have gratefully accepted my offer.”

"I did this on the explicit understanding from the Law Commission that they will make public the report they submit to the Minister and that this will happen in a matters of months, not years.

"I thank all who contributed to my Consultation process, and urge Minister Simon Hamilton to take heed of the huge level of consensus on the need for reform, and not to look over his shoulder at the opinion of his predecessor and potential future party leader. This is a moment to do what is right for Northern Ireland and in this regard, doing what is right is to bring forward positive, progressive change."

The current position

The Ulster Unionist Party recognises that this issue is much more important than many people realise, because it impacts on our economy as much as it does on any individual libelled by a media report. The key implications include:

- Media outlets will either have to consider publishing editions of their newspapers, programmes and websites that are sanitised to meet Northern Ireland's specific defamation laws, or not publish in NI at all;

- Our two Universities will struggle to attract the best researchers, as scientists and academics will be put off by the fact that Northern Ireland does not offer the same protection for peer-reviewed analysis as is afford by the 2013 Act;

- The Executive's drive to establish Northern Ireland as a global centre of excellence for the new Creative Industries will be damaged;

- Several thousand people are employed in media related jobs in Northern Ireland. Some will be under serious threat.

- There is a real possibility the rich and powerful will use Northern Ireland as the equivalent of a "Tax Haven", such individuals becoming what is commonly referred to as "libel tourists".

Reforming our libel laws will help make Northern Ireland a normal, progressive, attractive society. The Ulster Unionist Party’s main aims are to ensure we make it easier and less expensive for people who are defamed to take legal action, while trying to exclude trivial claims. We want to promote robust debate among scientists and academics, without an unreasonable threat of legal action for expressing an honestly held and researched opinion. We also think it is

absurd to support the current laws, given they were written decades before the invention of the World Wide Web.

This is about protecting Freedom of Speech in Northern Ireland. This is particularly important to us, because our current system of government in the Northern Ireland Assembly means we do not have a second chamber, like the House of Lords in London, who scrutinise and revise legislation coming out of the Commons. Nor do we have an official opposition, a role performed to a large extent by the media, who are unduly hampered from investigating government by a former minister in the same government.

We therefore support strongly support the reform of Defamation Law in Northern Ireland.

ENDS

Stephen Barr

Ulster Unionist Press & Policy Office

Room 215 Parliament Buildings

Stormont

Belfast

BT4 3XX

Stephen Barr

078554 29980

MEDIA LAWYERS ASSOCIATION

Response to Consultation Paper: Defamation Law in Northern Ireland

This is a response to the Northern Ireland Law Commission's consultation on Defamation Law in Northern Ireland (the "Consultation Paper"). It is submitted on behalf of the Media Lawyers Association (the "MLA") which is an association of in-house media lawyers from many of Northern Ireland and the United Kingdom's leading newspapers, magazines, book publishers, broadcasters and news agencies. MLA Members account for the overwhelming majority of newspapers and broadcasters in Northern Ireland. The MLA includes the News Media Association, whose own members include publishers of daily and weekly newspaper titles in Northern Ireland including the Belfast Telegraph, the Belfast News Letter, Irish News, and Sunday Life. Other MLA members include the BBC which broadcasts local and national channels in Northern Ireland together with the leading national UK newspapers and broadcasters. A full list of the MLA's members is set out in Annex 1 to this response.

Summary of MLA's Response

1. In response to the Consultation Paper, the MLA's position is that:

- The MLA strongly supports and encourages the prompt adoption of the Defamation Act 2013 (the "Act") in its entirety in Northern Ireland. It believes that this is essential not only for the substantive benefits to the law of defamation which the Act includes, but also to ensure consistency of approach for liability for defamation between Northern Ireland and England and Wales.

- The MLA opposes a piecemeal or varied adoption of the Act in Northern Ireland. It believes that consistency of approach between jurisdictions is of paramount importance, and that none of the lacunae identified by the Consultation Paper are sufficiently injurious to either freedom of expression or the right to reputation to warrant Northern Ireland taking its own distinctive approach. There are no other

torts where Northern Ireland has allowed for marked differences with the English common law in terms of interpretation or application. There is no good policy reason why the law of defamation should have special consideration, in particular where the trans-jurisdictional nature of publishing has a particular facility for creating actionable torts in multiple jurisdictions simultaneously.

- If, contrary to its primary position, it is proposed that Northern Ireland adopts parts of the Act in a piecemeal or varied manner, the MLA emphasises the particular importance of adopting sections 1, 3, 4, 7, 8 and 11 of the Act in Northern Ireland.

- The MLA strongly opposes the proposed alternative scheme suggested in Section 5 of the Consultation Paper which would be highly damaging to the proper and necessary exercise of freedom of expression by all members of society within Northern Ireland and which, if implemented, may well be incompatible with Article 10 ECHR. The scheme is impractical and would have real and harmful consequences for the media and publishers generally in Northern Ireland and in the United Kingdom.

Responses to Specific Questions in Consultation Paper

Q1. Should the Defamation Act 2013 be extended in its application, in full to the Northern Irish jurisdiction?

2. Yes. The MLA considers that this is the most important part of the Consultation Paper.

3. Although the Act may be susceptible to criticism as a piece of legislation from both the perspective of a plaintiff and a defendant, when taken as a whole, the Act strikes a strong and cohesive balance between the right to reputation and the right to freedom of expression which properly reflects the media and communications of the 21st century. The Act represents the product of a considered and extensive consultation and debate between interested parties over a period of several years.

4. The MLA believes that that the prompt and wholesale adoption of the Act in Northern Ireland is essential for the development of the legal framework in this area of law within Northern Ireland. Its adoption will not only promote the responsible exercise of freedom of expression, but also lead to the earlier determination of defamation claims, while also providing greater certainty in the long term which will benefit both plaintiffs

and defendants. If Northern Ireland does not, for the first time in recent history, adopt a substantially similar legal framework to that which exists in England and Wales, the MLA believes that this will have a detrimental impact upon freedom of expression and the freedom of the media in Northern Ireland.

5. The Consultation Paper acknowledges that prior to the passing of the Defamation Act 2013 at Westminster, Northern Ireland already had more than five times as many libel claims per capita of population compared to England and Wales. Such a disparity existed in 2012 even though the number of libel cases had apparently been declining in Northern Ireland. This disparity is alarming but reflects the experience of members of the MLA; there are a disproportionate number of libel claims in Northern Ireland and that they can be disproportionately difficult to bring to swift determination, particularly when compared to similar claims brought in England and Wales. This is a matter of significant concern, because as the courts have recognised, the very fact of being sued for libel can amount to a serious interference with freedom of expression.[1] The chilling effect of libel actions, even if apprehended rather than actual, is well documented and undermines the right to freedom of expression which exists for the benefit of society as a whole. It is a collective right, as well as a right exercised by individuals.

6. The MLA believes that the clear disparity in the number of libel claims in Northern Ireland and England and Wales is due in significant part to a number of important but subtle differences in the procedural and legal frameworks between the jurisdictions which combine to substantively prolong libel actions in Northern Ireland, deter their prompt and proportionate resolution and unnecessarily extend the costs involved. Although these matters are equally inimical to plaintiffs and defendants, plaintiffs can rely on the common law's presumption of falsity and presumption of damage to establish a prima facie claim (in contrast to most other torts) which can prove extremely difficult to strike out before trial because of the presumptive right to jury trial. This framework operates in favour of plaintiffs, who often have little incentive to settle claims before trial. Consequently, defendants often chose to settle libel claims irrespective of the merits because settlement can still result in a better financial result than following taxation after a successful trial and also because of the inevitable uncertainty which results from a determination of libel trials by jury.

[1] See Lonzim v Sprague [2009] EWHC 2838 (QB) per Tugendhat J and Zinda v Ark (Academies) Schools [2011] EWHC 3394 (QB) per Eady J.

7. The MLA believes that the implementation of the Act will therefore be an important step in remedying this disparity. It will be a significant move towards ensuring the prompt and expeditious resolution of defamation claims, thereby minimising the resources of both sides and the amount of time such claims take up in the court system. Ultimately, that is in the interests of both plaintiffs who have suffered unmerited attacks on their reputation and defendant publishers' freedom of expression.

8. The MLA does not concur therefore with the Consultation Paper's assertion that the real imbalance in this area of law in Northern Ireland is between those who can afford to litigate and those who cannot. That is not to say that access to court and to proper remedies are not of real importance consideration in this of law; they certainly are. However, properly characterised, the MLA believes that the real imbalance in this area of law lies in a system which allows either party, but particularly plaintiffs, to prolong and avoid the determination of key issues in libel claims, knowing full well that a trial by jury has inherent uncertainty of outcome. This leads to an unduly tactical approach to litigation in this area which broadens and complicates the scope of litigation, rather than narrows the issues between the parties and ensures the prompt identification and resolution of key issues by the court. The MLA believes that the implementation of the Act as a whole would be an important step towards achieving this.

9. Although the importance of individual sections of the Act is addressed separately in the responses to the other questions below, the MLA believe that the Act should be assessed as a cumulative and coherent policy framework which reflects modifications and updates to the law of defamation as a whole for both plaintiffs and defendants. It would therefore be a serious error to cherry-pick sections of the Act for implementation in Northern Ireland. Indeed, as the Consultation Paper recognises, there are common themes and interactions between sections of the Act which would be undermined if the Act were assessed as individual and separate provisions. For example, sections 5, 10, 12 and 13 of the Act achieve a clear framework for allocation of liability and protection of reputation in respect of online publications.

10. For the reasons expanded upon below, the MLA believes that the substance of the Act is of benefit to plaintiffs and defendants alike and updates defamation law to make it fit and appropriate for publishing in the 21st century. The Act provides new remedies for plaintiffs to achieve prominent vindication of their reputation. It sets out a clear allocation of responsibility between original posters of defamatory publications and intermediaries. The Act encourages the provision of information to plaintiffs so that the

original poster can be pursued through the courts. This strengthens a plaintiff's ability to secure proper injunctive relief and vindicatory damages. The law codifies and enhances the defences of truth, honest opinion and responsible publication on a matter of public interest. It introduces a threshold test for whether a publication is defamatory which focuses on the actual extent of harm done to reputation. This threshold is an important counterweight to the common law's presumption of damage and presumption of falsity. It introduces a single limitation period for publications, bringing the law of limitation up to date with internet publishing. Critically, the Act also abolishes the presumptive right to trial by jury, therefore permitting the early determination of key issues in libel claims and allowing for their prompt resolution. This narrows the issues in dispute, which is of benefit to plaintiffs and defendants alike. For the reasons set out above, this is an essential change which is really necessary and ultimately beneficial for Northern Ireland. These changes must therefore be assessed collectively and as a cohesive package of reforms to the law of defamation which update the law for both plaintiffs and defendants.

11. Although arguably an imperfect piece of legislation in certain minor respects, there is nothing in the Act which is so obviously harmful to freedom of expression or the right to reputation which would warrant Northern Ireland following its own unique approach to defamation law for the first time in modern history. On the contrary, the MLA contends that there will be a far more serious impact if Northern Ireland does not adopt the Act and instead becomes an outlier within the United Kingdom in respect of the law relating to freedom of expression and the right to reputation. In this context, it is important to recognise that the court's permission is not required to serve a Writ publishers domiciled in England, Wales and Scotland, thereby bringing them within the court's jurisdiction without any threshold test required.[2] In respect of UK domiciled publishers, a claim can be brought in Northern Ireland in respect of publications throughout the United Kingdom.[3] Ultimately such a position would be not only harmful to publishers in Northern Ireland (local and national) but harmful to civil society in Northern Ireland generally, as it would undermine the important rights of freedom of expression and the corollary right to receive information which the courts have made clear is a central part of a modern democratic society.

12. Further, as the Consultation Paper recognises at paragraph 2.52, the communality of significant areas of the common law of defamation between England and Wales and

[2] Order 11, r.1(2) of the Rules of Court.
[3] Shevill v Press Alliance SA [1995] 2 AC 18

Northern Ireland has been of major benefit to Northern Ireland. Indeed, it is noticeable that the overwhelming number of cases cited in the Consultation Paper are judgments of the English courts. If Northern Ireland does not implement the Act, the continued determination of libel trials with a jury without reasoned judgments in Northern Ireland would only serve to reduce the common law authorities which provide important guidance according to which plaintiffs and defendants can be advised. Although there are a very few areas where the Act purports simply to codify the existing common law, it is inevitable that if it is not implemented in Northern Ireland, that there will be further divergence of common law principles for both jurisdictions. This will promote uncertainty of principle and outcome which is ultimately unfavourable to both plaintiffs and defendants and will serve only to promote rather than reduce legal disputes.

13. There are no other torts where Northern Ireland has allowed for marked differences with the English common law in terms of interpretation or application. In particular, the law of data protection, misuse of private information, harassment and malicious falsehood are substantially the same in England and Wales and Northern Ireland. There is no good policy reason why the law of defamation should have special sand distinct treatment, in particular where the trans-jurisdictional nature of publishing has a particular facility for creating actionable torts in multiple jurisdictions simultaneously.

14. Adopting a piecemeal or divergent approach from the prevalent law in England & Wales can only serve to discourage or deter publishers from publishing in Northern Ireland. For example, if Northern Ireland does not adopt important provisions such as sections 1, 3, 6, 7 and 8 of the Act, publishers may be faced with claims in respect of publications which may be entirely lawful in most the United Kingdom but which may nevertheless be indefensible (or extremely costly to defend) under the common law in Northern Ireland. This applies not only in respect of the introduction of a ‘serious harm’ threshold under s.1 of the Act but also to the extensions of privilege set out in ss.6-7 of the Act which have been substantially adopted throughout the rest of the United Kingdom including Scotland. Imposing a need for additional and distinct legal advice or liability in respect of publications in Northern Ireland will inevitably discourage or disincentivise publishers from participating in Northern Ireland. Such action does not require the impact of the Act to be “very substantial” as asserted at paragraph 2.53 of the Consultation Paper, but simply requires further divergence between the legal principles applied in Northern Ireland and those of England and Wales so as to make the cost/benefit analysis of any publication in Northern Ireland more unfavourable. In

this regard, it is important to note that as a media market, Northern Ireland comprises only 2.8% of the population of the United Kingdom.[4]

15. Achieving consistency and certainty in the law within the United Kingdom is of central importance, both for regional and national publishers. The certainty of a consistent legal framework is also beneficial to potential plaintiffs. The MLA believe that if Northern Ireland does not keep pace with reform and evolution in respect of libel law, there is a real risk that this will have a significantly detrimental impact upon media plurality and freedom of expression in Northern Ireland. This applies not only if Northern Ireland retains the status quo, but also if it implements the Act in a selective or varied manner. For these reasons, the MLA strongly encourages the prompt implementation of the Act in full in Northern Ireland.

Q2. 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?

16. Yes. The MLA's primary position is that it believes that Act should be extended in full to Northern Ireland. It also believes that it would be an error to selectively extend isolated sections of the Act which should be assessed as cumulative and coherent policy framework for the law of defamation. If, contrary to this primary submission, the Act is not implemented in full in Northern Ireland, the MLA believes that sections 1, 3, 4, 5, 7, 8 and 11 are the most important sections of the Act which should be extended in their application to Northern Ireland if Northern Ireland is not to be seen as a significantly disadvantageous for publishers. The importance of each of these sections is addressed further below.

Q3. 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?

17. No. The MLA believes that consistency of approach between jurisdictions is critically important to sustain a vibrant media and publishing landscape in Northern Ireland. Although it is arguable that the Act could be further revised or enhanced from the

[4] According to ONS statistics for 2012 available at http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/mid-2011-and-mid-2012/index.html.

perspective of both plaintiffs and defendants, there is no part of the Act which is so obviously harmful to freedom of expression or the right to reputation which would warrant Northern Ireland following its own unique approach. Revising or refining of the Act before implementation in Northern Ireland will serve to increase the costs of compliance for publishers in Northern Ireland. The Act should be seen as a cumulative and coherent policy framework which should be promptly implemented in its totality and without amendment in Northern Ireland.

Q4. 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?

18. No. The MLA strongly opposes the proposed alternative scheme suggested in Section 5 of the Consultation Paper. The importance of this issue is such that we have provided a detailed examination of it and of the problems that the MLA believes would arise. By way of very brief summary:

- The proposal to reform the single meaning rule is premised on the belief that established rules and practices are complex, cause uncertainty and lead to injustices. However, if the presumption in favour of trial by jury is removed, the single meaning of an article can often be determined at an early stage leading to the resolution of the claim. The single meaning rule also ensure that the determination of meaning is a proportionate (and usually a binary) exercise.
- A multiple meaning rule would have an enormous chilling effect on freedom of expression. It would inevitably cause publishers to self-censor for fear of what a minority of readers may take from an article rather than focussing on what is conveyed to the majority. This will impact on publishers across the UK who be constrained from exercising fully the right to freedom of expression as recognised elsewhere in the United Kingdom.
- It would also draw litigants to the Northern Irish courts as Plaintiffs seek to take advantage of what would be a significantly lower bar.
- Whilst there has been recent judicial criticism of the single meaning rule in the Court of Appeal decision in *Ajinimoto Sweeteners SAS v Asda Stores Ltd,* this case concerned malicious falsehood which, as the Court recognised, is not closely analogous to the tort of libel. Importantly, libel is a tort of strict liability whereas malicious falsehood requires malice to be proven and is an economic

tort. There is a clear logic to malicious publishers having to take their audiences as they find them with regard to the economic loss they cause.

- The proposal to protect publishers from liability where they make a prompt apology does not overcome these problems. Further, there can be little benefit to the public or meaningful vindication of plaintiffs if the result is the widespread publication of apologies with regard to meanings which were not in fact conveyed to the majority of readers and which the publisher did not intend.

19. Turning to our more detailed examination of this issue, the proposed scheme is seriously flawed, impractical and would have a substantial chilling effect on freedom of expression and significant consequences for the freedom of the media in Northern Ireland. It may well also be incompatible with Article 10 ECHR

20. The MLA disagrees with the Consultation Paper as to the central problem in libel law in Northern Ireland; the problem is not the complexity of the rules of meaning; indeed the principles are well established. The real issue lies with the prompt determination of key issues in defamation claims, including meaning, which are delayed by the presumption in favour of a jury trial. This anomalous position only applies to claims in defamation. Once the presumption in favour of trial by jury is reversed, this will allow for the prompt and expeditious determination of libel claims. This is precisely what has been happening with increasing frequency in England and Wales, see for example *RBOS Shareholders Action Group Ltd v News Group Newspapers* [2014] EWHC 130 (QB) at [18] where the court determined the meaning of the publication before a defence had been served. This narrowed the issues between the parties and led to the prompt settlement of the claim.

21. In this regard, the MLA disagrees with the assertion at paragraph 5.28 of the Consultation Paper that “early determination” of meaning is a misnomer, based on the calculations at Table 1 of the Consultation Paper. Table 1 bases its calculation on the date of publication, not the date the claim was issued. In many cases, it is apparent that the claim was issued until almost the end of the limitation period and in many cases a substantial period after the original publication. Clearly, a court cannot determine meaning until a claim has commenced issued, so this basis of calculation will inevitably misrepresent the speed with which the court can determine such issues as meaning. For those seven claims where the judgment identifies the date the claim was issued, it took an average (mean) of 336 days for the court to hear the application on meaning. This compares to an average (mean) of 673 days for the same cases

when judged against the date of first publication. Moreover, it is apparent that for those claims issued since the Act came into force, and which therefore automatically did not have a presumption in favour of jury trials, the courts have determined preliminary issues even more promptly and within six months of the claim being issued.[5] The abolition of the presumption in favour of trial by jury therefore does actually lead to the court's earlier engagement and determination of critical issues. It is not a misnomer.

22. The Consultation Paper relies on the criticisms of the single meaning rule in the Court of Appeal in *Ajinimoto Sweeteners SAS v Asda Stores Ltd*. However the Consultation Paper does not address the fundamental differences which apply between the torts of libel and malicious falsehood which underpinned the Court of Appeal's decision to abolish the single meaning rule for claims in malicious falsehood.

23. As Counsel for the successful appellant in *Ajinimoto* recognised, a claim in libel is for injury to personal reputation.[6] In contrast malicious falsehood is a claim for injury to the reputation of property and thus an economic tort. Further, libel is a tort of strict liability; the publisher's intention is irrelevant in establishing a prima facie claim. Damage is presumed and falsity of the defamatory allegation is presumed.[7] In contrast a claim of malicious falsehood is by definition a tort of intention. To establish a claim in malicious falsehood, a plaintiff cannot rely on the same automatic presumptions of the common law; he or she must overcome the high hurdle of pleading and proving malice and he or she must either establish that the publication has caused special damage or can fit within the limited statutory presumption of special damage set out in s.3 of the Defamation Act (Northern Ireland) 1955. As the Court of Appeal expressly remarked in *Ajinimoto,* the torts make "different demands on the parties; and they offer redress for different things." It was precisely because the Court of Appeal recognised that a plaintiff needed to establish malice that moderating the single meaning rule was possible for claims in malicious falsehood.[8]

24. The requirements to prove malice and to establish special damage to bring a successful claim are critical and fundamental brakes on claims for malicious falsehood. As the Northern Ireland Court of Appeal recently confirmed, a pleading of malice has a

[5] Cooke v MGN Ltd [2014] EWHC 2831 (QB), where the preliminary determination took place 179 days after publication (the date of the claim is not identified in the judgment) and Ames v Spamhaus Project Ltd [2015] EWHC 127 (QB) where the court ruled on preliminary issues including harm within 138 days of the claim form having been issued.
[6] Ajinimoto Sweetners Europe SAS v Asda Stores Ltd [2011] QB 497 at [14]
[7] Jameel v Dow Jones Inc [2005] QB 946
[8] Ajinimoto Sweetners Europe SAS v Asda Stores Ltd [2011] QB 497 at [42]

high threshold to meet before it can be advanced at trial.[9] An assertion of malice is akin to a pleading of dishonesty which requires the pleader to have sufficient material to sustain a case of dishonesty before s/he is permitted to advance such an allegation. Unsustainable pleadings of malice which are permitted to go to trial undermine the important rights of defendant publishers which are protected by Article 10 ECHR.[10] The requirement to establish malice in these circumstances is an important protector of a defendant's rights to freedom of expression. It was in this limited context that the Court of Appeal disapplied the single meaning rule for claims in malicious falsehood; as the Court made clear, the single meaning rule was a fundamental bastion of defamation law which should not be altered.[11]

25. The single meaning rule is an artifice of the law of defamation, but it is a vital balancing mechanism of real significance which has been developed by the common law and followed by repeated decisions of the House of Lords over several centuries. It is a mechanism of public policy which strikes a proper and necessary balance between the need to protect reputation and the use of excessive or improper complaints which inhibit and chill freedom of expression. It is a critical factor in permitting the public to be informed. It moves the law into the middle ground between the author's intent, which is favourable to defendants, and multiple meanings which are overwhelmingly favourable to plaintiffs. It is a practical and fair method of permitting the court to rule out untenable meanings, and to approach a claim on the middle ground. As Lord Nicholls stated in *Charleston v News Group Newspapers Ltd*:[12]

> *"In principle this is a crude yardstick, because readers of mass circulation newspapers vary enormously in the way they read articles and the way they interpret what they read. It is, indeed, in this very consideration that the law finds justification for its single standard. The consequence is that, in the case of some publications, there may be many readers who understand in a defamatory sense words which, by the single standard of the ordinary reader, were not defamatory. In respect of those readers a plaintiff has no remedy. The converse is equally true. So a newspaper may find itself paying damages for libel assessed by reference to a readership many of whose members did not read the words in a defamatory sense."*

26. If Northern Ireland introduced a multiple meaning rule into the tort of libel, which is a tort of strict liability with automatic presumptions of falsity and damage, this would have an enormous chilling effect on freedom of expression. Publishers would have no way of anticipating what they can or cannot say without fear of liability. Put another way,

[9] Loughran v Century Newspapers Ltd [2014] NICA 26
[10] Henderson v London Borough of Hackney [2010] EWHC 1651 (QB) at [35] per Eady J
[11] Ajinimoto Sweetners Europe SAS v Asda Stores Ltd [2011] QB 497 at [27]
[12] [1995] 2 AC 65 at 73-74

why should a minority of readers be able to determine what the majority of readers would properly understand from a publication? In this regard, it is important to note that the Court of Appeal in *Ajinimoto* recognised that a rule of 'perjori sensu' when interpreting meaning would be "equally productive of unfairness." Yet this would be the effect of introducing multiple meaning rules in libel without the counterbalance of needing to establish malice and special damage.

27. Abolishing the single meaning rule in libel would therefore have all manner of unintended consequences for libel litigation. It would undermine the fundamental defence of justification if a defendant were able to prove that a particular allegation which was understood by a majority of publishers was true, but was then held liable for a meaning which only a small minority of readers understood. It would require evidence to determine the number of readers understood a particular meaning so as to assess quantum of damages in order to ensure that damages were proportionate to the size of the readership who understood the publication in that manner. As Lord Bridge recognised in the House of Lords in *Charleston*, it is the single rule which prevents libel actions resulting in endless witnesses being called to say how they understood a particular publication.[13] The abolition of the single meaning rule would make trial by jury even more unpredictable and unsustainable and liable to produce perverse or inexplicable decisions.

28. The Court of Appeal correctly recognised in *Ajinimoto* that the single meaning rule was a foundation stone of the tort of libel, and recognised that its abolition for defamation claims would have profound and unfair consequences. Contrary to the suggestion at paragraph 5.18 of the Consultation Paper, it was precisely because the Court of Appeal did not believe that a claim in malicious falsehood was "closely analogous" to the tort of libel that it was possible to rule that the single meaning rule did not apply to claims in malicious falsehood.

29. Ultimately, the MLA believes that the abolition of the single meaning rule for defamation claims would be severely injurious to freedom of expression and the freedom of the media and may well be found to be incompatible with Article 10 ECHR. It is not alone in this view. Lord Neuberger, the current President of the Supreme Court regarded the rule as "essential" in a recent decision of the Hong Kong Final Court of

[13] Charleston v News Group Newspapers Ltd [1995] 2 AC 65 at 72

Appeal, where he described the consequences which would flow from its abolition in the following uncompromising terms, with which the MLA concur:

> *"If the single meaning rule did not apply in defamation, it would similarly lead to greater uncertainty in outcome and increased legal expenses. 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. Abolition of the single meaning rule would also 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."*[14]

30. The Consultation Paper disagrees with the views of the President of the Supreme Court, and cites the decision of Arnold J in *Interflora* v *Marks & Spencer Plc*.[15] The MLA does not believe that the comments of a High Court judge in very different intellectual property case provide any proper basis to undermine the clear views of the President of the Supreme Court in the context of a direct attack on the single meaning rule in a defamation claim as took place in *Ming Pao*. The rights of freedom of expression and rights to reputation are engaged in libel claims in a very different way to the engagement of rights in intellectual property claims.

31. Moreover, if Northern Ireland were to become the only jurisdiction within the UK which abolished the single meaning rule for libel claims,[16] it would undoubtedly become a magnet for libel claims by plaintiffs, including those who were seeking to improperly chill freedom of expression. Northern Ireland would be regarded by publishers internationally as a jurisdiction which was seriously inimical to publishing. The MLA does not believe that could seriously be in Northern Ireland's best interests.

32. Further, under Order 11 r.1(2) of the Rules of Court, the court's permission is not required to serve writs on defendants located outside Northern Ireland but elsewhere in the United Kingdom. Any significant publication into Northern Ireland, including on the internet, would therefore leave UK based defendants liable to claims for libel in Belfast which could not be brought in England, Wales or Scotland. This could have very serious implications for freedom of expression throughout the United Kingdom. This could lead to some UK media publishers restricting access to certain content for

[14] Oriental Daily Publisher v Ming Pao Holdings [2012] HKCFA 59 at [142].
[15] [2013] EWHC 1291 (Ch)
[16] Scotland also applies the single meaning rule to defamation claims.

internet users in Northern Ireland, and taking active steps to prevent hard copy publication into the jurisdiction. National content, including broadcast content, would have to be heavily moderated before it was published in Northern Ireland.

33. Further, the MLA does not concur with the Consultation Paper's view at paragraph 5.30 that the abolition of the single meaning rule would represent some panacea which would cure some of the complexity of defamation actions. Contrary to the suggestion, the principles identified at paragraph 5.09 of the Consultation Paper are not principles of meaning, but are principles of the defence of justification – indeed the decision in *Chase v News Group Newspapers* itself is a decision on the principles which apply to pleading a justification defence. These would still apply in the same manner where any defendant publisher properly wished to assert the truth of a publication, albeit his ability to do so would be substantially eroded in the absence of a single meaning rule. The MLA believes that the Consultation Paper's criticisms of the single meaning rule in this regard are misplaced.

34. The MLA acknowledges that the Consultation Paper proposes to balance the benefit which would undoubtedly accrue to plaintiffs from the abolition of the single meaning rule with a bar on liability where publishers apologised promptly and prominently for unintended meanings. In the MLA's view, this proposal not only does not nearly mitigate the highly detrimental and unfair impact which the abolition of the single meaning rule would entail for publishers large and small, but it is itself misconceived and impractical in any event. Nor will it achieve the results identified in the Consultation Paper. It is also is unnecessary in light of the offer of amends scheme set out at s.2-4 of the Defamation Act 1996 which is barely referred to in the Consultation Paper and which currently provides a proper mechanism for publishers to promptly apologise and mitigate their financial exposure when they have made a mistake.

35. The proposed scheme, would for the first time in libel law, introduce the concept of a publisher's intention in relation to meaning and liability. It has always been a longstanding principle of law that a publisher's intention is irrelevant to the determination of meaning.[17] A publisher's intention is only relevant in the limited circumstances where malice may be asserted; however as the courts have made clear, malice will rarely apply to publications involving the media.[18] The proposal

[17] E Hulton & Co v Jones [1910] AC 20; Slim v Daily Telegraph Ltd [1968] 2 QB 157 at 172.
[18] Bonnick v Morris [2003] 1 AC 300 at [14] per Lord Nicholls.

therefore proposes to abolish another fundamental principle of the common law, even though this has not previously been thought in need of reform in any major forum.

36. The MLA does not agree that with the assertion at paragraph 5.31 of the Consultation Paper's that the jettisoning of the single meaning rule and the introduction of discursive remedies would take all but intractable claims out of court. On the contrary, the MLA believes that in fact the proposal would simply shift the focus of the legal disputes and indeed increase legal disputes about meaning, not diminish them. Contrary to the stated preference of the Consultation Paper, it would encourage plaintiff's lawyers to propose hyperbolic or unreasonable meanings which may be understood by a small proportion of the audience. Whereas such meanings might have been ruled out by the courts at trial, or following an application under Order 82 r.3A because they were not the single meaning which a publication bore, such meanings would actually give a plaintiff a cause of action where none existed previously. This would therefore encourage this practice which the courts have already recognises directly interferes with Article 10 ECHR.[19] Moreover, as accepted by the current President of the Supreme Court and previous House of Lords decisions, the result would clearly be an extension of the court's involvement in the process of ruling on meaning, frequently requiring survey evidence or the calling of witnesses.

37. Instead of narrowing the issues between the parties, the proposed scheme will lead to more areas for disagreement; what was the intended meaning of the publisher, whether there is a realistic distinction in the sting of different meanings sufficient to give a plaintiff a claim in respect of an unintended meaning and intended meaning. There would be increased court hearings about whether a particular meaning was intended by a publisher or not. There would also be extensive disputes and litigation about whether a publication has been sufficiently prompt and prominent. The court will be drawn into decision making in an area the courts have made clear is the preserve of editors, nor the courts.[20]

38. The proposed scheme also would be highly impractical and would lead to newspapers and news bulletins being filled with articles and packages correcting or apologising for meanings which were not intended and which only a minimal number of people might

[19] John v Guardian News and Media Ltd [2008] EWHC 3066 (QB) per Tugendhat J at [17]: "There is a real risk of a violation of Art 10 if a claimant strains to attribute to words complained of a high factual meaning, which cannot be defended as true".
[20] Jersild v Denmark (1994) 19 EHRR 1, O'Rawe v William Trimble Ltd [2010] NIQB 135 per Gillen J, re Guardian News and Media [2010] UKSC 1; [2010] 2 AC 697 per Lord Hope.

have understood, for fear of otherwise being liable in damages to the tune of tens of thousands of pounds. It would make the presentation of journalistic material practically impossible and severely and improperly impact on the editorial journalistic function.

39. Moreover, the speed with which the Consultation Paper suggests any apology or correction must be forthcoming to benefit from the bar on libel claims demonstrates a lack of appreciation for the inevitable complexity of libel disputes and the time which it is often takes to properly and thoroughly investigate complaints. Even large and well-resourced media organisations may require a significant period of time to consider properly and respond to complaints. The proposed scheme therefore would require publishers to significantly increase their reliance on lawyers given the draconian consequences which could follow from failing to apologise promptly.

40. Indeed, it is precisely the draconian consequences which would follow a complaint which would ultimately have a real chilling effect on freedom of expression, forcing publishers to apologise and publish corrections in situations where previously no apology or correction would be necessary or indeed appropriate. In that regard, the proposed scheme would put the position of the plaintiff on an elevated pedestal in the balancing of rights.

41. Critically the proposed scheme fails to take account the fundamental importance to publishers, and indeed the clear public interest, in maintaining editorial integrity and supporting responsible journalism where appropriate. By simply offering publishers a ‘cheap get out’ for making prompt apologies, the scheme ignores the importance and public interest in defending claims for libel in appropriate cases. There is a fundamental public interest in publishers defending proper, responsible and accurate publications. The scheme would act as simply a further reason why publishers would be encouraged not to defend journalism but to make prompt “corrections”, however unnecessary or injurious to freedom of expression such correction or apologies would be.

42. The proposed scheme would also lead to more disputes and more court time in assessing damages. In the event that no correction was forthcoming, evidence would be needed to ascertain the proportion of an audience who had understood a publication in a particular manner and therefore to assess the corresponding quantum of damages. Disputes would arise, which would need to be determined by the courts, as to the extent to which damages could and indeed should be mitigated by facts

which could be proven true in relation to other meanings which the words bore, and indeed which had been understood in that manner. Such court assessments would clearly be necessary, as the courts have made clear that a plaintiff cannot recover damages for reputation which he does not have, and it is essential that damages are not assessed in a vacuum.[21] The reliance on substantial pleadings in mitigation of damages would increase very significantly.

43. For these reasons, the MLA believes that the proposed scheme at section 5 of the Consultation Paper would have severe and highly detrimental consequences for publishers in Northern Ireland and throughout the United Kingdom. The scheme is impractical, unworkable and is likely not to comply with Article 10 ECHR. It would make Northern Ireland a magnet for libel claims not only within the United Kingdom but around the English speaking world. The MLA strongly advocates that the proposal is rejected.

Q5. Are there any other desirable reforms of defamation law in Northern Ireland?

44. There are two areas where the MLA advocates further reform, possibly in the form of a Defamation Practice Direction.

    a. A Practice Direction which emphasises the importance of proper compliance with the Pre-Action Protocol for Defamation and which has actual cost consequences if not followed by plaintiffs and defendants. In the MLA's experience, there is far less observance of the requirements of the Pre-Action Protocol in Northern Ireland than there is in England and Wales. Letters of complaint do not identify adequately identify the precise words which are complained of, and publishers are frequently not given sufficient information to assess the merits of the complaint. This undermines the importance of the Protocol and means it does not achieve its intended results. Providing costs consequences for failure to comply with the Protocol would give this real bite and allow for disputes to be resolved properly and proportionately and potentially without the need for court action. At the moment, initial letters of complaint are often intended as little more than a notice of legal action by solicitors in Northern Ireland, rather than a proper explanation of their client's complaint.

[21] See *M'Pherson v Daniels* (1829) 10 B & C 263 at 272; Turner v News Group Newspapers Ltd [2006] EWCA Civ 540; [2006] 1 W.L.R. 3469.

b. The MLA believes that a Practice Direction should encourage preliminary hearings in libel claims to determine key issues such as meaning and issues relating to fact or comment. Although some notable judges have proactively encouraged such an approach in Northern Ireland, this has not always been the case, and indeed the Northern Ireland Court of Appeal has discouraged hearings of preliminary issues, for example *Ryder v Northern Ireland Policing Board* [2007] NICA 43 and *Faulkner and others v BT (Northern Ireland) and others* [2008] NICA 39. For the reasons addressed elsewhere in this response, the early determination of meaning by preliminary issue has real and significant benefits for plaintiffs and defendants alike in the resolution of libel claims. In combination with the reversal of the presumption in favour of jury trials, this would have a profound and really beneficial impact on the management of defamation claims in Northern Ireland.

Q6. 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?

45. Yes. Although s.2 of the Act is ostensibly a codification of the common law's defence of justification, it would be beneficial nevertheless to implement this centrally important defence in the Act in Northern Ireland. This will avoid any arguments about a divergence of approach between England and Wales and Northern Ireland as the courts develop the defence of truth. It will achieve important consistency between the jurisdictions which is mutually beneficial for both systems of common law and will encourage publishers to publish in Northern Ireland.

Q7. 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 in Northern Irish law? Would it instead be preferable with the common law approach as restated in *Spiller v Joseph?*

46. Yes. Section 3 of the Act reforms the common law's defence of honest comment which is of critical importance for all types of publishers and clarifies and enhances this complex area of law in important ways. The Consultation Paper correctly recognises this defence as a "mainstream of the law of defamation" which is afforded strong

protection under Article 10 ECHR. The reforms to this complex area of law in s.3 make its prompt extension to Northern Ireland all the more essential.

47. The MLA agrees with paragraphs 3.34 and 3.37 of the Consultation Paper that there is a temporal lacuna at s.3(4)(b) of the Act which as drafted requires that an opinion be based on a privileged statement which occurred *before* the opinion was published and that this could lead to unjust results in respect of simultaneous publications. However the MLA does not believe that a statutory amendment to address this only in Northern Irish law is necessary.

48. However, the MLA does not agree with the Consultation Paper that it is not clear that the defence in s.3 of the Act extends to inferences of fact. It believes this is tolerably clear from the Act and the Explanatory Notes; indeed this has been recognised as such by leading practitioners.[22] No further amplification or amendment is necessary. Indeed, in light of the accepted complexity of this area of the common law, it is particularly important that Northern Ireland adopts s.3 of the Act to ensure that there is no divergence of liability for publishers between jurisdictions. Such divergence would be particularly inimical to the important Article 10 ECHR values protected by this defence.

Q8. Should it be confirmed that the defence of honest comment/honest opinion extends to encompass inferences of verifiable fact from underpinning facts?

49. No. This is not necessary and s.3 of Act should be extended to Northern Ireland as it stands. Section 3 clearly does encompass inferences of verifiable fact from underpinning facts. In this complex area of law, divergence from the provisions of the Act should be avoided and indeed would be unhelpful.

Q9. 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."?

50. No. Section 3 strikes a reasonable balance between competing rights and that balance might be disturbed by this proposed change. The MLA also believes, in accordance with its approach to the Consultation Paper generally, that consistency of approach in

[22] See paragraph 13.12 of *Duncan and Neill, 4th Edition, 2015, London.*

this complex area of law between jurisdictions is essential to avoid introducing additional complexity and lack of clarity.

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?

51. No. Although such an amendment would ostensibly favour freedom of expression, the MLA believes, in accordance with its overall approach to the Consultation Paper, that consistency of approach in the law of England and Wales and Northern Ireland is preferable. Although there is a temporal lacuna at s.3(4)(b) of the Act which could lead to unjust results in respect of simultaneous publications, the MLA does not believe that a statutory amendment to address this only in Northern Irish law is necessary. Consistency of approach in this complex area of law between jurisdictions is essential to avoid introducing further complexity and lack of clarity.

Q.11. If it is desirable for a rule equivalent to section 3 of the 2013 Act to be introduced into Northern Ireland 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 he or she reasonably believed to be true at the time the statement complained of was published?

52. No. Although such an amendment would ostensibly favour freedom of expression, the MLA believes, in accordance with its approach to the Consultation Paper generally, that consistency of approach in the law of England and Wales and Northern Ireland is preferable. Such an amendment to the common law or the Act would significantly favour freedom of expression over the right to reputation and would undermine the repetition rule which is an important bulwark of the right to freedom of expression. Consistency of approach in this complex area of law between jurisdictions is essential to avoid introducing further complexity, lack of clarity and further uncertainty.

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*?

53. Yes. It is essential that this defence which protects the publication of matters on a public interest is promptly extended to Northern Ireland. Although it is a defence which is open to any publisher, in practice it is likely to be the media for whom the defence is particularly important and for whom the scope of editorial deference set out in s.4(4) of the Act is particularly important. Northern Ireland has a particularly vibrant history and tradition of investigative journalism on matters of public interest and it is essential that this should continue to be encouraged by the implementation of this section of the Act in Northern Ireland. The MLA agrees with the Consultation Paper that this section emphasises the importance of public-spirited journalism in a democratic society.

54. The MLA does not however agree that the implementation of this section would be simply symbolic. Although this section purports to simply codify the common law position in *Jameel* and *Flood*, the Consultation Paper correctly identifies the nuanced differences in language in the wording of the section. It is therefore essential that this section is extended to Northern Ireland so that the development and interpretation of this section by the courts is consistent between Northern Ireland and England and Wales. Moreover, and as the Consultation Paper recognises, s.4(5) extends the law so that the new statutory defences applies to both statements of opinion and fact. Consistency of approach between England and Wales and Northern Ireland is therefore all the more important for a defence which is designed to protect and promote publications on a matter of public interest. If it is not adopted, there is a risk that Northern Ireland will be seen as a jurisdiction which disincentivises and discourages the publication of matters of public interest.

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?

55. No. The MLA does not agree with the Consultation Paper's criticisms of incorporating expressions of comment or opinion within the s.4 defence. The importance of s.4(5) is that it helpfully avoids technical discussions about whether statements are opinion or fact but concentrates on the circumstances of publication and the nature of the publication itself. The use of vituperative comment and its impact upon 'tone' would of course still be an important factor in determining the overall responsibility and reasonableness of the publication which is the correct focus of this defence. Section 4(5) does not change this, The MLA believe it is essential for consistency and to avoid

unhelpful distinctions emerging between the law of England and Wales and Northern Ireland that s.4 is adopted wholesale in Northern Ireland.

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?

56. Yes. This section has already been adopted in the rest of the United Kingdom and if not extended to Northern Ireland, this clearly risks publishers deciding not to publish journals examining important scientific and academic issues in Northern Ireland. This would be severely detrimental to Northern Ireland's economic and social development and undermine Northern Ireland's rich scientific and academic heritage. This the starkest example of the many risks which may result if Northern Ireland does not adopt the Defamation Act 2013 and follows divergent legal principles from England and Wales.

57. The MLA also believes the concerns raised about this section in the Consultation Paper are misplaced; the language of the section does not require statutory definition. It is tolerably clear what the section is aimed at and is intended to achieve and the courts will interpret the language consistently with this. Further, the fact that the defence is capable of being defeated only by malice emphasises the importance of this defence, which is as much to address the chilling effect on academic and scientific debate through the threat of libel actions as to ultimately provide a defence to libel claims at trial. This is critically important, even if other substantive defences of honest opinion or truth were available. That is the very purpose of qualified privilege in defamation law; to draw a line of public policy to protect freedom of expression in circumstances where it is generally accepted that the public interest in freedom of expression outweighs the right to reputation. If the occasion of publication is misused, the defence will not survive.

58. Ultimately it would be severely deleterious for academic and scientific debate and development in Northern Ireland if it was the only jurisdiction within the United Kingdom which did not have the protection of these privileges. As the Consultation Paper correctly recognises, the privilege is not a panacea to the problems of libel law, but it is nevertheless a positive step which should be promptly adopted.

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?

59. Yes. If this section is not extended to Northern Ireland, there is a risk that the benefit of this privilege which applies in England, Wales and Scotland will be lost for national publishers, who cannot risk publishing privileged material where that privilege does not extend to Northern Ireland. Northern Ireland would therefore become the "lowest common denominator" for the United Kingdom. Consequently, and in respect of both local and national publications, discussions and publications on matters of public interest which are protected by these privileges will not be available to residents of Northern Ireland. This is precisely what these updating provisions to the law of qualified privilege are intended to ensure and protect against. There is no good reason why these important provisions should not be extended to Northern Ireland. They represent prudent and careful extensions of privilege to publications which the media and others have a duty to disseminate in the 21st century for the benefit of all of Northern Ireland.

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?

60. Yes; the MLA believes that it would be desirable for s.5 of the Act to be introduced in Northern Ireland. As the Consultation Paper recognises this is an important development of the common law position for secondary publishers and updates the law for the 21st century.

61. This update to the law of defamation is consistent with the public policy principles in the E-Commerce Directive (2000/EC/31) and emphasises that it is not for website hosts to police content on the internet. This section properly places responsibility for publication and liability for that publication on the originator of the allegations. This encourages personal responsibility for actions taken by a defendant. The policy behind the section encourages website operators to disclose the identity of posters. This is also to be encouraged, as it is as against the original poster that a plaintiff may properly seek, and if appropriate obtain, injunctive relief and vindication through an award of damages.

62. The MLA believes that this section is an important and proper development of the law. If online publishers wish to rely on this defence, it requires them to provide information to a complainant which will assist in the identification of the originating poster, so that those who are directly responsible for originating and publishing defamatory allegations can be pursued through the courts. It would also be a real concern if Northern Ireland became a destination for libel claims against online publishers, who would have a complete defence under the Act in England and Wales. This would undermine attempts in Northern Ireland to encourage the development of internet companies as a tool of economic growth. In this regard, it is very significant that online publishers are most susceptible to libel tourism on the established common law basis that a fresh actionable publication occurs online every time an internet publication is read and accessed around the world.[23]

63. The MLA does not believe that it would be appropriate or practical to require website operators to include a notice of complaint alongside statements of which complaint has been made. As the consultation process for the passage of the Act in Westminster recognised, this would be cumbersome and technically difficult. Moreover, it undermines the important public policy behind this section that it should not be for website operators to police or censor the internet in respect of third party content. The proper forum for that determination is a court of law, which can order both the removal of the offending statements under s.13 of the Act and the publication of a summary of its decision under s.12 of the Act. The MLA believes that these mechanisms are the best and most appropriate mechanisms for protection of reputation. They avoid website publishers being required to act as a noticeboard for undetermined threats of litigation. Such a mechanism would also encourage individuals to threaten litigation, requiring a website operator to post such a notice, irrespective of the merit of the complaint. The online publisher may of course not be in a position to determine the merit of the complaint. The MLA believes that the prompt implementation of s.5 of the Act in Northern Ireland is a proper and necessary step to update the allocation of responsibility for libel claims in the internet era.

[23] Berezovsky v Michaels [2000] 1 WLR 1004

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?

64. Yes. The same policy principles which apply to s.5 of the Act apply here to this section also. This provision encourages a plaintiff to take action against the original publisher of information, rather than secondary publishers. This is a proper allocation of liability and encourages personal responsibility for publishing information rather than hiding behind others. It is also the most appropriate route for securing proper injunctive relief and vindicatory damages. In the event that it is not reasonably practicable to bring an action against the original publisher, the section preserves the right to a remedy against secondary publishers. The MLA believes that the prompt implementation of s.10 in Northern Ireland is a proper and necessary step to update the allocation of responsibility for libel claims.

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?

65. Yes. The existing law in this area is otiose and a relic of history. The law as it stands is not compatible with equality principles. There is no valid reason why the law should not be updated to reflect 21st century mores.

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?

66. Yes. The MLA believes that the reversal of the presumption in favour of the jury trial is central to libel reform and should be introduced as part of the extension of the Act to Northern Ireland. The presumptive right under s.62 of the Judicature (Northern Ireland) Act 1978 for a trial by jury represents one of the most significant obstacles to the prompt and efficient resolution of libel claims in Northern Ireland and which ultimately serves either to delay the rightful vindication of a plaintiff's reputation or unnecessarily chills freedom of expression. It prolongs defamation claims and ensure they take a disproportionate amount of court time and resources

67. Although the presumption in favour of a jury still existed England and Wales prior to the implementation of the Act, the common law had developed to make jury trials the exception rather than the rule. Northern Ireland is now the only jurisdiction in the United Kingdom which has a presumptive right to a jury trial which can only be displaced in very limited circumstances. As Gillen J recently recognised in **Loughran v Century Newspapers:**[24]

> *"the right to jury trial is jealously guarded by judges in Northern Ireland. While the overriding objective of Order 1 rule 1A and the dynamic of the principles in Jameel do represent a wind of change in how litigation is processed nowadays, they must not eclipse the continuing and vital role of juries in our system of justice absent circumstances where…only a perverse jury could find for the plaintiff."*

68. This approach continues to apply in Northern Ireland, even though senior judges have recognised the real difficulties which trial by jury creates for libel actions.[25] In the 21st century, there are no strong policy reasons why claims in defamation are tried by a judge sitting with a jury. All other causes of action which protect an individual's autonomy and their personal information such as negligent misstatement, malicious falsehood, misuse of private information, breach of confidence, harassment and claims under the Data Protection Act 1998 are determined by judges sitting alone. Defamation claims are therefore entirely anomalous in this regard. There is no logic in giving ordinary citizens "a voice" in defamation claims as opposed to any of these other causes of action. Nor do concerns about "unconscious predilections" of judges carry any greater weight in their fact finding role in libel cases than in any other causes of action. For example a claim in misuse of private information requires a plaintiff to establish a "reasonable expectation of privacy" in the relevant information. Judges are expert fact finding tribunals and should be empowered to carry out this role in libel claims as in any other torts. There is no reason why defamation claims should continue to be given an elevated and differentiated status.

69. Although trial by jury brings no obvious benefits, it has a number of significant drawbacks for the efficient and proportionate determination of defamation claims. As the English law common recognised in a series of judgments, the presumption of the right to trial by jury does not accord with the overriding objective, delays the prompt determination of key aspects of defamation claims, and unnecessary prolongs and exacerbates costs incurred. In this regard, the courts have recognised that the cost of

[24] [2014] NIQB 26 per Gillen J.
[25] See for example O'Rawe v William Trimble Ltd [2010] NIQB 135 at 46-50 per Gillen J.

defamation claims has spiralled disproportionately to the level of damages recoverable, which risks amounting not only to an interference with freedom of expression for defendants, but also with the rights of access to the court for plaintiffs and defendants alike. In Northern Ireland, it is not uncommon for juries in libel trials to be discharged halfway through the trial because of the difficulties in conducting such trials.[26] Further, the trial of libel actions by a jury has made the common law's development in compliance with the Human Rights Act 1998 much more difficult.[27] The lack of any reasoned judgment at the end of a trial with a jury also undermines certainty which is mutually inimical for plaintiffs and defendants.

70. The reversal of the presumption in favour of a jury trial will allow for the early determination of critical issues in a libel claim, for example a) the meaning of a publication, b) whether the words complained of constitute fact or comment, c) the viability of any defences and d) the early and preliminary trial of defences such as qualified privilege which may obviate the need for trials on alternatives defences such as justification. If there is no presumption of trial by jury, the possibility for summary determination of a libel claim under ss.8-11 of the Act becomes of practical use to plaintiffs and defendants. At the moment, these provisions are effectively redundant.

71. With a presumption in favour of a jury trial, a party can only strike-out part of their opponent's claim if it can be shown that a jury would be perverse to find for their opponent's case. An alleged meaning can only be struck out under Ord. 82 r.3A of the Rules of Court if it can be shown that a publication is incapable of bearing that meaning. Both tests are high-hurdles to overcome. If the presumption in favour of jury trial is abolished, the court can determine key issues at an early stage, either before service of a defence or as a preliminary issue. For example, the principles for determining meaning are well-known and are straightforward, and the meaning of a publication can be determined by the court immediately upon issue of the Writ and Statement of Claim and prior to the service of a defence.[28] If the court finds that a publication bears a meaning more serious than the publisher anticipated and which it can legitimately defend, it is still open to the defendant to make an offer of amend pursuant to s.2 of the Defamation Act 1996 prior to service of the defence and for a plaintiff's reputation to be promptly and publicly vindicated. If judges are given full

[26] See for example O'Rawe v William Trimble Ltd [2010] NIQB 135 at 46-50 per Gillen J.
[27] See Cook v Telegraph Media Group [2011] EWHC 763 per Tugendhat J.
[28] See for example RBOS Shareholders Action Group Ltd v News Group Newspapers [2014] EWHC 130 (QB)

control over libel proceedings from the outset, they will be fully empowered to determine these essential matters at the outset, leading to significant cost and time savings for all parties and the court system.

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 intentions of the authors of the Act? Would it instead be preferable to continue with the common law approach reflected in *Jameel v Dow Jones?*

72. Yes. The MLA believes that s.1(1) of the Act should be introduced in its current form into the law of Northern Ireland. S.1 of the Act acts as an important, counterweight to the automatic presumption of falsity and damage in the common law, albeit a change whose significance should not be overstated.

73. Section 1 of the Act develops, albeit modestly, the English common law decision in **Thornton v Telegraph Media Group Ltd** which emphasised the importance of a "threshold of seriousness" in defamation claims.[29] In the balancing of the rights to freedom of expression and the right to reputation which must underpin every defamation claim, this is an important principle which the Consultation Paper recognises. The MLA however is not however aware of any written judgment in Northern Ireland where **Thornton** has been followed. Similarly, the MLA is only aware of one case in Northern Ireland where the principles in **Jameel v Dow Jones & Co Inc.** have been followed, which was self-evidently a highly atypical case.[30] As evidence-in-chief is given orally at trial, and in light of the presumption in favour of jury trials, the common law in Northern Ireland has therefore not adopted these developments of the English law in the same substantive and proactive manner in which they have been pursued in England & Wales.

74. Section 1 of the Act therefore is an important counterweight to the common law's presumptions of falsity and damage. It focuses the parties' and the court's attention at an early stage on whether there has been or is likely to be serious harm to reputation. This is an important issue, but it reflects a continuation of the reasoning in **Jameel** and **Thornton.** In **Ames** the most recent decision on s.1 of the Act, it was recognised that

[29] [2010] EWHC 1414 (QB)
[30] Ewing v Times Newspapers Ltd

the questions to be approached in determining whether a publication is defamatory under s.1 are the very same issues which arise under the principles identified by the common law in **Jameel**.[31] The principles in s.1 accord with Article 10 ECHR. If a reputation has not been seriously damaged or is not likely to be seriously damaged, is there a press social need to restrict freedom of expression in accordance with Article 10(2) ECHR by permitting a libel plaintiff to bring a claim and then possibly recover damages?

75. The main stated objection to s.1 in the Consultation Paper is that it would increase costs to litigants of presenting evidence of harm. However, as both decisions in England & Wales on the interpretation of s.1 of the Act demonstrate, s.1 does not require a plaintiff to prove by way of evidence that his or her reputation has been seriously damaged; in many cases it will be entirely apparent from the facts of publication. Contrary to the suggestion at paragraph 4.24 of the Consultation Paper, the courts have recognised that it is impractical and inappropriate to seek out witness evidence of damage; all that s.1 requires is that the court should be "wary" of attempts to rely on a presumption that a particular publication has caused serious harm to a plaintiff's reputation.[32] This approach simply crystallises the court's assessment of damage to reputation in a flexible context. This is of benefit to all parties to litigation and to the court. There can be no good reason in policy or in law why a libel claim should be permitted to proceed to trial with all the attendant costs and incursion of resources, if there is no realistic prospect of establishing serious damage to reputation. Of course, a claim will only be dismissed before trial for failing to meet the s.1 criteria if the threshold criteria for strike-out are met; perversity in cases where there is a presumption of trial by jury, or no realistic prospect of success under s.8 of the Defamation Act 1996 where trial is to be by judge alone.

76. Therefore, as the recent decision in **Ames** makes clear, s.1 does not require empirical evidence of harm in all the circumstances, as paragraph 4.24 of the Consultation Paper suggests. The MLA also has significant concerns that if s.1 is not implemented in Northern Ireland it will increasingly be seen as an attractive destination for libel plaintiffs pursuing claims against British publishers. Claims can be pursued in Belfast against British publishers domiciled in England, Wales or Scotland in respect of publications throughout the United Kingdom, Wales or Scotland.[33] If section 1 is not

[31] Ames v Spamhaus Project Ltd [2015] EWHC 127.
[32] Ames v Spamhaus Project Ltd [2015] EWHC 127 (QB) per Warby J at [55].
[33] Shevill v Press Alliance SA [1995] 2 AC 18.

implemented in Northern Ireland, it will inevitably have a chilling effect on publishers' willingness to publish in Northern Ireland. Maintaining a parity of approach between jurisdictions is critical to ensure that a publication which may be perfectly lawful in England and Wales is not subject to expensive litigation in Northern Ireland. Such a position would be highly detrimental to freedom of expression in Northern Ireland and would inevitably lead to publishers preventing information from being available within the jurisdiction.

77. The MLA strongly supports its prompt introduction in Northern Ireland which it believes is particularly imperative to ensure that the existing disparity in the number of libel claims between England and Wales does not grow further.

Q.21 If the 2013 Act is not adopted in its entirety, and irrespective of whether the standard of "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?

78. Yes. The MLA believes that s.1(2) of the Act should be introduced in its current form into the law of Northern Ireland. Section 1(2) of the Act is another positive policy development which is consistent with the law of defamation balancing the right to reputation against the right to freedom of expression. This is not unique to England and is a development which has taken place in other common law jurisdictions, for example Australia, as recognised by the Consultation Paper. Corporations should not be allowed to use their significant financial clout to restrict freedom of expression unless they can show it has caused serious financial loss.

79. Section 1(2) is a significant development of the common law. It is an evolution of the common law position that corporations only have very limited rights under Article 8 ECHR and cannot recover aggravated damages or damages for injury to feelings.[34] The requirement to prove serious financial loss or a likelihood of serious financial loss is substantially akin to the requirements to prove special damages in claims for malicious falsehood, or indeed when establishing loss in other torts. The MLA believes that this s.1(2) is an important evolution which should be implemented in Northern

[34] Hays Plc v Hartley [2010] EWHC 1068 (QB) at [25].

Ireland promptly. As with other areas of the Act which evolve the common law position, Northern Ireland risks seriously chilling freedom of expression within the jurisdiction if publications which would not be actionable within England and Wales can be brought in Belfast.

80. Although the Australian model discussed in the Consultation Paper encompasses similar policy principles to that which underpin s.1(2) of the Act, the MLA believe that there is no benefit to the Australian model which limits claims by corporations at the number of employees. Such a test will lead to ancillary arguments about the extent to which individuals are employees, as opposed to contractors or freelancers. This is particularly important in Northern Ireland where companies often employ a large number of agency workers or employees on zero-hours contracts. The test also focuses on the size of the company rather than the actual damage which a publication has caused. Such an approach is arbitrary and does not accord with the policy behind these provisions which should be to focus on the extent of damage caused by a publication. Section 1(2) provides a clear focus on the extent of damage which has been caused to a company. It is to be preferred to the Australian model as a matter of principle and also to achieve consistency.

Q.22. If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to s.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?

81. Yes. Section 8 of the Act should be introduced into Northern Ireland with prompt effect. In doing so, Northern Ireland would bring itself into line with the approach of both England and Wales and the Republic of Ireland which have reformed the common law to introduce single publication rules in recent years.[35]

82. Section 8 of the Act also corrects significant anomalies in the law of defamation in the internet age. In Northern Ireland, like England and Wales, claims for libel have a strict limitation period of one year. The public policy behind this limitation period is the importance of promptly pursuing vindication of reputation and to avoid the chilling effect on freedom of expression which lengthier limitation periods can create. In the internet era, the 'multiple publication rule' effectively creates indefinite liability for

[35] S.11 of the Defamation Act 2009.

publishers and undermines the effect of article 6(2) of the Limitation (Northern Ireland) Order 1989 (as amended). The public policy imperative which requires plaintiffs to bring libel claims promptly in order to vindicate their reputation has been emphasised on numerous occasions by the courts.[36]

83. The policy behind the one year limitation period for defamation claims therefore does not run counter to the with plaintiff's interests in their prompt vindication. Section 8 of the Act, properly preserves the court's flexibility to override the limitation period where it would be just and equitable to do so.[37] However, it is difficult to envisage any situation where significant damage was caused to reputation by repeated or continuing publications and where it would be in a plaintiff's interests not to bring prompt action for vindication and injunctive relief by way of a claim for libel. Indeed, as the courts have emphasised, promptly seeking vindication is the hallmark of a genuine libel claim. Section 8 therefore brings defamation law into the 21st century. It reinforces the public policy imperative of bringing prompt action which is beneficial for plaintiffs and defendants alike. If this section is not implemented in Northern Ireland, it would make the jurisdiction susceptible to claims which would otherwise fail in England and Wales and the Republic of Ireland. There would be no good reason for such a manifest disparity.

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.

84. Yes. This is an important reform, particularly in the context of Northern Ireland, which as the Consultation Paper acknowledges, does have some history as a jurisdiction of choice for plaintiffs, including individuals whose primary association is not with Northern Ireland. The Consultation Paper recognises that the fear of libel actions may exceed their number in court, but it is the fear of such claims which ultimately has a significant chilling effect on freedom of expression and which may result in citizens of Northern Ireland not being able to access information on matters of public importance which is widely and properly available in other European and international jurisdictions. The MLA believes that this is a small but significant reform which would bring Northern Ireland into line with England and Wales. The MLA does not believe there are any

[36] See Bewry v Reed Elsevier Ltd [2014] EWCA Civ 1411 for a recent recitation of these longstanding principles.
[37] Article 51 of the Limitation (Northern Ireland) Order 1989.

good policy reasons why claims which were barred in England and Wales by virtue of this rule should be able to be brought in Belfast. The Consultation Paper does not establish any basis for suggesting that there is a good reason why such claims should be permitted when Northern Ireland is not clearly the most appropriate jurisdiction for that claim to be tried. There is a real danger that if this rule is not implemented in Northern Ireland, this will accentuate any differences of approach between the jurisdictions and make Northern Ireland even more attractive to foreign plaintiffs suing foreign defendants in Belfast. It is the threat of such actions which is ultimately so injurious to freedom of expression.

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 section 12 and 13 of the Act to be introduced into Northern Irish law?

85. Yes. The MLA believe that consistency of approach between London and Belfast is important so that neither jurisdiction comes to be regarded, or actually is, unduly favourable to plaintiffs or defendants. The MLA believes that section 12 and section 13 of the Act should be introduced as part of the overall extension of the entire Act to Northern Ireland.

Q.25. Would it be desirable for any other "discursive remedies" to be introduced into Northern Irish law?

86. No. The law retains sufficient flexibility within its current powers to afford plaintiffs appropriate remedies. Sections 2-4 of the Defamation Act 1996 provide an important remedy which enables a plaintiff to achieve prompt vindication where a defendant makes an offer of amends. Section 9 of the Defamation Act 1996 also provides the court with the power to grant a declaration of falsity or require a defendant to publish a suitable correction and apology. This is supplemented by the remedies available in the Defamation Act 2013, and the court's inherent powers to grant appropriate injunctions under s.91 of the Judicature (Northern Ireland) Act 1978. Further discursive remedies are therefore unnecessary.

20 February 2015

ANNEX 1

List of MLA members as at 20 February 2015

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1. **Anova Books Group Limited**, publisher of books and related publishing services specialising in non-fiction subject matter.

2. **Associated Newspapers Limited,** publisher of the Daily Mail, the Mail on Sunday, Metro and related websites.

3. **The British Broadcasting Corporation,** a public service publisher of 8 UK-wide television channels, interactive services, 9 UK-wide radio/audio stations, national and local radio/audio services, bbc.co.uk and the BBC World Service.

4. **British Sky Broadcasting Limited,** a programme maker and broadcaster, responsible for numerous television channels, including Sky News and Sky One.

5. **Channel Four Television Corporation,** public service broadcaster of Channel 4 and three other digital channels, plus new media/interactive services, including websites, video on demand and podcasts.

6. **CNBC (UK) Ltd,** business and financial news broadcaster which also operates a portfolio of digital products delivering real-time financial market news and information.

7. **The Economist Newspaper Limited,** publisher of the Economist magazine and related services.

8. **Express Newspapers,** publisher of the Daily Express, the Sunday Express, the Daily Star, the Daily Star Sunday and related websites.

9. **The Financial Times Limited,** publisher of the Financial Times newspaper, FT.com and a number of business magazines and websites, including Investors Chronicle, Investment Adviser, The Banker and Money Management.

10. **Guardian News & Media Limited,** publisher of the Guardian, the Observer and Guardian Unlimited website.

11. **Independent Print Limited,** publisher of the Independent, the Independent on Sunday, the Evening Standard, i and related websites.

12. **Independent Television News Limited (ITN),** producer of ITV News, Channel 4 News, Channel 5 News, internet sites and mobile phones.

13. **ITV PLC,** a programme maker and a public service broadcaster of the channels ITV1 (in England and Wales), ITV2, ITV3, ITV4 and CITV, interactive services and related websites.

14. **Hearst Magazines UK,** publisher of consumer magazines including Cosmopolitan, Good Housekeeping, Harper's Bazaar and Reveal.

15. **News Group Newspapers Limited,** publisher of The Sun and related magazines and websites, and part of NI Group Limited.

16. **The News Media Association**, which represents the publishers of over 1200 regional and local newspapers, 1500 websites, 600 ultra-local and niche titles, together with 43 radio stations and 2 TV channels .

17. **PPA (The Professional Publishers Association),** which is the trade body for the UK magazine and business media industry. Its 250 members operate in print, online, and face to face, producing more than 2,500 titles and their related brands.

18. **The Press Association,** the national news agency for the UK and the Republic of Ireland.

19. **Telegraph Media Group Limited,** publisher of the Daily Telegraph, Sunday Telegraph and related websites.

20. **Thomson Reuters PLC,** international news agency and information provider.

21. **Times Newspapers Limited,** publisher of The Times and The Sunday Times and related websites, and part of NI Group Limited.

22. **Trinity Mirror PLC (including MGN Limited),** publisher of over 140 local and regional newspapers, 5 national newspapers including the Daily Mirror, Sunday Mirror and The People and over 400 websites.

23. **Which?,** the largest independent consumer body in the UK and publisher of the Which? series of magazines and related websites.

From: Zoe Norden
Sent: 20 February 2015 15:52
To: info nilawcommission
Subject: RESPONSE TO CONSULTATION PAPER - DEFAMATION LAW IN NORTHERN IRELAND

Dear Sirs

GNM supports the the Media Lawyers Association response, as attached to this email and the enactment of the Defamation Act 2013 in Northern Ireland as soon as possible. It makes no sense for Northern Ireland to operate a system that is at odds to that in England and Wales.
Yours faithfully

Zoe Norden
Guardian News and Media

Response of the BBC to the Northern Ireland Law Commission consultation: Defamation Law in Northern Ireland

The BBC has contributed to the detailed submission made by the Media Lawyers Association which it fully endorses.

In very brief summary, the BBC strongly supports the prompt adoption of the Defamation Act 2013 in its entirety in Northern Ireland. The provisions of the Act overall promote the responsible exercise of freedom of expression and reflect modern media and means of communication and we believe they would bring social, cultural and economic benefits. At present, the Northern Irish courts deal with a disproportionate number of defamation cases which, to a degree, may be reflective of a strong and robust local media but which we believe is also due to differences in the legal and procedural frameworks between Northern Ireland and England and Wales. If Northern Ireland does not adopt the Act, it risks further becoming an outlier within the United Kingdom (and a tactical jurisdiction of choice) which will have a harmful impact on freedom of expression.

Q1. Should the Defamation Act 2013 be extended in its application, in full to the Northern Irish jurisdiction?

Yes, the BBC supports the prompt implementation of the Defamation Act 2013 in Northern Ireland in full.

Q2. 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?

There are a number of provisions in the Act of particular significance (for example Section 1 and Section 5) but we strongly support the introduction of the Act in full as it represents a cohesive and balanced package of reform.

Q3. 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?

No, we believe that the benefit of having clarity and consistency between jurisdictions outweighs any benefit that may flow from adopting revised provisions.

Q4. 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?

No, for the reasons outlined in detail in the Media Lawyers Association's submission, we believe such a reform would seriously undermine freedom of expression and would have serious practical difficulties

Q5. Are there any other desirable reforms of defamation law in Northern Ireland?

The BBC believes that procedural reforms aimed at ensuring the compliance with Court rules and at encouraging the early determination of issues would help ensure that disputes are resolved without excessive delay and at proportionate cost.

Q6. 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?

Yes

Q7. 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 in Northern Irish law? Would it instead be preferable with the common law approach as restated in *Spiller v Joseph?*

Yes

Q8. Should it be confirmed that the defence of honest comment/honest opinion extends to encompass inferences of verifiable fact from underpinning facts?

No, this is a complex area and divergence from the provisions of the Act should be avoided.

Q9. 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."?

No, this is a complex area and divergence from the provisions of the Act should be avoided.

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?

No. On balance, divergence from the provisions of the Act should be avoided

Q.11. If it is desirable for a rule equivalent to section 3 of the 2013 Act to be introduced into Northern Ireland 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 he or she reasonably believed to be true at the time the statement complained of was published?

No. On balance, divergence from the provisions of the Act should be avoided

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*?

Yes

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?

Yes

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?

Yes

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?

Yes

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?

Yes

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?

Yes

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?

Yes

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?.

Yes

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 intentions of the authors of the Act? Would it instead be preferable to continue with the common law approach reflected in *Jameel v Dow Jones?*

Yes

Q.21 If the 2013 Act is not adopted in its entirety, and irrespective of whether the standard of "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?

Yes

Q.22. If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to s.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?

Yes

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.

Yes

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 section 12 and 13 of the Act to be introduced into Northern Irish law?

Yes

Q.25. Would it be desirable for any other "discursive remedies" to be introduced into Northern Irish law?

No. The law retains sufficient flexibility within its current powers to afford plaintiffs appropriate remedies.

20 February 2015

From: Hamish Thomson
Sent: 20 February 2015 17:32
To: info nilawcommission
Cc: Harry Kinmonth; JOHN.BATTLE; Prash Naik; Helen Jay
Subject: Northern Ireland Libel Reform

TO WHOM IT MAY CONCERN

Please find attached the substantive submission of the Media Lawyers Association to the Consultation Paper – Defamation Law in Northern Ireland.

I can confirm that Channel 4 TV, as a member of the MLA, formally supports this submission.
Yours faithfully,

Hamish Thomson
Channel 4 Television
London

TIMES NEWSPAPERS LIMITED

10th Floor, 1 London Bridge Street, London SE1 9GF.
Telephone: 020 7782 5970/5941 Facsimile: 020 7782 5860

From the Legal Department ***Our Ref.:*** TNL/MLA/15/BMJ

Date: 20th February 2015 ***Your Ref.:***

Northern Ireland Law Commission,
Linum Chambers,
2 Bedford Square,
Bedford Street,
Belfast, BT2 7ES.

BY EMAIL: *info@nilawcommission.gov.uk*

Dear Sirs,

Times Newspapers Limited's Response to the Consultation Paper: Defamation Law in Northern Ireland (the "Consultation")

Times Newspapers Limited (TNL) confirms its agreement with the Media Lawyers Association's response to the Consultation (copy enclosed) and TNL endorses its content.

TNL requests that the MLA response be treated as its response to the Consultation.

Yours faithfully,

Bríd Jordan
Senior Editorial Lawyer
Times Newspapers Limited

MLA

MEDIA LAWYERS ASSOCIATION

Response to Consultation Paper: Defamation Law in Northern Ireland

This is a response to the Northern Ireland Law Commission's consultation on Defamation Law in Northern Ireland (the "Consultation Paper"). It is submitted on behalf of the Media Lawyers Association (the "MLA") which is an association of in-house media lawyers from many of Northern Ireland and the United Kingdom's leading newspapers, magazines, book publishers, broadcasters and news agencies. MLA Members account for the overwhelming majority of newspapers and broadcasters in Northern Ireland. The MLA includes the News Media Association, whose own members include publishers of daily and weekly newspaper titles in Northern Ireland including the Belfast Telegraph, the Belfast News Letter, Irish News, and Sunday Life. Other MLA members include the BBC which broadcasts local and national channels in Northern Ireland together with the leading national UK newspapers and broadcasters. A full list of the MLA's members is set out in Annex 1 to this response.

Summary of MLA's Response

1. In response to the Consultation Paper, the MLA's position is that:

- The MLA strongly supports and encourages the prompt adoption of the Defamation Act 2013 (the "Act") in its entirety in Northern Ireland. It believes that this is essential not only for the substantive benefits to the law of defamation which the Act includes, but also to ensure consistency of approach for liability for defamation between Northern Ireland and England and Wales.

- The MLA opposes a piecemeal or varied adoption of the Act in Northern Ireland. It believes that consistency of approach between jurisdictions is of paramount importance, and that none of the lacunae identified by the Consultation Paper are sufficiently injurious to either freedom of expression or the right to reputation to warrant Northern Ireland taking its own distinctive approach. There are no other

torts where Northern Ireland has allowed for marked differences with the English common law in terms of interpretation or application. There is no good policy reason why the law of defamation should have special consideration, in particular where the trans-jurisdictional nature of publishing has a particular facility for creating actionable torts in multiple jurisdictions simultaneously.

- If, contrary to its primary position, it is proposed that Northern Ireland adopts parts of the Act in a piecemeal or varied manner, the MLA emphasises the particular importance of adopting sections 1, 3, 4, 7, 8 and 11 of the Act in Northern Ireland.

- The MLA strongly opposes the proposed alternative scheme suggested in Section 5 of the Consultation Paper which would be highly damaging to the proper and necessary exercise of freedom of expression by all members of society within Northern Ireland and which, if implemented, may well be incompatible with Article 10 ECHR. The scheme is impractical and would have real and harmful consequences for the media and publishers generally in Northern Ireland and in the United Kingdom.

Responses to Specific Questions in Consultation Paper

Q1. Should the Defamation Act 2013 be extended in its application, in full to the Northern Irish jurisdiction?

2. Yes. The MLA considers that this is the most important part of the Consultation Paper.

3. Although the Act may be susceptible to criticism as a piece of legislation from both the perspective of a plaintiff and a defendant, when taken as a whole, the Act strikes a strong and cohesive balance between the right to reputation and the right to freedom of expression which properly reflects the media and communications of the 21st century. The Act represents the product of a considered and extensive consultation and debate between interested parties over a period of several years.

4. The MLA believes that that the prompt and wholesale adoption of the Act in Northern Ireland is essential for the development of the legal framework in this area of law within Northern Ireland. Its adoption will not only promote the responsible exercise of freedom of expression, but also lead to the earlier determination of defamation claims, while also providing greater certainty in the long term which will benefit both plaintiffs

and defendants. If Northern Ireland does not, for the first time in recent history, adopt a substantially similar legal framework to that which exists in England and Wales, the MLA believes that this will have a detrimental impact upon freedom of expression and the freedom of the media in Northern Ireland.

5. The Consultation Paper acknowledges that prior to the passing of the Defamation Act 2013 at Westminster, Northern Ireland already had more than five times as many libel claims per capita of population compared to England and Wales. Such a disparity existed in 2012 even though the number of libel cases had apparently been declining in Northern Ireland. This disparity is alarming but reflects the experience of members of the MLA; there are a disproportionate number of libel claims in Northern Ireland and that they can be disproportionately difficult to bring to swift determination, particularly when compared to similar claims brought in England and Wales. This is a matter of significant concern, because as the courts have recognised, the very fact of being sued for libel can amount to a serious interference with freedom of expression.[1] The chilling effect of libel actions, even if apprehended rather than actual, is well documented and undermines the right to freedom of expression which exists for the benefit of society as a whole. It is a collective right, as well as a right exercised by individuals.

6. The MLA believes that the clear disparity in the number of libel claims in Northern Ireland and England and Wales is due in significant part to a number of important but subtle differences in the procedural and legal frameworks between the jurisdictions which combine to substantively prolong libel actions in Northern Ireland, deter their prompt and proportionate resolution and unnecessarily extend the costs involved. Although these matters are equally inimical to plaintiffs and defendants, plaintiffs can rely on the common law's presumption of falsity and presumption of damage to establish a prima facie claim (in contrast to most other torts) which can prove extremely difficult to strike out before trial because of the presumptive right to jury trial. This framework operates in favour of plaintiffs, who often have little incentive to settle claims before trial. Consequently, defendants often chose to settle libel claims irrespective of the merits because settlement can still result in a better financial result than following taxation after a successful trial and also because of the inevitable uncertainty which results from a determination of libel trials by jury.

[1] See Lonzim v Sprague [2009] EWHC 2838 (QB) per Tugendhat J and Zinda v Ark (Academies) Schools [2011] EWHC 3394 (QB) per Eady J.

7. The MLA believes that the implementation of the Act will therefore be an important step in remedying this disparity. It will be a significant move towards ensuring the prompt and expeditious resolution of defamation claims, thereby minimising the resources of both sides and the amount of time such claims take up in the court system. Ultimately, that is in the interests of both plaintiffs who have suffered unmerited attacks on their reputation and defendant publishers' freedom of expression.

8. The MLA does not concur therefore with the Consultation Paper's assertion that the real imbalance in this area of law in Northern Ireland is between those who can afford to litigate and those who cannot. That is not to say that access to court and to proper remedies are not of real importance consideration in this of law; they certainly are. However, properly characterised, the MLA believes that the real imbalance in this area of law lies in a system which allows either party, but particularly plaintiffs, to prolong and avoid the determination of key issues in libel claims, knowing full well that a trial by jury has inherent uncertainty of outcome. This leads to an unduly tactical approach to litigation in this area which broadens and complicates the scope of litigation, rather than narrows the issues between the parties and ensures the prompt identification and resolution of key issues by the court. The MLA believes that the implementation of the Act as a whole would be an important step towards achieving this.

9. Although the importance of individual sections of the Act is addressed separately in the responses to the other questions below, the MLA believe that the Act should be assessed as a cumulative and coherent policy framework which reflects modifications and updates to the law of defamation as a whole for both plaintiffs and defendants. It would therefore be a serious error to cherry-pick sections of the Act for implementation in Northern Ireland. Indeed, as the Consultation Paper recognises, there are common themes and interactions between sections of the Act which would be undermined if the Act were assessed as individual and separate provisions. For example, sections 5, 10, 12 and 13 of the Act achieve a clear framework for allocation of liability and protection of reputation in respect of online publications.

10. For the reasons expanded upon below, the MLA believes that the substance of the Act is of benefit to plaintiffs and defendants alike and updates defamation law to make it fit and appropriate for publishing in the 21st century. The Act provides new remedies for plaintiffs to achieve prominent vindication of their reputation. It sets out a clear allocation of responsibility between original posters of defamatory publications and intermediaries. The Act encourages the provision of information to plaintiffs so that the

original poster can be pursued through the courts. This strengthens a plaintiff's ability to secure proper injunctive relief and vindicatory damages. The law codifies and enhances the defences of truth, honest opinion and responsible publication on a matter of public interest. It introduces a threshold test for whether a publication is defamatory which focuses on the actual extent of harm done to reputation. This threshold is an important counterweight to the common law's presumption of damage and presumption of falsity. It introduces a single limitation period for publications, bringing the law of limitation up to date with internet publishing. Critically, the Act also abolishes the presumptive right to trial by jury, therefore permitting the early determination of key issues in libel claims and allowing for their prompt resolution. This narrows the issues in dispute, which is of benefit to plaintiffs and defendants alike. For the reasons set out above, this is an essential change which is really necessary and ultimately beneficial for Northern Ireland. These changes must therefore be assessed collectively and as a cohesive package of reforms to the law of defamation which update the law for both plaintiffs and defendants.

11. Although arguably an imperfect piece of legislation in certain minor respects, there is nothing in the Act which is so obviously harmful to freedom of expression or the right to reputation which would warrant Northern Ireland following its own unique approach to defamation law for the first time in modern history. On the contrary, the MLA contends that there will be a far more serious impact if Northern Ireland does not adopt the Act and instead becomes an outlier within the United Kingdom in respect of the law relating to freedom of expression and the right to reputation. In this context, it is important to recognise that the court's permission is not required to serve a Writ publishers domiciled in England, Wales and Scotland, thereby bringing them within the court's jurisdiction without any threshold test required.[2] In respect of UK domiciled publishers, a claim can be brought in Northern Ireland in respect of publications throughout the United Kingdom.[3] Ultimately such a position would be not only harmful to publishers in Northern Ireland (local and national) but harmful to civil society in Northern Ireland generally, as it would undermine the important rights of freedom of expression and the corollary right to receive information which the courts have made clear is a central part of a modern democratic society.

12. Further, as the Consultation Paper recognises at paragraph 2.52, the communality of significant areas of the common law of defamation between England and Wales and

[2] Order 11, r.1(2) of the Rules of Court.
[3] Shevill v Press Alliance SA [1995] 2 AC 18

Northern Ireland has been of major benefit to Northern Ireland. Indeed, it is noticeable that the overwhelming number of cases cited in the Consultation Paper are judgments of the English courts. If Northern Ireland does not implement the Act, the continued determination of libel trials with a jury without reasoned judgments in Northern Ireland would only serve to reduce the common law authorities which provide important guidance according to which plaintiffs and defendants can be advised. Although there are a very few areas where the Act purports simply to codify the existing common law, it is inevitable that if it is not implemented in Northern Ireland, that there will be further divergence of common law principles for both jurisdictions. This will promote uncertainty of principle and outcome which is ultimately unfavourable to both plaintiffs and defendants and will serve only to promote rather than reduce legal disputes.

13. There are no other torts where Northern Ireland has allowed for marked differences with the English common law in terms of interpretation or application. In particular, the law of data protection, misuse of private information, harassment and malicious falsehood are substantially the same in England and Wales and Northern Ireland. There is no good policy reason why the law of defamation should have special sand distinct treatment, in particular where the trans-jurisdictional nature of publishing has a particular facility for creating actionable torts in multiple jurisdictions simultaneously.

14. Adopting a piecemeal or divergent approach from the prevalent law in England & Wales can only serve to discourage or deter publishers from publishing in Northern Ireland. For example, if Northern Ireland does not adopt important provisions such as sections 1, 3, 6, 7 and 8 of the Act, publishers may be faced with claims in respect of publications which may be entirely lawful in most the United Kingdom but which may nevertheless be indefensible (or extremely costly to defend) under the common law in Northern Ireland. This applies not only in respect of the introduction of a 'serious harm' threshold under s.1 of the Act but also to the extensions of privilege set out in ss.6-7 of the Act which have been substantially adopted throughout the rest of the United Kingdom including Scotland. Imposing a need for additional and distinct legal advice or liability in respect of publications in Northern Ireland will inevitably discourage or disincentivise publishers from participating in Northern Ireland. Such action does not require the impact of the Act to be "very substantial" as asserted at paragraph 2.53 of the Consultation Paper, but simply requires further divergence between the legal principles applied in Northern Ireland and those of England and Wales so as to make the cost/benefit analysis of any publication in Northern Ireland more unfavourable. In

this regard, it is important to note that as a media market, Northern Ireland comprises only 2.8% of the population of the United Kingdom.[4]

15. Achieving consistency and certainty in the law within the United Kingdom is of central importance, both for regional and national publishers. The certainty of a consistent legal framework is also beneficial to potential plaintiffs. The MLA believe that if Northern Ireland does not keep pace with reform and evolution in respect of libel law, there is a real risk that this will have a significantly detrimental impact upon media plurality and freedom of expression in Northern Ireland. This applies not only if Northern Ireland retains the status quo, but also if it implements the Act in a selective or varied manner. For these reasons, the MLA strongly encourages the prompt implementation of the Act in full in Northern Ireland.

Q2. 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?

16. Yes. The MLA's primary position is that it believes that Act should be extended in full to Northern Ireland. It also believes that it would be an error to selectively extend isolated sections of the Act which should be assessed as cumulative and coherent policy framework for the law of defamation. If, contrary to this primary submission, the Act is not implemented in full in Northern Ireland, the MLA believes that sections 1, 3, 4, 5, 7, 8 and 11 are the most important sections of the Act which should be extended in their application to Northern Ireland if Northern Ireland is not to be seen as a significantly disadvantageous for publishers. The importance of each of these sections is addressed further below.

Q3. 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?

17. No. The MLA believes that consistency of approach between jurisdictions is critically important to sustain a vibrant media and publishing landscape in Northern Ireland. Although it is arguable that the Act could be further revised or enhanced from the

[4] According to ONS statistics for 2012 available at http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/mid-2011-and-mid-2012/index.html.

perspective of both plaintiffs and defendants, there is no part of the Act which is so obviously harmful to freedom of expression or the right to reputation which would warrant Northern Ireland following its own unique approach. Revising or refining of the Act before implementation in Northern Ireland will serve to increase the costs of compliance for publishers in Northern Ireland. The Act should be seen as a cumulative and coherent policy framework which should be promptly implemented in its totality and without amendment in Northern Ireland.

Q4. 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?

18. No. The MLA strongly opposes the proposed alternative scheme suggested in Section 5 of the Consultation Paper. The importance of this issue is such that we have provided a detailed examination of it and of the problems that the MLA believes would arise. By way of very brief summary:

- The proposal to reform the single meaning rule is premised on the belief that established rules and practices are complex, cause uncertainty and lead to injustices. However, if the presumption in favour of trial by jury is removed, the single meaning of an article can often be determined at an early stage leading to the resolution of the claim. The single meaning rule also ensure that the determination of meaning is a proportionate (and usually a binary) exercise.
- A multiple meaning rule would have an enormous chilling effect on freedom of expression. It would inevitably cause publishers to self-censor for fear of what a minority of readers may take from an article rather than focussing on what is conveyed to the majority. This will impact on publishers across the UK who be constrained from exercising fully the right to freedom of expression as recognised elsewhere in the United Kingdom.
- It would also draw litigants to the Northern Irish courts as Plaintiffs seek to take advantage of what would be a significantly lower bar.
- Whilst there has been recent judicial criticism of the single meaning rule in the Court of Appeal decision in *Ajinimoto Sweeteners SAS v Asda Stores Ltd,* this case concerned malicious falsehood which, as the Court recognised, is not closely analogous to the tort of libel. Importantly, libel is a tort of strict liability whereas malicious falsehood requires malice to be proven and is an economic

tort. There is a clear logic to malicious publishers having to take their audiences as they find them with regard to the economic loss they cause.

- The proposal to protect publishers from liability where they make a prompt apology does not overcome these problems. Further, there can be little benefit to the public or meaningful vindication of plaintiffs if the result is the widespread publication of apologies with regard to meanings which were not in fact conveyed to the majority of readers and which the publisher did not intend.

19. Turning to our more detailed examination of this issue, the proposed scheme is seriously flawed, impractical and would have a substantial chilling effect on freedom of expression and significant consequences for the freedom of the media in Northern Ireland. It may well also be incompatible with Article 10 ECHR

20. The MLA disagrees with the Consultation Paper as to the central problem in libel law in Northern Ireland; the problem is not the complexity of the rules of meaning; indeed the principles are well established. The real issue lies with the prompt determination of key issues in defamation claims, including meaning, which are delayed by the presumption in favour of a jury trial. This anomalous position only applies to claims in defamation. Once the presumption in favour of trial by jury is reversed, this will allow for the prompt and expeditious determination of libel claims. This is precisely what has been happening with increasing frequency in England and Wales, see for example *RBOS Shareholders Action Group Ltd v News Group Newspapers* [2014] EWHC 130 (QB) at [18] where the court determined the meaning of the publication before a defence had been served. This narrowed the issues between the parties and led to the prompt settlement of the claim.

21. In this regard, the MLA disagrees with the assertion at paragraph 5.28 of the Consultation Paper that "early determination" of meaning is a misnomer, based on the calculations at Table 1 of the Consultation Paper. Table 1 bases its calculation on the date of publication, not the date the claim was issued. In many cases, it is apparent that the claim was issued until almost the end of the limitation period and in many cases a substantial period after the original publication. Clearly, a court cannot determine meaning until a claim has commenced issued, so this basis of calculation will inevitably misrepresent the speed with which the court can determine such issues as meaning. For those seven claims where the judgment identifies the date the claim was issued, it took an average (mean) of 336 days for the court to hear the application on meaning. This compares to an average (mean) of 673 days for the same cases

when judged against the date of first publication. Moreover, it is apparent that for those claims issued since the Act came into force, and which therefore automatically did not have a presumption in favour of jury trials, the courts have determined preliminary issues even more promptly and within six months of the claim being issued.[5] The abolition of the presumption in favour of trial by jury therefore does actually lead to the court's earlier engagement and determination of critical issues. It is not a misnomer.

22. The Consultation Paper relies on the criticisms of the single meaning rule in the Court of Appeal in *Ajinimoto Sweeteners SAS v Asda Stores Ltd*. However the Consultation Paper does not address the fundamental differences which apply between the torts of libel and malicious falsehood which underpinned the Court of Appeal's decision to abolish the single meaning rule for claims in malicious falsehood.

23. As Counsel for the successful appellant in *Ajinimoto* recognised, a claim in libel is for injury to personal reputation.[6] In contrast malicious falsehood is a claim for injury to the reputation of property and thus an economic tort. Further, libel is a tort of strict liability; the publisher's intention is irrelevant in establishing a prima facie claim. Damage is presumed and falsity of the defamatory allegation is presumed.[7] In contrast a claim of malicious falsehood is by definition a tort of intention. To establish a claim in malicious falsehood, a plaintiff cannot rely on the same automatic presumptions of the common law; he or she must overcome the high hurdle of pleading and proving malice and he or she must either establish that the publication has caused special damage or can fit within the limited statutory presumption of special damage set out in s.3 of the Defamation Act (Northern Ireland) 1955. As the Court of Appeal expressly remarked in *Ajinimoto,* the torts make "different demands on the parties; and they offer redress for different things." It was precisely because the Court of Appeal recognised that a plaintiff needed to establish malice that moderating the single meaning rule was possible for claims in malicious falsehood.[8]

24. The requirements to prove malice and to establish special damage to bring a successful claim are critical and fundamental brakes on claims for malicious falsehood. As the Northern Ireland Court of Appeal recently confirmed, a pleading of malice has a

[5] Cooke v MGN Ltd [2014] EWHC 2831 (QB), where the preliminary determination took place 179 days after publication (the date of the claim is not identified in the judgment) and Ames v Spamhaus Project Ltd [2015] EWHC 127 (QB) where the court ruled on preliminary issues including harm within 138 days of the claim form having been issued.
[6] Ajinimoto Sweetners Europe SAS v Asda Stores Ltd [2011] QB 497 at [14]
[7] Jameel v Dow Jones Inc [2005] QB 946
[8] Ajinimoto Sweetners Europe SAS v Asda Stores Ltd [2011] QB 497 at [42]

high threshold to meet before it can be advanced at trial.[9] An assertion of malice is akin to a pleading of dishonesty which requires the pleader to have sufficient material to sustain a case of dishonesty before s/he is permitted to advance such an allegation. Unsustainable pleadings of malice which are permitted to go to trial undermine the important rights of defendant publishers which are protected by Article 10 ECHR.[10] The requirement to establish malice in these circumstances is an important protector of a defendant's rights to freedom of expression. It was in this limited context that the Court of Appeal disapplied the single meaning rule for claims in malicious falsehood; as the Court made clear, the single meaning rule was a fundamental bastion of defamation law which should not be altered.[11]

25. The single meaning rule is an artifice of the law of defamation, but it is a vital balancing mechanism of real significance which has been developed by the common law and followed by repeated decisions of the House of Lords over several centuries. It is a mechanism of public policy which strikes a proper and necessary balance between the need to protect reputation and the use of excessive or improper complaints which inhibit and chill freedom of expression. It is a critical factor in permitting the public to be informed. It moves the law into the middle ground between the author's intent, which is favourable to defendants, and multiple meanings which are overwhelmingly favourable to plaintiffs. It is a practical and fair method of permitting the court to rule out untenable meanings, and to approach a claim on the middle ground. As Lord Nicholls stated in *Charleston v News Group Newspapers Ltd*:[12]

> *"In principle this is a crude yardstick, because readers of mass circulation newspapers vary enormously in the way they read articles and the way they interpret what they read. It is, indeed, in this very consideration that the law finds justification for its single standard. The consequence is that, in the case of some publications, there may be many readers who understand in a defamatory sense words which, by the single standard of the ordinary reader, were not defamatory. In respect of those readers a plaintiff has no remedy. The converse is equally true. So a newspaper may find itself paying damages for libel assessed by reference to a readership many of whose members did not read the words in a defamatory sense."*

26. If Northern Ireland introduced a multiple meaning rule into the tort of libel, which is a tort of strict liability with automatic presumptions of falsity and damage, this would have an enormous chilling effect on freedom of expression. Publishers would have no way of anticipating what they can or cannot say without fear of liability. Put another way,

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[9] Loughran v Century Newspapers Ltd [2014] NICA 26
[10] Henderson v London Borough of Hackney [2010] EWHC 1651 (QB) at [35] per Eady J
[11] Ajinimoto Sweetners Europe SAS v Asda Stores Ltd [2011] QB 497 at [27]
[12] [1995] 2 AC 65 at 73-74

why should a minority of readers be able to determine what the majority of readers would properly understand from a publication? In this regard, it is important to note that the Court of Appeal in *Ajinimoto* recognised that a rule of 'perjori sensu' when interpreting meaning would be "equally productive of unfairness." Yet this would be the effect of introducing multiple meaning rules in libel without the counterbalance of needing to establish malice and special damage.

27. Abolishing the single meaning rule in libel would therefore have all manner of unintended consequences for libel litigation. It would undermine the fundamental defence of justification if a defendant were able to prove that a particular allegation which was understood by a majority of publishers was true, but was then held liable for a meaning which only a small minority of readers understood. It would require evidence to determine the number of readers understood a particular meaning so as to assess quantum of damages in order to ensure that damages were proportionate to the size of the readership who understood the publication in that manner. As Lord Bridge recognised in the House of Lords in *Charleston*, it is the single rule which prevents libel actions resulting in endless witnesses being called to say how they understood a particular publication.[13] The abolition of the single meaning rule would make trial by jury even more unpredictable and unsustainable and liable to produce perverse or inexplicable decisions.

28. The Court of Appeal correctly recognised in *Ajinimoto* that the single meaning rule was a foundation stone of the tort of libel, and recognised that its abolition for defamation claims would have profound and unfair consequences. Contrary to the suggestion at paragraph 5.18 of the Consultation Paper, it was precisely because the Court of Appeal did not believe that a claim in malicious falsehood was "closely analogous" to the tort of libel that it was possible to rule that the single meaning rule did not apply to claims in malicious falsehood.

29. Ultimately, the MLA believes that the abolition of the single meaning rule for defamation claims would be severely injurious to freedom of expression and the freedom of the media and may well be found to be incompatible with Article 10 ECHR. It is not alone in this view. Lord Neuberger, the current President of the Supreme Court regarded the rule as "essential" in a recent decision of the Hong Kong Final Court of

[13] Charleston v News Group Newspapers Ltd [1995] 2 AC 65 at 72

Appeal, where he described the consequences which would flow from its abolition in the following uncompromising terms, with which the MLA concur:

> *"If the single meaning rule did not apply in defamation, it would similarly lead to greater uncertainty in outcome and increased legal expenses. 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. Abolition of the single meaning rule would also 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."*[14]

30. The Consultation Paper disagrees with the views of the President of the Supreme Court, and cites the decision of Arnold J in *Interflora* v *Marks & Spencer Plc.*[15] The MLA does not believe that the comments of a High Court judge in very different intellectual property case provide any proper basis to undermine the clear views of the President of the Supreme Court in the context of a direct attack on the single meaning rule in a defamation claim as took place in *Ming Pao.* The rights of freedom of expression and rights to reputation are engaged in libel claims in a very different way to the engagement of rights in intellectual property claims.

31. Moreover, if Northern Ireland were to become the only jurisdiction within the UK which abolished the single meaning rule for libel claims,[16] it would undoubtedly become a magnet for libel claims by plaintiffs, including those who were seeking to improperly chill freedom of expression. Northern Ireland would be regarded by publishers internationally as a jurisdiction which was seriously inimical to publishing. The MLA does not believe that could seriously be in Northern Ireland's best interests.

32. Further, under Order 11 r.1(2) of the Rules of Court, the court's permission is not required to serve writs on defendants located outside Northern Ireland but elsewhere in the United Kingdom. Any significant publication into Northern Ireland, including on the internet, would therefore leave UK based defendants liable to claims for libel in Belfast which could not be brought in England, Wales or Scotland. This could have very serious implications for freedom of expression throughout the United Kingdom. This could lead to some UK media publishers restricting access to certain content for

[14] Oriental Daily Publisher v Ming Pao Holdings [2012] HKCFA 59 at [142].
[15] [2013] EWHC 1291 (Ch)
[16] Scotland also applies the single meaning rule to defamation claims.

internet users in Northern Ireland, and taking active steps to prevent hard copy publication into the jurisdiction. National content, including broadcast content, would have to be heavily moderated before it was published in Northern Ireland.

33. Further, the MLA does not concur with the Consultation Paper's view at paragraph 5.30 that the abolition of the single meaning rule would represent some panacea which would cure some of the complexity of defamation actions. Contrary to the suggestion, the principles identified at paragraph 5.09 of the Consultation Paper are not principles of meaning, but are principles of the defence of justification – indeed the decision in *Chase v News Group Newspapers* itself is a decision on the principles which apply to pleading a justification defence. These would still apply in the same manner where any defendant publisher properly wished to assert the truth of a publication, albeit his ability to do so would be substantially eroded in the absence of a single meaning rule. The MLA believes that the Consultation Paper's criticisms of the single meaning rule in this regard are misplaced.

34. The MLA acknowledges that the Consultation Paper proposes to balance the benefit which would undoubtedly accrue to plaintiffs from the abolition of the single meaning rule with a bar on liability where publishers apologised promptly and prominently for unintended meanings. In the MLA's view, this proposal not only does not nearly mitigate the highly detrimental and unfair impact which the abolition of the single meaning rule would entail for publishers large and small, but it is itself misconceived and impractical in any event. Nor will it achieve the results identified in the Consultation Paper. It is also is unnecessary in light of the offer of amends scheme set out at s.2-4 of the Defamation Act 1996 which is barely referred to in the Consultation Paper and which currently provides a proper mechanism for publishers to promptly apologise and mitigate their financial exposure when they have made a mistake.

35. The proposed scheme, would for the first time in libel law, introduce the concept of a publisher's intention in relation to meaning and liability. It has always been a longstanding principle of law that a publisher's intention is irrelevant to the determination of meaning.[17] A publisher's intention is only relevant in the limited circumstances where malice may be asserted; however as the courts have made clear, malice will rarely apply to publications involving the media.[18] The proposal

[17] E Hulton & Co v Jones [1910] AC 20; Slim v Daily Telegraph Ltd [1968] 2 QB 157 at 172.
[18] Bonnick v Morris [2003] 1 AC 300 at [14] per Lord Nicholls.

therefore proposes to abolish another fundamental principle of the common law, even though this has not previously been thought in need of reform in any major forum.

36. The MLA does not agree that with the assertion at paragraph 5.31 of the Consultation Paper's that the jettisoning of the single meaning rule and the introduction of discursive remedies would take all but intractable claims out of court. On the contrary, the MLA believes that in fact the proposal would simply shift the focus of the legal disputes and indeed increase legal disputes about meaning, not diminish them. Contrary to the stated preference of the Consultation Paper, it would encourage plaintiff's lawyers to propose hyperbolic or unreasonable meanings which may be understood by a small proportion of the audience. Whereas such meanings might have been ruled out by the courts at trial, or following an application under Order 82 r.3A because they were not the single meaning which a publication bore, such meanings would actually give a plaintiff a cause of action where none existed previously. This would therefore encourage this practice which the courts have already recognises directly interferes with Article 10 ECHR.[19] Moreover, as accepted by the current President of the Supreme Court and previous House of Lords decisions, the result would clearly be an extension of the court's involvement in the process of ruling on meaning, frequently requiring survey evidence or the calling of witnesses.

37. Instead of narrowing the issues between the parties, the proposed scheme will lead to more areas for disagreement; what was the intended meaning of the publisher, whether there is a realistic distinction in the sting of different meanings sufficient to give a plaintiff a claim in respect of an unintended meaning and intended meaning. There would be increased court hearings about whether a particular meaning was intended by a publisher or not. There would also be extensive disputes and litigation about whether a publication has been sufficiently prompt and prominent. The court will be drawn into decision making in an area the courts have made clear is the preserve of editors, nor the courts.[20]

38. The proposed scheme also would be highly impractical and would lead to newspapers and news bulletins being filled with articles and packages correcting or apologising for meanings which were not intended and which only a minimal number of people might

[19] John v Guardian News and Media Ltd [2008] EWHC 3066 (QB) per Tugendhat J at [17]: "There is a real risk of a violation of Art 10 if a claimant strains to attribute to words complained of a high factual meaning, which cannot be defended as true".
[20] Jersild v Denmark (1994) 19 EHRR 1, O'Rawe v William Trimble Ltd [2010] NIQB 135 per Gillen J, re Guardian News and Media [2010] UKSC 1; [2010] 2 AC 697 per Lord Hope.

have understood, for fear of otherwise being liable in damages to the tune of tens of thousands of pounds. It would make the presentation of journalistic material practically impossible and severely and improperly impact on the editorial journalistic function.

39. Moreover, the speed with which the Consultation Paper suggests any apology or correction must be forthcoming to benefit from the bar on libel claims demonstrates a lack of appreciation for the inevitable complexity of libel disputes and the time which it is often takes to properly and thoroughly investigate complaints. Even large and well-resourced media organisations may require a significant period of time to consider properly and respond to complaints. The proposed scheme therefore would require publishers to significantly increase their reliance on lawyers given the draconian consequences which could follow from failing to apologise promptly.

40. Indeed, it is precisely the draconian consequences which would follow a complaint which would ultimately have a real chilling effect on freedom of expression, forcing publishers to apologise and publish corrections in situations where previously no apology or correction would be necessary or indeed appropriate. In that regard, the proposed scheme would put the position of the plaintiff on an elevated pedestal in the balancing of rights.

41. Critically the proposed scheme fails to take account the fundamental importance to publishers, and indeed the clear public interest, in maintaining editorial integrity and supporting responsible journalism where appropriate. By simply offering publishers a 'cheap get out' for making prompt apologies, the scheme ignores the importance and public interest in defending claims for libel in appropriate cases. There is a fundamental public interest in publishers defending proper, responsible and accurate publications. The scheme would act as simply a further reason why publishers would be encouraged not to defend journalism but to make prompt "corrections", however unnecessary or injurious to freedom of expression such correction or apologies would be.

42. The proposed scheme would also lead to more disputes and more court time in assessing damages. In the event that no correction was forthcoming, evidence would be needed to ascertain the proportion of an audience who had understood a publication in a particular manner and therefore to assess the corresponding quantum of damages. Disputes would arise, which would need to be determined by the courts, as to the extent to which damages could and indeed should be mitigated by facts

which could be proven true in relation to other meanings which the words bore, and indeed which had been understood in that manner. Such court assessments would clearly be necessary, as the courts have made clear that a plaintiff cannot recover damages for reputation which he does not have, and it is essential that damages are not assessed in a vacuum.[21] The reliance on substantial pleadings in mitigation of damages would increase very significantly.

43. For these reasons, the MLA believes that the proposed scheme at section 5 of the Consultation Paper would have severe and highly detrimental consequences for publishers in Northern Ireland and throughout the United Kingdom. The scheme is impractical, unworkable and is likely not to comply with Article 10 ECHR. It would make Northern Ireland a magnet for libel claims not only within the United Kingdom but around the English speaking world. The MLA strongly advocates that the proposal is rejected.

Q5. Are there any other desirable reforms of defamation law in Northern Ireland?

44. There are two areas where the MLA advocates further reform, possibly in the form of a Defamation Practice Direction.

    a. A Practice Direction which emphasises the importance of proper compliance with the Pre-Action Protocol for Defamation and which has actual cost consequences if not followed by plaintiffs and defendants. In the MLA's experience, there is far less observance of the requirements of the Pre-Action Protocol in Northern Ireland than there is in England and Wales. Letters of complaint do not identify adequately identify the precise words which are complained of, and publishers are frequently not given sufficient information to assess the merits of the complaint. This undermines the importance of the Protocol and means it does not achieve its intended results. Providing costs consequences for failure to comply with the Protocol would give this real bite and allow for disputes to be resolved properly and proportionately and potentially without the need for court action. At the moment, initial letters of complaint are often intended as little more than a notice of legal action by solicitors in Northern Ireland, rather than a proper explanation of their client's complaint.

[21] See *M'Pherson v Daniels* (1829) 10 B & C 263 at 272; Turner v News Group Newspapers Ltd [2006] EWCA Civ 540; [2006] 1 W.L.R. 3469.

b. The MLA believes that a Practice Direction should encourage preliminary hearings in libel claims to determine key issues such as meaning and issues relating to fact or comment. Although some notable judges have proactively encouraged such an approach in Northern Ireland, this has not always been the case, and indeed the Northern Ireland Court of Appeal has discouraged hearings of preliminary issues, for example *Ryder v Northern Ireland Policing Board* [2007] NICA 43 and *Faulkner and others v BT (Northern Ireland) and others* [2008] NICA 39. For the reasons addressed elsewhere in this response, the early determination of meaning by preliminary issue has real and significant benefits for plaintiffs and defendants alike in the resolution of libel claims. In combination with the reversal of the presumption in favour of jury trials, this would have a profound and really beneficial impact on the management of defamation claims in Northern Ireland.

Q6. 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?

45. Yes. Although s.2 of the Act is ostensibly a codification of the common law's defence of justification, it would be beneficial nevertheless to implement this centrally important defence in the Act in Northern Ireland. This will avoid any arguments about a divergence of approach between England and Wales and Northern Ireland as the courts develop the defence of truth. It will achieve important consistency between the jurisdictions which is mutually beneficial for both systems of common law and will encourage publishers to publish in Northern Ireland.

Q7. 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 in Northern Irish law? Would it instead be preferable with the common law approach as restated in *Spiller v Joseph?*

46. Yes. Section 3 of the Act reforms the common law's defence of honest comment which is of critical importance for all types of publishers and clarifies and enhances this complex area of law in important ways. The Consultation Paper correctly recognises this defence as a "mainstream of the law of defamation" which is afforded strong

protection under Article 10 ECHR. The reforms to this complex area of law in s.3 make its prompt extension to Northern Ireland all the more essential.

47. The MLA agrees with paragraphs 3.34 and 3.37 of the Consultation Paper that there is a temporal lacuna at s.3(4)(b) of the Act which as drafted requires that an opinion be based on a privileged statement which occurred *before* the opinion was published and that this could lead to unjust results in respect of simultaneous publications. However the MLA does not believe that a statutory amendment to address this only in Northern Irish law is necessary.

48. However, the MLA does not agree with the Consultation Paper that it is not clear that the defence in s.3 of the Act extends to inferences of fact. It believes this is tolerably clear from the Act and the Explanatory Notes; indeed this has been recognised as such by leading practitioners.[22] No further amplification or amendment is necessary. Indeed, in light of the accepted complexity of this area of the common law, it is particularly important that Northern Ireland adopts s.3 of the Act to ensure that there is no divergence of liability for publishers between jurisdictions. Such divergence would be particularly inimical to the important Article 10 ECHR values protected by this defence.

Q8. Should it be confirmed that the defence of honest comment/honest opinion extends to encompass inferences of verifiable fact from underpinning facts?

49. No. This is not necessary and s.3 of Act should be extended to Northern Ireland as it stands. Section 3 clearly does encompass inferences of verifiable fact from underpinning facts. In this complex area of law, divergence from the provisions of the Act should be avoided and indeed would be unhelpful.

Q9. 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."?

50. No. Section 3 strikes a reasonable balance between competing rights and that balance might be disturbed by this proposed change. The MLA also believes, in accordance with its approach to the Consultation Paper generally, that consistency of approach in

[22] See paragraph 13.12 of *Duncan and Neill, 4th Edition, 2015, London.*

this complex area of law between jurisdictions is essential to avoid introducing additional complexity and lack of clarity.

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?

51. No. Although such an amendment would ostensibly favour freedom of expression, the MLA believes, in accordance with its overall approach to the Consultation Paper, that consistency of approach in the law of England and Wales and Northern Ireland is preferable. Although there is a temporal lacuna at s.3(4)(b) of the Act which could lead to unjust results in respect of simultaneous publications, the MLA does not believe that a statutory amendment to address this only in Northern Irish law is necessary. Consistency of approach in this complex area of law between jurisdictions is essential to avoid introducing further complexity and lack of clarity.

Q.11. If it is desirable for a rule equivalent to section 3 of the 2013 Act to be introduced into Northern Ireland 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 he or she reasonably believed to be true at the time the statement complained of was published?

52. No. Although such an amendment would ostensibly favour freedom of expression, the MLA believes, in accordance with its approach to the Consultation Paper generally, that consistency of approach in the law of England and Wales and Northern Ireland is preferable. Such an amendment to the common law or the Act would significantly favour freedom of expression over the right to reputation and would undermine the repetition rule which is an important bulwark of the right to freedom of expression. Consistency of approach in this complex area of law between jurisdictions is essential to avoid introducing further complexity, lack of clarity and further uncertainty.

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*?

53. Yes. It is essential that this defence which protects the publication of matters on a public interest is promptly extended to Northern Ireland. Although it is a defence which is open to any publisher, in practice it is likely to be the media for whom the defence is particularly important and for whom the scope of editorial deference set out in s.4(4) of the Act is particularly important. Northern Ireland has a particularly vibrant history and tradition of investigative journalism on matters of public interest and it is essential that this should continue to be encouraged by the implementation of this section of the Act in Northern Ireland. The MLA agrees with the Consultation Paper that this section emphasises the importance of public-spirited journalism in a democratic society.

54. The MLA does not however agree that the implementation of this section would be simply symbolic. Although this section purports to simply codify the common law position in *Jameel* and *Flood*, the Consultation Paper correctly identifies the nuanced differences in language in the wording of the section. It is therefore essential that this section is extended to Northern Ireland so that the development and interpretation of this section by the courts is consistent between Northern Ireland and England and Wales. Moreover, and as the Consultation Paper recognises, s.4(5) extends the law so that the new statutory defences applies to both statements of opinion and fact. Consistency of approach between England and Wales and Northern Ireland is therefore all the more important for a defence which is designed to protect and promote publications on a matter of public interest. If it is not adopted, there is a risk that Northern Ireland will be seen as a jurisdiction which disincentivises and discourages the publication of matters of public interest.

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?

55. No. The MLA does not agree with the Consultation Paper's criticisms of incorporating expressions of comment or opinion within the s.4 defence. The importance of s.4(5) is that it helpfully avoids technical discussions about whether statements are opinion or fact but concentrates on the circumstances of publication and the nature of the publication itself. The use of vituperative comment and its impact upon 'tone' would of course still be an important factor in determining the overall responsibility and reasonableness of the publication which is the correct focus of this defence. Section 4(5) does not change this, The MLA believe it is essential for consistency and to avoid

unhelpful distinctions emerging between the law of England and Wales and Northern Ireland that s.4 is adopted wholesale in Northern Ireland.

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?

56. Yes. This section has already been adopted in the rest of the United Kingdom and if not extended to Northern Ireland, this clearly risks publishers deciding not to publish journals examining important scientific and academic issues in Northern Ireland. This would be severely detrimental to Northern Ireland's economic and social development and undermine Northern Ireland's rich scientific and academic heritage. This the starkest example of the many risks which may result if Northern Ireland does not adopt the Defamation Act 2013 and follows divergent legal principles from England and Wales.

57. The MLA also believes the concerns raised about this section in the Consultation Paper are misplaced; the language of the section does not require statutory definition. It is tolerably clear what the section is aimed at and is intended to achieve and the courts will interpret the language consistently with this. Further, the fact that the defence is capable of being defeated only by malice emphasises the importance of this defence, which is as much to address the chilling effect on academic and scientific debate through the threat of libel actions as to ultimately provide a defence to libel claims at trial. This is critically important, even if other substantive defences of honest opinion or truth were available. That is the very purpose of qualified privilege in defamation law; to draw a line of public policy to protect freedom of expression in circumstances where it is generally accepted that the public interest in freedom of expression outweighs the right to reputation. If the occasion of publication is misused, the defence will not survive.

58. Ultimately it would be severely deleterious for academic and scientific debate and development in Northern Ireland if it was the only jurisdiction within the United Kingdom which did not have the protection of these privileges. As the Consultation Paper correctly recognises, the privilege is not a panacea to the problems of libel law, but it is nevertheless a positive step which should be promptly adopted.

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?

59. Yes. If this section is not extended to Northern Ireland, there is a risk that the benefit of this privilege which applies in England, Wales and Scotland will be lost for national publishers, who cannot risk publishing privileged material where that privilege does not extend to Northern Ireland. Northern Ireland would therefore become the "lowest common denominator" for the United Kingdom. Consequently, and in respect of both local and national publications, discussions and publications on matters of public interest which are protected by these privileges will not be available to residents of Northern Ireland. This is precisely what these updating provisions to the law of qualified privilege are intended to ensure and protect against. There is no good reason why these important provisions should not be extended to Northern Ireland. They represent prudent and careful extensions of privilege to publications which the media and others have a duty to disseminate in the 21st century for the benefit of all of Northern Ireland.

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?

60. Yes; the MLA believes that it would be desirable for s.5 of the Act to be introduced in Northern Ireland. As the Consultation Paper recognises this is an important development of the common law position for secondary publishers and updates the law for the 21st century.

61. This update to the law of defamation is consistent with the public policy principles in the E-Commerce Directive (2000/EC/31) and emphasises that it is not for website hosts to police content on the internet. This section properly places responsibility for publication and liability for that publication on the originator of the allegations. This encourages personal responsibility for actions taken by a defendant. The policy behind the section encourages website operators to disclose the identity of posters. This is also to be encouraged, as it is as against the original poster that a plaintiff may properly seek, and if appropriate obtain, injunctive relief and vindication through an award of damages.

62. The MLA believes that this section is an important and proper development of the law. If online publishers wish to rely on this defence, it requires them to provide information to a complainant which will assist in the identification of the originating poster, so that those who are directly responsible for originating and publishing defamatory allegations can be pursued through the courts. It would also be a real concern if Northern Ireland became a destination for libel claims against online publishers, who would have a complete defence under the Act in England and Wales. This would undermine attempts in Northern Ireland to encourage the development of internet companies as a tool of economic growth. In this regard, it is very significant that online publishers are most susceptible to libel tourism on the established common law basis that a fresh actionable publication occurs online every time an internet publication is read and accessed around the world.[23]

63. The MLA does not believe that it would be appropriate or practical to require website operators to include a notice of complaint alongside statements of which complaint has been made. As the consultation process for the passage of the Act in Westminster recognised, this would be cumbersome and technically difficult. Moreover, it undermines the important public policy behind this section that it should not be for website operators to police or censor the internet in respect of third party content. The proper forum for that determination is a court of law, which can order both the removal of the offending statements under s.13 of the Act and the publication of a summary of its decision under s.12 of the Act. The MLA believes that these mechanisms are the best and most appropriate mechanisms for protection of reputation. They avoid website publishers being required to act as a noticeboard for undetermined threats of litigation. Such a mechanism would also encourage individuals to threaten litigation, requiring a website operator to post such a notice, irrespective of the merit of the complaint. The online publisher may of course not be in a position to determine the merit of the complaint. The MLA believes that the prompt implementation of s.5 of the Act in Northern Ireland is a proper and necessary step to update the allocation of responsibility for libel claims in the internet era.

[23] Berezovsky v Michaels [2000] 1 WLR 1004

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?

64. Yes. The same policy principles which apply to s.5 of the Act apply here to this section also. This provision encourages a plaintiff to take action against the original publisher of information, rather than secondary publishers. This is a proper allocation of liability and encourages personal responsibility for publishing information rather than hiding behind others. It is also the most appropriate route for securing proper injunctive relief and vindicatory damages. In the event that it is not reasonably practicable to bring an action against the original publisher, the section preserves the right to a remedy against secondary publishers. The MLA believes that the prompt implementation of s.10 in Northern Ireland is a proper and necessary step to update the allocation of responsibility for libel claims.

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?

65. Yes. The existing law in this area is otiose and a relic of history. The law as it stands is not compatible with equality principles. There is no valid reason why the law should not be updated to reflect 21st century mores.

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?

66. Yes. The MLA believes that the reversal of the presumption in favour of the jury trial is central to libel reform and should be introduced as part of the extension of the Act to Northern Ireland. The presumptive right under s.62 of the Judicature (Northern Ireland) Act 1978 for a trial by jury represents one of the most significant obstacles to the prompt and efficient resolution of libel claims in Northern Ireland and which ultimately serves either to delay the rightful vindication of a plaintiff's reputation or unnecessarily chills freedom of expression. It prolongs defamation claims and ensure they take a disproportionate amount of court time and resources

67. Although the presumption in favour of a jury still existed England and Wales prior to the implementation of the Act, the common law had developed to make jury trials the exception rather than the rule. Northern Ireland is now the only jurisdiction in the United Kingdom which has a presumptive right to a jury trial which can only be displaced in very limited circumstances. As Gillen J recently recognised in **Loughran v Century Newspapers:**[24]

> *"the right to jury trial is jealously guarded by judges in Northern Ireland. While the overriding objective of Order 1 rule 1A and the dynamic of the principles in Jameel do represent a wind of change in how litigation is processed nowadays, they must not eclipse the continuing and vital role of juries in our system of justice absent circumstances where…only a perverse jury could find for the plaintiff."*

68. This approach continues to apply in Northern Ireland, even though senior judges have recognised the real difficulties which trial by jury creates for libel actions.[25] In the 21st century, there are no strong policy reasons why claims in defamation are tried by a judge sitting with a jury. All other causes of action which protect an individual's autonomy and their personal information such as negligent misstatement, malicious falsehood, misuse of private information, breach of confidence, harassment and claims under the Data Protection Act 1998 are determined by judges sitting alone. Defamation claims are therefore entirely anomalous in this regard. There is no logic in giving ordinary citizens "a voice" in defamation claims as opposed to any of these other causes of action. Nor do concerns about "unconscious predilections" of judges carry any greater weight in their fact finding role in libel cases than in any other causes of action. For example a claim in misuse of private information requires a plaintiff to establish a "reasonable expectation of privacy" in the relevant information. Judges are expert fact finding tribunals and should be empowered to carry out this role in libel claims as in any other torts. There is no reason why defamation claims should continue to be given an elevated and differentiated status.

69. Although trial by jury brings no obvious benefits, it has a number of significant drawbacks for the efficient and proportionate determination of defamation claims. As the English law common recognised in a series of judgments, the presumption of the right to trial by jury does not accord with the overriding objective, delays the prompt determination of key aspects of defamation claims, and unnecessary prolongs and exacerbates costs incurred. In this regard, the courts have recognised that the cost of

[24] [2014] NIQB 26 per Gillen J.
[25] See for example O'Rawe v William Trimble Ltd [2010] NIQB 135 at 46-50 per Gillen J.

defamation claims has spiralled disproportionately to the level of damages recoverable, which risks amounting not only to an interference with freedom of expression for defendants, but also with the rights of access to the court for plaintiffs and defendants alike. In Northern Ireland, it is not uncommon for juries in libel trials to be discharged halfway through the trial because of the difficulties in conducting such trials.[26] Further, the trial of libel actions by a jury has made the common law's development in compliance with the Human Rights Act 1998 much more difficult.[27] The lack of any reasoned judgment at the end of a trial with a jury also undermines certainty which is mutually inimical for plaintiffs and defendants.

70. The reversal of the presumption in favour of a jury trial will allow for the early determination of critical issues in a libel claim, for example a) the meaning of a publication, b) whether the words complained of constitute fact or comment, c) the viability of any defences and d) the early and preliminary trial of defences such as qualified privilege which may obviate the need for trials on alternatives defences such as justification. If there is no presumption of trial by jury, the possibility for summary determination of a libel claim under ss.8-11 of the Act becomes of practical use to plaintiffs and defendants. At the moment, these provisions are effectively redundant.

71. With a presumption in favour of a jury trial, a party can only strike-out part of their opponent's claim if it can be shown that a jury would be perverse to find for their opponent's case. An alleged meaning can only be struck out under Ord. 82 r.3A of the Rules of Court if it can be shown that a publication is incapable of bearing that meaning. Both tests are high-hurdles to overcome. If the presumption in favour of jury trial is abolished, the court can determine key issues at an early stage, either before service of a defence or as a preliminary issue. For example, the principles for determining meaning are well-known and are straightforward, and the meaning of a publication can be determined by the court immediately upon issue of the Writ and Statement of Claim and prior to the service of a defence.[28] If the court finds that a publication bears a meaning more serious than the publisher anticipated and which it can legitimately defend, it is still open to the defendant to make an offer of amend pursuant to s.2 of the Defamation Act 1996 prior to service of the defence and for a plaintiff's reputation to be promptly and publicly vindicated. If judges are given full

[26] See for example O'Rawe v William Trimble Ltd [2010] NIQB 135 at 46-50 per Gillen J.
[27] See Cook v Telegraph Media Group [2011] EWHC 763 per Tugendhat J.
[28] See for example RBOS Shareholders Action Group Ltd v News Group Newspapers [2014] EWHC 130 (QB)

control over libel proceedings from the outset, they will be fully empowered to determine these essential matters at the outset, leading to significant cost and time savings for all parties and the court system.

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 intentions of the authors of the Act? Would it instead be preferable to continue with the common law approach reflected in *Jameel v Dow Jones?*

72. Yes. The MLA believes that s.1(1) of the Act should be introduced in its current form into the law of Northern Ireland. S.1 of the Act acts as an important, counterweight to the automatic presumption of falsity and damage in the common law, albeit a change whose significance should not be overstated.

73. Section 1 of the Act develops, albeit modestly, the English common law decision in **Thornton v Telegraph Media Group Ltd** which emphasised the importance of a "threshold of seriousness" in defamation claims.[29] In the balancing of the rights to freedom of expression and the right to reputation which must underpin every defamation claim, this is an important principle which the Consultation Paper recognises. The MLA however is not however aware of any written judgment in Northern Ireland where **Thornton** has been followed. Similarly, the MLA is only aware of one case in Northern Ireland where the principles in **Jameel v Dow Jones & Co Inc.** have been followed, which was self-evidently a highly atypical case.[30] As evidence-in-chief is given orally at trial, and in light of the presumption in favour of jury trials, the common law in Northern Ireland has therefore not adopted these developments of the English law in the same substantive and proactive manner in which they have been pursued in England & Wales.

74. Section 1 of the Act therefore is an important counterweight to the common law's presumptions of falsity and damage. It focuses the parties' and the court's attention at an early stage on whether there has been or is likely to be serious harm to reputation. This is an important issue, but it reflects a continuation of the reasoning in **Jameel** and **Thornton.** In **Ames** the most recent decision on s.1 of the Act, it was recognised that

[29] [2010] EWHC 1414 (QB)
[30] Ewing v Times Newspapers Ltd

the questions to be approached in determining whether a publication is defamatory under s.1 are the very same issues which arise under the principles identified by the common law in **Jameel**.[31] The principles in s.1 accord with Article 10 ECHR. If a reputation has not been seriously damaged or is not likely to be seriously damaged, is there a press social need to restrict freedom of expression in accordance with Article 10(2) ECHR by permitting a libel plaintiff to bring a claim and then possibly recover damages?

75. The main stated objection to s.1 in the Consultation Paper is that it would increase costs to litigants of presenting evidence of harm. However, as both decisions in England & Wales on the interpretation of s.1 of the Act demonstrate, s.1 does not require a plaintiff to prove by way of evidence that his or her reputation has been seriously damaged; in many cases it will be entirely apparent from the facts of publication. Contrary to the suggestion at paragraph 4.24 of the Consultation Paper, the courts have recognised that it is impractical and inappropriate to seek out witness evidence of damage; all that s.1 requires is that the court should be "wary" of attempts to rely on a presumption that a particular publication has caused serious harm to a plaintiff's reputation.[32] This approach simply crystallises the court's assessment of damage to reputation in a flexible context. This is of benefit to all parties to litigation and to the court. There can be no good reason in policy or in law why a libel claim should be permitted to proceed to trial with all the attendant costs and incursion of resources, if there is no realistic prospect of establishing serious damage to reputation. Of course, a claim will only be dismissed before trial for failing to meet the s.1 criteria if the threshold criteria for strike-out are met; perversity in cases where there is a presumption of trial by jury, or no realistic prospect of success under s.8 of the Defamation Act 1996 where trial is to be by judge alone.

76. Therefore, as the recent decision in **Ames** makes clear, s.1 does not require empirical evidence of harm in all the circumstances, as paragraph 4.24 of the Consultation Paper suggests. The MLA also has significant concerns that if s.1 is not implemented in Northern Ireland it will increasingly be seen as an attractive destination for libel plaintiffs pursuing claims against British publishers. Claims can be pursued in Belfast against British publishers domiciled in England, Wales or Scotland in respect of publications throughout the United Kingdom, Wales or Scotland.[33] If section 1 is not

[31] Ames v Spamhaus Project Ltd [2015] EWHC 127.
[32] Ames v Spamhaus Project Ltd [2015] EWHC 127 (QB) per Warby J at [55].
[33] Shevill v Press Alliance SA [1995] 2 AC 18.

implemented in Northern Ireland, it will inevitably have a chilling effect on publishers' willingness to publish in Northern Ireland. Maintaining a parity of approach between jurisdictions is critical to ensure that a publication which may be perfectly lawful in England and Wales is not subject to expensive litigation in Northern Ireland. Such a position would be highly detrimental to freedom of expression in Northern Ireland and would inevitably lead to publishers preventing information from being available within the jurisdiction.

77. The MLA strongly supports its prompt introduction in Northern Ireland which it believes is particularly imperative to ensure that the existing disparity in the number of libel claims between England and Wales does not grow further.

Q.21 If the 2013 Act is not adopted in its entirety, and irrespective of whether the standard of "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?

78. Yes. The MLA believes that s.1(2) of the Act should be introduced in its current form into the law of Northern Ireland. Section 1(2) of the Act is another positive policy development which is consistent with the law of defamation balancing the right to reputation against the right to freedom of expression. This is not unique to England and is a development which has taken place in other common law jurisdictions, for example Australia, as recognised by the Consultation Paper. Corporations should not be allowed to use their significant financial clout to restrict freedom of expression unless they can show it has caused serious financial loss.

79. Section 1(2) is a significant development of the common law. It is an evolution of the common law position that corporations only have very limited rights under Article 8 ECHR and cannot recover aggravated damages or damages for injury to feelings.[34] The requirement to prove serious financial loss or a likelihood of serious financial loss is substantially akin to the requirements to prove special damages in claims for malicious falsehood, or indeed when establishing loss in other torts. The MLA believes that this s.1(2) is an important evolution which should be implemented in Northern

[34] Hays Plc v Hartley [2010] EWHC 1068 (QB) at [25].

Ireland promptly. As with other areas of the Act which evolve the common law position, Northern Ireland risks seriously chilling freedom of expression within the jurisdiction if publications which would not be actionable within England and Wales can be brought in Belfast.

80. Although the Australian model discussed in the Consultation Paper encompasses similar policy principles to that which underpin s.1(2) of the Act, the MLA believe that there is no benefit to the Australian model which limits claims by corporations at the number of employees. Such a test will lead to ancillary arguments about the extent to which individuals are employees, as opposed to contractors or freelancers. This is particularly important in Northern Ireland where companies often employ a large number of agency workers or employees on zero-hours contracts. The test also focuses on the size of the company rather than the actual damage which a publication has caused. Such an approach is arbitrary and does not accord with the policy behind these provisions which should be to focus on the extent of damage caused by a publication. Section 1(2) provides a clear focus on the extent of damage which has been caused to a company. It is to be preferred to the Australian model as a matter of principle and also to achieve consistency.

Q.22. If the 2013 Act is not adopted in its entirety, would it be desirable for a rule equivalent to s.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?

81. Yes. Section 8 of the Act should be introduced into Northern Ireland with prompt effect. In doing so, Northern Ireland would bring itself into line with the approach of both England and Wales and the Republic of Ireland which have reformed the common law to introduce single publication rules in recent years.[35]

82. Section 8 of the Act also corrects significant anomalies in the law of defamation in the internet age. In Northern Ireland, like England and Wales, claims for libel have a strict limitation period of one year. The public policy behind this limitation period is the importance of promptly pursuing vindication of reputation and to avoid the chilling effect on freedom of expression which lengthier limitation periods can create. In the internet era, the 'multiple publication rule' effectively creates indefinite liability for

[35] S.11 of the Defamation Act 2009.

publishers and undermines the effect of article 6(2) of the Limitation (Northern Ireland) Order 1989 (as amended). The public policy imperative which requires plaintiffs to bring libel claims promptly in order to vindicate their reputation has been emphasised on numerous occasions by the courts.[36]

83. The policy behind the one year limitation period for defamation claims therefore does not run counter to the with plaintiff's interests in their prompt vindication. Section 8 of the Act, properly preserves the court's flexibility to override the limitation period where it would be just and equitable to do so.[37] However, it is difficult to envisage any situation where significant damage was caused to reputation by repeated or continuing publications and where it would be in a plaintiff's interests not to bring prompt action for vindication and injunctive relief by way of a claim for libel. Indeed, as the courts have emphasised, promptly seeking vindication is the hallmark of a genuine libel claim. Section 8 therefore brings defamation law into the 21st century. It reinforces the public policy imperative of bringing prompt action which is beneficial for plaintiffs and defendants alike. If this section is not implemented in Northern Ireland, it would make the jurisdiction susceptible to claims which would otherwise fail in England and Wales and the Republic of Ireland. There would be no good reason for such a manifest disparity.

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.

84. Yes. This is an important reform, particularly in the context of Northern Ireland, which as the Consultation Paper acknowledges, does have some history as a jurisdiction of choice for plaintiffs, including individuals whose primary association is not with Northern Ireland. The Consultation Paper recognises that the fear of libel actions may exceed their number in court, but it is the fear of such claims which ultimately has a significant chilling effect on freedom of expression and which may result in citizens of Northern Ireland not being able to access information on matters of public importance which is widely and properly available in other European and international jurisdictions. The MLA believes that this is a small but significant reform which would bring Northern Ireland into line with England and Wales. The MLA does not believe there are any

[36] See Bewry v Reed Elsevier Ltd [2014] EWCA Civ 1411 for a recent recitation of these longstanding principles.
[37] Article 51 of the Limitation (Northern Ireland) Order 1989.

good policy reasons why claims which were barred in England and Wales by virtue of this rule should be able to be brought in Belfast. The Consultation Paper does not establish any basis for suggesting that there is a good reason why such claims should be permitted when Northern Ireland is not clearly the most appropriate jurisdiction for that claim to be tried. There is a real danger that if this rule is not implemented in Northern Ireland, this will accentuate any differences of approach between the jurisdictions and make Northern Ireland even more attractive to foreign plaintiffs suing foreign defendants in Belfast. It is the threat of such actions which is ultimately so injurious to freedom of expression.

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 section 12 and 13 of the Act to be introduced into Northern Irish law?

85. Yes. The MLA believe that consistency of approach between London and Belfast is important so that neither jurisdiction comes to be regarded, or actually is, unduly favourable to plaintiffs or defendants. The MLA believes that section 12 and section 13 of the Act should be introduced as part of the overall extension of the entire Act to Northern Ireland.

Q.25. Would it be desirable for any other "discursive remedies" to be introduced into Northern Irish law?

86. No. The law retains sufficient flexibility within its current powers to afford plaintiffs appropriate remedies. Sections 2-4 of the Defamation Act 1996 provide an important remedy which enables a plaintiff to achieve prompt vindication where a defendant makes an offer of amends. Section 9 of the Defamation Act 1996 also provides the court with the power to grant a declaration of falsity or require a defendant to publish a suitable correction and apology. This is supplemented by the remedies available in the Defamation Act 2013, and the court's inherent powers to grant appropriate injunctions under s.91 of the Judicature (Northern Ireland) Act 1978. Further discursive remedies are therefore unnecessary.

20 February 2015

ANNEX 1

List of MLA members as at 20 February 2015

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1. **Anova Books Group Limited**, publisher of books and related publishing services specialising in non-fiction subject matter.

2. **Associated Newspapers Limited,** publisher of the Daily Mail, the Mail on Sunday, Metro and related websites.

3. **The British Broadcasting Corporation,** a public service publisher of 8 UK-wide television channels, interactive services, 9 UK-wide radio/audio stations, national and local radio/audio services, bbc.co.uk and the BBC World Service.

4. **British Sky Broadcasting Limited,** a programme maker and broadcaster, responsible for numerous television channels, including Sky News and Sky One.

5. **Channel Four Television Corporation,** public service broadcaster of Channel 4 and three other digital channels, plus new media/interactive services, including websites, video on demand and podcasts.

6. **CNBC (UK) Ltd,** business and financial news broadcaster which also operates a portfolio of digital products delivering real-time financial market news and information.

7. **The Economist Newspaper Limited,** publisher of the Economist magazine and related services.

8. **Express Newspapers,** publisher of the Daily Express, the Sunday Express, the Daily Star, the Daily Star Sunday and related websites.

9. **The Financial Times Limited,** publisher of the Financial Times newspaper, FT.com and a number of business magazines and websites, including Investors Chronicle, Investment Adviser, The Banker and Money Management.

10. **Guardian News & Media Limited,** publisher of the Guardian, the Observer and Guardian Unlimited website.

11. **Independent Print Limited,** publisher of the Independent, the Independent on Sunday, the Evening Standard, i and related websites.

12. **Independent Television News Limited (ITN),** producer of ITV News, Channel 4 News, Channel 5 News, internet sites and mobile phones.

13. **ITV PLC,** a programme maker and a public service broadcaster of the channels ITV1 (in England and Wales), ITV2, ITV3, ITV4 and CITV, interactive services and related websites.

14. **Hearst Magazines UK,** publisher of consumer magazines including Cosmopolitan, Good Housekeeping, Harper's Bazaar and Reveal.

15. **News Group Newspapers Limited,** publisher of The Sun and related magazines and websites, and part of NI Group Limited.

16. **The News Media Association,** which represents the publishers of over 1200 regional and local newspapers, 1500 websites, 600 ultra-local and niche titles, together with 43 radio stations and 2 TV channels .

17. **PPA (The Professional Publishers Association),** which is the trade body for the UK magazine and business media industry. Its 250 members operate in print, online, and face to face, producing more than 2,500 titles and their related brands.

18. **The Press Association,** the national news agency for the UK and the Republic of Ireland.

19. **Telegraph Media Group Limited,** publisher of the Daily Telegraph, Sunday Telegraph and related websites.

20. **Thomson Reuters PLC,** international news agency and information provider.

21. **Times Newspapers Limited,** publisher of The Times and The Sunday Times and related websites, and part of NI Group Limited.

22. **Trinity Mirror PLC (including MGN Limited),** publisher of over 140 local and regional newspapers, 5 national newspapers including the Daily Mirror, Sunday Mirror and The People and over 400 websites.

23. **Which?,** the largest independent consumer body in the UK and publisher of the Which? series of magazines and related websites.

Cleaver Fulton Rankin

Northern Ireland Law Commission
Linum Chambers, 8th Floor
2 Bedford Square
Bedford Street
Belfast
BT2 7ES

Our Ref: ARM/NAS/
Your Ref:
Date: 19 February 2015

Dear Sirs

Consultation Paper – Defamation Law Northern Ireland

I refer to the above mentioned consultation paper and in particular to the various questions set out therein.

I would comment as follows:-

Q1
Given the limited size and jurisdiction of Northern Ireland and its dependence up to this point to a greater or lesser extent on the law applicable in England and Wales (with modification)I believe that the only sensible approach is to extend the application of the Defamation Act 2013 in full to Northern Ireland.

It is acknowledged that the 2013 Act is by no means perfect (could any law ever be said to be so?) This is primarily due to the compromises that had to be made in the course of its development and also that it ended up being finalised in the "headlights" of the Leveson enquiry which did not assist and in some ways deflected the legislators from their primary purpose.

It is to be presumed that this will not be the last legislative enactment on this topic of law. Until such time as further amendments, which admittedly might have been considered for the 2013 Act and perhaps should by now have already been made, are made I take the view that judges in the two jurisdictions are well able to apply principles of law in such a way as to ensure fairness.

It is has been stated by commentators that the number of defamation claims in Northern Ireland are higher "per capita" in Northern Ireland by comparison to England and Wales. While that is a serious consideration

50 Bedford Street
Belfast BT2 7FW
DX421 NR Belfast

T +44 (0) 28 9024 3141
F +44 (0) 28 9024 9096
www.cfrlaw.co.uk

a.mcalister@cfrlaw.co.uk
D +44 (0) 2890271359

Cleaver Fulton Rankin

to be taken into account and may be the subject of further research it may be that we also have more politicians "per capita" than England and Wales. On a serious point that same point cannot be made with regard to judicial pronouncements on the law. As noted below the bulk of case-law will be generated in England and Wales, primarily due to the differing approaches within the jurisdictions.

It is for the purposes of consistency clarity and certainty I believe the 2013 Act should be extended to Northern Ireland in its entirety.
In so far as a "corpus" of precedent exists and will continue to be created it is likely that Northern Ireland will continue (even though not obliged) to follow the law as applied by the English Courts almost as a juror partner. Northern Ireland is too small a jurisdiction to justify its own academic publications in this area of law and consequently relies heavily on those produced by the English law publishers.

The essence for any amendment must be to make the law less complex and more cost effective for the end user. Again, I believe this would be more likely to apply if Northern Ireland follows the 2013 Act rather than seeks to strike out on a direction of its own.

My concern is that the current law in Northern Ireland now requires amendment. While the 2013 Act is not perfect it is arguably an improvement on what prevailed before and what still prevails in Northern Ireland. If Northern Ireland does not take action to extend the law by adopting the 2013 Act in full, which would be a relatively benign process, I can envisage no change in the foreseeable future to the law particularly given:-

- The attitude so far shown by the NI legislature to the issue.
- The apprehensions of what could be produced by a NI legislature.
- The monies available to deal with the issue when Northern Ireland is faced with much more significant economic difficulties. This is evidenced by the production of this consultation document at a time when there had been an announcement of the closure of the Northern Ireland Law Commission.

The further questions which are asked in this consultation paper only highlight the difficulties if Q1 is not answered in the affirmative.

Q2 – 25
Accordingly I answer these as being "Not applicable" in light of my answer to Q1. I do not consider "piecemeal" amendment as being in any way satisfactory or appropriate.

Clearly there are issues which may need to be considered further but in my view those would best be looked at in the need for further reform in both England and Wales and Northern Ireland and for that matter Scotland (which having been a jurisdiction held up by those opposed to extending the 2013 Act to Northern Ireland as an independent legal jurisdiction in the UK not proposing to extend the law of defamation in any like way) has now in the Scottish Law Commission's recent programme of law reform recognised the changes and included reference to the law of defamation.

Interestingly the Northern Ireland Executive's imminent closing down of the Northern Ireland Law Commission highlights the need for developments in Northern Ireland law to seek benefit from the laws made for England and Wales.

There are some interesting points put forward in the Consultation Page which I believe it may have been wrong of Parliament not to have included in the 2013 Act and which may be the subject of continuing debate.

Out of interest I make some additional comments on specific questions:

Q21
This is the issue of claims by small corporate entities equivalent to that introduced in the Australian Uniform Defamation Acts relating to the size of the commercial entity being sued.
In a jurisdiction seeking to foster and develop small business this might be considered a valid proposal. In that regard I cannot see why it would not also relate to similar like sized legal entities in the whole of the UK.

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It does raise a question of "barring" remedies to those wronged merely because of the size of the wrongdoer which might need to be the topic of further careful consideration and debate before any change should be implemented. This would raise the question of how one measures a small business e.g. by number of employees or by annual turnover. This in itself will require further deliberation.

Q25

This raises the issue of discursive remedies. This clearly is worth more consideration than has previously been given to it. As against that there is already open to the courts the opportunity to "press" mediation as a means of dispute resolution.

Mediation as a means of dispute resolution is becoming increasingly popular and effective in Northern Ireland. With proper case management by the judiciary and with the wider scope for what can be discussed in the process and what remedies can be achieved (in an area in which the courts are somewhat hide-bound) this could still be achieved without any real need to amend the law. Judges in their case management directions recommend mediation as a preliminary to continuing before the courts. It may be that greater emphasis could be placed on this and sanctions created for those unwilling to engage in such a process.

Unfortunately much as it can often be portrayed as such this is not simply a matter between a complainant and a publisher, with the publisher always having the greater depth of pocket.

Much is made in defamation proceedings and in commentary on defamation law of the "inequality of arms" between the parties.

The real dilemma for the law (as at it is in other areas, needless to say, not just defamation) is that he who "shouts loudest" and can back up his shouts with financial backing may inevitably prevail and not necessarily the person who has the best and most valid argument.

This is a deeper issue in our legal system which is not dealt with by the 2013 Act nor was it intended to be. It is one of life's certainties – that money can buy success - and the only means to resolve that might be something akin to the introduction of protective costs orders such as are seen in judicial review applications where it was seen that meritorious claims were perhaps losing out to monied interests and where parties had to be encouraged to bring claims (primarily on environmental matters) without the risk of serious financial harm being suffered. Some limitation on the costs recoverable is clearly required.

As matters stand if the powerful complainant or the wealthy publisher wishes to spend vast sums of money there is little that can currently be done. The whole area of financing of legal claims requires to be addressed thoroughly.

One final point is that I believe that it is an absolute that the jury has seen its day and that there should be a reversal of the presumption that defamation claims be heard by a jury.

The law in England and Wales has reversed that presumption and it is necessary also that Northern Ireland should do likewise. A jury is not the best forum by which the complex issues which arise in defamation proceedings should be decided. I take the view that by its very nature even the most simple defamation claim depending as it does on the meaning of words and the different interpretations placed on them by the parties makes it perhaps too complex for the ordinary juror.

My point is as much aimed at the jury system itself as the role of the jury in defamation actions. More and more, the standard of juror is being reduced by the ability of those who would prefer not to sit in judgment of their peers to ensure that they are not selected, leaving less able individuals to be the forum of decision which is less than appropriate. I appreciate that this is a controversial view but one on an issue that needs addressing.

I am happy at any time to discuss these issues further with the Commission.

Yours faithfully

Alan McAlister
Director

To: **The Northern Ireland Law Commission**
Linum Chambers
8th Floor
2 Bedford Square
Bedford Street
BELFAST BT2 7ES

Defamation Law in Northern Ireland - Consultation Paper Submission by Brian Garrett LLB, FCI Arb

This Submission is provided in response to the invitation contained in the Commission's Consultation Paper NILC 19 (2014) on the above subject.

I found the Consultation Paper comprehensive, helpful and relevant but, as will be seen, I have confined this Submission to responding to the "series of general consultation questions" set out in Chapter 1: (Introduction) of the Consultation Paper.

As will be known, prior to the Defamation Act 2013 being enacted there was extensive lengthy debate and consultation on the proposals which ultimately became law on 1st January 2014 in England and Wales and, while it is understandable that many of the issues then raised have been reiterated in the Consultation Paper, I have not sought to rehearse at length the various arguments earlier advanced in support of the new law.

The principal observation/submission which I would respectfully make is that the case for the law on defamation in Northern Ireland following that which applies in England would be in keeping with the earlier established approach and a compelling one. It is critical (and in my view in the public interest) that there should be such similar law in Northern Ireland on this subject not least when, for example, national newspapers published in other parts of the United Kingdom are also distributed widely in Northern Ireland. It will prove problematic that there be differing tests in the UK in relation to defamation depending on the location of the proceedings. I am also satisfied that the various alterations in the law introduced by the Defamation Act 2013 will better secure the freedom of the press (and the right of free expression) and support academic/ scientific work in peer reviewed literature and studies.

The general consultation questions (with a response in each case) addressed here are as follows:-

Q1: Should the Defamation Act 2013 be extended in its application, in full, to the Northern Irish jurisdiction?

Extended in full.

As indicated I consider this to be critical in terms of press freedom and the right to free expression as well as supporting genuine academic studies research and providing an element of regulation of websites etc. Failure to do so will certainly be calculated to restrict press freedom in Northern Ireland. The local Northern Ireland press is already vunerable in terms of its scale and financial strength. In addition the current law in Northern Ireland ultimately inhibits local newspaper investigative journalism when dealing with issues of public interest.. The key consideration in defamation law must ultimately be one of balance between press freedom and the right of individuals to secure their reputation. I would respectively submit that the introduction of provisions similar to the Defamation Act 2013 would aid free expression, encourage more responsible journalism and better secure academic freedom in relation to published peer reviewed studies. These are very important benefits and would not threaten the right of individuals to secure their reputation against significant damaging defamatory material.

I acknowledge that this view may raise the question of the need for comparable reform in Scotland but this is an issue which will require to be settled in the Scottish Assembly and with due regard to relevant features of the law of Scotland. I am also conscious that it has been suggested that some of the substantive provisions introduced by the Defamation Act 2013 are already reflected in various case law decisions of the Northern Ireland Courts but this view requires a selective reading of the case law and in any event should not operate to rule out legislative action which would put the issue beyond doubt.

Q2: 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?

It is central to this submission that all of the provisions of the Defamation Act 2013 should be introduced in Northern Ireland – this law should not be altered in an a la carte fashion as to do so may prompt confusion in practical terms for journalists authors, publishers and the general public.

Q3: 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?

No. The most coherent arrangement should embrace all of the provisions and not be selective if, as is here submitted to be the case, there is no cogent reason to justify being selective.

Q4: 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?

The Consultation Paper has raised important arguments in these two areas and on balance I am of the view that it would be desirable to introduce these elements into law in Northern Ireland – to do so may seem to run contrary to the above earlier comments but I do not think that enacting such additional provisions would cause confusion; indeed there would be merit in such legislative provisions being introduced which would allow Northern Ireland to lead the debate in these matters in other parts of the UK. In relation to cases where a prompt and prominent correction/retraction has been made I would also suggest that any bar to further action should apply only if the correction/retraction is sufficiently specific and adequate (and not be such as to rule out the possibility in appropriate cases of a correction/retraction being accompanied by an element of compensation and the assumption of costs by the publisher of the offending material).

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

See Submission re Q4.

J & Garrett

January 2015

JOHNSONS

17th February 2015

Northern Ireland Law Commission
Linum Chambers, 8th Floor
2 Bedford Square
Bedford Street
Belfast BT2 7ES

Dear Sirs,

RE: CONSULTATION ON DEFAMATION LAW IN NORTHERN IRELAND

Whilst I broadly concur with the recommendations made in the Report, my primary concern is that it will nonetheless limit the ordinary citizens' access to justice in the libel courts in Northern Ireland.

As its stands, the current law already makes it very difficult for the man on the street to vindicate his reputation. Further legislation risks placing it even further out of reach.

Factors such as the lack of legal aid and an overzealous press, with deep pockets, printing intimidating articles make the idea of taking on any publication a terrifying prospect for the general public.

Recently, we have had a case were the local newspaper had an English law firm controlling the litigation in the background, and at a relatively early stage in the proceedings, had warned the client that the Defendant had incurred what was an outrageously high six figure sum in defence costs, even before the first interlocutory Hearing had taken place.

This is one of many examples which demonstrate why defamation hearings are very rare in Northern Ireland. If the bar is raised any further the debate will be academic, as the press will have effectively stamped out any challenge to their perceived right to "publish and be dammed".

I would also like to express my concern and objection to the statements in the press in support of what is effectively a "right to libel" campaign. The Ulster Unionist Party survey is in no way representative of the views of the general public (who have little to no knowledge of libel law) as it was only drawing responses from people involved and from parties with a specific interest in this issue.

Whilst the press are quick to highlight the well-known clients who I have represented in the past, they fail to acknowledge that a large proportion of my clients are in fact journalists themselves. I have recently achieved vindication for four investigative journalists in as many weeks.

Johnsons Law Firm

Belfast Office :
Johnson House
50/56 Wellington Place
Belfast BT1 6GF
DX 405 Belfast 1

T +44 (0) 28 9024 0183
F +44 (0) 28 9031 3300

Dublin Office :
4 Harbourmaster Place
IFSC
Dublin 1
Ireland
DX 112018 Talbot Street, Dublin

T +353 (1) 612 6966
F +353 (1) 670 0183

London Office :
21 Arlington Street
London
SW1A 1RN

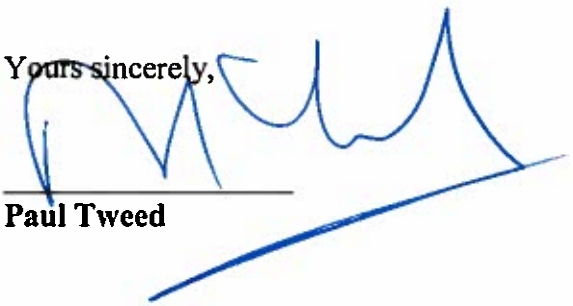
T +44 (0) 20 7409 7404
F +44 (0) 20 7629 1225

I feel that there is absolutely no need whatsoever for any libel law reform and the issue is only on the table as a result of pressure from self-interested lobby groups.

I am attaching copies of earlier correspondence and press articles by way of detailing a number of specific points I have made to various Parliamentary and Judicial Committees.

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

Yours sincerely,



Paul Tweed