**NUJ submission to the Department of Finance (DOF) review of Defamation Law in Northern Ireland.**

**January 2024**

The National Union of Journalists (NUJ) is the voice for journalism and journalists in the UK and Ireland. It was founded in 1907 and has more than 28,000 members working in broadcasting, newspapers, news agencies, magazines, book publishing, public relations, photography, videography, and digital media.

In Northern Ireland, the NUJ has two large branches - Belfast and District and Derry & North West, with members employed across public service broadcasting, independent commercial broadcasting, national and regional print, online and digital platforms and in PR and public affairs. The union has a proud record of defending media freedom and upholding professional standards.

We welcome the opportunity to contribute to the review and make the following comments and observations in this response.

The provisions of the Act replicate (or substantially replicate) provisions in the Defamation Act 2013 (“DA 2013”) which applies in England and Wales, but a number of the provisions of the DA 2013 are omitted. These include two provisions which have importance for journalists. These are sections 1 and 8 in DA 2013, which contain respectively:

* Conditions of actionability for defamation actions by individuals and corporations requiring proof of *serious* *harm* to reputation caused by the publication complained of;
* A single publication rule providing that where the same person publishes the same or *substantially the same* defamatory statement on different occasions any claim in respect of the later publications must be brought within the defamation limitation period (of one year) applying to the first publication in time.

We respectfully suggest these provisions or similar provisions apply in Northern Ireland.

* The fact that there is no anti-SLAPP (strategic lawsuit against public participation) legislation for defamation in Northern Ireland and no commitment to introducing any. As the DOF’s consultation document recognises, both the UK and Irish governments are proposing to introduce forms of general anti-SLAPP legislation. The EU Parliament is also discussing the final text of an Anti-SLAPP Directive. In the UK the Economic Crime and Corporate Transparency Act 2013 already contains provisions at ss.194-195 providing for the court to strike out SLAPP claims as defined therein. These are essentially abusive claims seeking to restrain a defendant’s right to freedom of speech in the public interest in relation to economic crime.
* The substantial costs of defending defamation actions in Northern Ireland and the lack of any effective mechanisms in the law in Northern Ireland for capping or otherwise controlling the costs defendants are liable to incur in defending such actions, serve to have a chilling effect on our journalist members and journalism.

**The Substantial Harm Requirement**

Under DA s.2013 section 1(1) requires a claimant in defamation to prove that the publication complained of *has caused or is likely to cause serious harm* to their reputation. DA section 1(2) provides that harm to the reputation of a body that trades for profit suing in defamation is not serious harm *unless it has caused or is likely to cause the body serious financial loss*.

The required harm under DA 2013 s.1, whether past or *likely,* must be proved by the claimant as a matter of fact. This calls for an assessment of the *impact* of the publication of the statement. This can be done by reference to the gravity of the defamatory meaning and the scale of publication alone. Publication of an allegation that the claimant is a murderer on the front page of a tabloid newspaper, to take an extreme example, would cross the threshold without further evidence being required. But other less extreme cases get litigated in defamation and have to be defended by journalists. Some are cases where the words complained of do not have such an obvious adverse impact on reputation and/or where the extent of their publication may be limited. Some are trivial. In these cases in England and Wales the claimant can be required to prove, by reference to other evidence, that the publication caused such serious harm.

Moreover, in ***Banks v Cadwalladr*** [2023] KB 524 the Court of Appeal in London ruled that serious harm must be proved for each publication complained of. In libel there is a separate publication, and a separate tort, each time the words (published in permanent form) complained of are read, viewed, or listened to. So, where a publication is online there will come a point where it is receiving so few viewings that a claim in libel can no longer be brought, because there is no serious harm from those few publications. This can be an important protection for journalists as ***Banks*** illustrates. The journalist defendant had a public interest speech defence in relation to all of the online publications during the first year. Then there was a change in circumstances which meant that the public interest speech defence was lost for subsequent publications online. But the journalist was able to argue that the subsequent online publications on their own did not cause serious harm to the claimant’s reputation. This argument succeeded on the facts in front of the judge. Although the Court of Appeal reversed this ruling on the facts the case illustrates the potential importance of the defence to journalists.

The ***Jameel*** case law has been considered and applied in defamation cases in Northern Ireland. See e.g. ***Ewing v Times Newspapers Limited*** [2013] NICA 74[36]-[39]. In the recent online defamation case of ***O’Neill v Carson*** [Master Bell; 7.11.23] the court considered that it might have struck the claim out as a ***Jameel*** abuse of process, had the submission been made by the Defendant. See at [46]. But if there had been a serious harm condition of actionability in Northern Ireland the onus would have been on the Plaintiff to establish the condition, rather than on the Defendant to argue for a ***Jameel*** abuse of process.

The consultation document suggests that:

*Arguably, the absence of a serious harm test in the 2022 Act could mean that the threshold for proving defamation in Northern Ireland remains lower than in England and Wales…*

We consider this understates the position. The Supreme Court decision in ***Lachaux v Independent Print Ltd and another [2020] AC 612 [12-[16]*** makes quite clear that the threshold of actionability is higher under DA 2013 s.1 than under the common law rule in ***Jameel*** (which applies in Northern Ireland). So, it is obviously the case that the threshold is lower in Northern Ireland. The claimant has to prove that a threshold of seriousness is met by reference to the actual facts about the impact of the statement and not just the defamatory meaning of the words complained of.

We would therefore argue for an equivalent to DA 2013 s.1 in Northern Ireland. It would provide important protection for our members’ right of journalistic free speech. If claims in defamation can be brought, even where there is not serious harm, this tends to chill freedom of expression by journalists. They are less likely to publish allegations that are defamatory but in the public interest if they do not have this protection, for fear of the stress, time and expense involved in defending claims. It may be argued that this is no bad thing where serious harm to reputation is caused. But it is difficult to see how this can be argued in situations where no such harm can be shown.

**Limitation**

The *single publication rule (“SPR”) in DA 2013 s.8 (*SPR) addresses a particular interference with free speech, and in particular journalistic free speech. It is an interference which did not arise before mass media publication – whether in print (e.g. of books) or online. It is as follows. A defendant may be exposed to defamation litigation, without limit in time, by repeatedly (e.g. a reprint of book) or continuously publishing the same or similar defamatory words (viz in an online publication).

This is because, as described above, at common law each publication of the words complained of in permanent form to a new reader/viewer is a fresh tort of libel. And so, the limitation period in respect of the repeated/continuous publication just keeps re-starting every time the words are re-read/viewed.

In ***Times Newspapers Limited v UK*** [2009] EMLR 14 the European Court of Human Rights recognised that such exposure may amount to a violation of the right to free speech under ECHR Art 10. There would come a point therefore when plaintiffs, in a position to do so, should be required to decide whether to sue or not, after which any interference with the right to free speech represented by the litigation could not be justified.

We would therefore urge the consideration of an equivalent to DA 2013 s.8 in Northern Ireland. Journalists, whether as authors of books or online material, are often sued in defamation as individuals. They can be vexed by defamation proceedings brought some time after the first publication when it is difficult to defend the proceedings for the reasons identified by the ECtHR in the ***Times* *Newspapers*** case. The balance struck by the SPR between the competing rights is fair, especially as it preserves court’s discretion to extend the limitation period in an appropriate case. Indeed, a case for violation of the Article 10 right could be taken to Strasbourg from Northern Ireland if, for example, a case of online publication of the same material outside of the one year period from first publication were allowed to proceed. It is difficult to see why the Assembly would not want to anticipate and legislate to avoid this possibility. The combination of a lack of a SPR and of a serious harm test is particularly problematic for journalists in Northern Ireland. They could be vexed by late and trivial libel claims in a way their counterparts in England and Wales are not.

**Anti-SLAPP**

In 1988 two US academics, George W Pring and Penelope Canan, wrote about *“a new breed of lawsuits stalking America.”* They called them “strategic lawsuits against public participation,” or “SLAPPs.” These were, essentially lawsuits brought by large corporations or wealthy/public figures against citizens for their speech or other activities by which they sought to influence government actions. Since then, a much broader, and generally accepted, understanding of SLAPP has emerged in the US. SLAPPs were notably described by a US judge in one case as *“generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so.”* Many SLAPP defendants are public interest journalists wishing to publish allegations against individuals or companies that may be defamatory of them but are part of a debate of public concern. In the US many states have anti-SLAPP laws. These may differ, especially in their precise definition of a SLAPP suit, but all contain mechanisms for defendants to have such lawsuits stayed/dismissed at an early stage and provisions to deter claimants from bringing them in the first place.

The argument most commonly raised against anti-SLAPP legislation is that there are not many SLAPP suits. This may be so. Indeed, there are not many defamation suits, by comparison with other types of claim. All of this will be true in Northern Ireland as it is in England and Wales, but this is not to the point. An imbalance of wealth and power is a key characteristic of a SLAPP suit. Potential claimants are able to meet the high costs of defamation litigation, using specialist lawyers who can intimidate potential defendants from the start of the pre-action correspondence. The threat of lengthy and costly libel proceedings is often enough to deter the potential defendant from publishing where they receive pre-publication correspondence from lawyers. Or if the correspondence only starts after publication, it may cause them to settle the prospective claim to avoid the now threatened litigation, which usually involves taking down online content. Here the damage done to free speech in the public interest is invisible and unquantifiable. This is the chilling effect on public interest freedom of expression that is the consequence of a democracy that has defamation laws, but without anti-SLAPP protection for free speech. Here the very existence of anti-SLAPP legislation is of value. It signals to claimants that this sort of tactic may be defeated by the intervention of the court and encourages the speaker/publisher to resist the threat in the knowledge they can stop the claim if it materialises.

There is a form of anti-SLAPP legislation which allows the court to identify a potential SLAPP as follows: if a principal effect of the legal proceedings will be to deter or chill participation in an area of social significance, then it is potentially a SLAPP. The more serious the risk of such deterrence (and the consequences of deterrence) the stronger must be the plaintiff’s justification for continuing it (i.e. for the court allowing the suit to proceed). Objective assessments would be made by the court, on the evidence, on both issues. In deciding whether strong justification is made out by a plaintiff the court would look at the harm that would be done to the plaintiff’s interests if the claim is stayed and balance this against the harm that continuing will cause to the defendant’s right of free speech on matters of public interest, and to public discourse on such matters generally. The Ontario law discussed in the consultation document is an example of this type of anti-SLAPP law. We would suggest anti-SLAPP law in Northern Ireland in broadly this form.

Journalists are very often the target of SLAPPs for example a recent report by academics at the University of Aberdeen for the EU Parliament. Referred to in <https://theconversation.com/slapps-inside-europes-struggle-to-protect-journalists-from-malicious-lawsuits-218632>. There is no reason to believe that journalists in Northern Ireland are any less vulnerable than counterparts across Europe.

The NUJ surveyed members in Northern Ireland seeking their views on defamation law. Almost a quarter (24%) of respondents had been issued with defamation proceedings and the majority of journalists (58%) confirmed they had received a threat of legal action. One member said, *“It's a calculated tactic to scare Press off and it often works.”* Another stated *“Threats of legal action verbally also need to be addressed as well as the issue of letters threatening legal action.”*

The length of time it takes for a full hearing was identified by 81% of journalists as the second highest concern, followed by the chilling impact of defamation law on journalists (77%), risk to professional reputation (73%) and uncertainty of outcome selected by 73%. 100% of survey respondents shared they felt the prospect of legal action inhibits journalism and that there is a need for legislation to outlaw SLAPPs.

Whilst the targeting of individual journalists including freelances is a tactic deployed by claimants, journalists have also reported legal departments of their employer settling claims where SLAPPs were issued – action likely taken with consideration given to the drawn-out legal processes they would otherwise become embroiled in. One respondent said*, “Past employers [are] far too ready to settle out of court cases that could be won.”*

Of survey respondents directly employed, 81% said their media organisation had been issued with defamation proceedings.

The scourge of SLAPPs and their impact on public interest journalism cannot be overstated. The NUJ welcomed Master Evan Bell’s decision to strike out a defamation case against Belfast journalist Malachi O’Doherty brought by NI Assembly member Gerry Kelly. This significant case described by Master Bell as “vexatious” is only one example of the growing use of SLAPPs against journalists by political figures.

**COSTS**

While no two defamation cases are likely to be the same, in defamation cases neither side’s costs are budgeted or capped.

The presumption is that a “winner” in the litigation which includes a plaintiff who achieves a “win” (i.e. a finding on liability and remedy) of any sort. See most recently, <https://www.theguardian.com/media/2023/nov/19/rights-groups-back-observer-writer-carole-cadwalladr-over-court-costs> will receive all or most of their costs of the case so the defendant who loses is likely to have to pay the other side’s costs of the action, taxed if not agreed. This regime is a huge disincentive to defendants to defend their free speech rights in defamation cases.

We would urge changes to the costs regime in Northern Irish defamation cases. Our members are probably the single most (adversely) affected group. There is no justification for the current regime in the human rights era and continues only through legislative inaction. Costs of the sort run up in High Court defamation cases in Belfast are not necessary to achieve a fair and effective procedure for determining defamation complaints. No one suggests the continental systems do not achieve this. Effective mechanisms for controlling the costs exposure of defendants in defamation cases could be easily justified. Most obviously the “winner takes all” costs presumption could be scrapped, costs should be strictly budgeted and capped at each stage by the court as the case progresses (with standard fee ranges for the normal work required as in other cases such as public law and personal injury cases) and the costs either side can recover at the end of the case should be necessary and proportionate to the result achieved. There could also be mandatory alternate dispute resolution (ADR) and costs penalties for parties who fail to engage properly with required ADR procedures. Consideration should be given to providing legal aid to defendants where the court identifies it as necessary to achieve equality of arms.

When asked in our member survey about key concerns regarding current defamation law, cost was identified as the top factor by 96% of participants. A comment from one member reflected feedback heard by the union on many occasions. They said, *“Ordinary people cannot afford the cost.”*

We again urge the DOF when reviewing the Defamation Law in Northern Ireland to consider the issues raised in our submission and the chilling impact on journalists and journalism.