

Response by the Libel Reform Campaign to report of Dr Andrew Scott: 'Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance'

12 January 2017

Overview

The detailed substantive recommendations made by Dr. Scott in his report ("the Report") are (with a few exceptions) welcomed and supported by the Libel Reform Campaign ("the Campaign"). The Report, coupled with the Consultation Paper of the Northern Ireland Law Commission ("NILC"), provides an extensive evidence base for reform of the law of libel in Northern Ireland. The consultation undertaken by the NILC elicited responses from major international and domestic publishers, from the BBC to The Guardian, newspaper representatives, the News Media Association, and the world's largest internet company, Google. The significant number of unique consultation responses reflects the importance of reform in Northern Ireland to a wide range of individuals, organisations and corporations.¹ Dr. Scott's recommendations in the wake of the NILC consultation and the inclusion in the Report of two pieces of draft legislation outline an evidence-led approach for reform of the law of defamation in Northern Ireland.

The Campaign is a coalition of over 100 civil society groups and 60,000 supporters from across the UK including leading names from science, the arts and public life. The Defamation Act 2013 was the culmination of 5 years of extensive campaigning, policy research, consultation and parliamentary scrutiny. In Northern Ireland, there have now been 5 years of scrutiny of many of the defences that underpin the law, plus an additional 3 years of scrutiny of the particular state of the law in Northern Ireland. During our campaign, the intention of Parliament that was conveyed to us was to reform the law in England, Wales, Scotland and Northern Ireland equally to protect citizens and publications across the four jurisdictions. The NILC received the request from the Minister for Finance and Personnel to carry out a review in September 2013. The Department of Justice formally approved the consultation by NILC in January 2014. We are now at the start of 2017. Significant and extensive consultation has now been done on the law in Northern Ireland and the Report now points clearly to the need to reform the law.

There is no reason whatsoever for any further political delays. As this consultation, along with the many consultations and opinions before it show, free speech in Northern Ireland is being chilled by an archaic, technical and restrictive law of libel.

¹ 32 unique responses were received to the consultation over a third as many as for the consultation by the UK Ministry of Justice for a population around forty times larger: The Report 1.09.

We welcome the engagement by the NILC and Dr Scott on the substantial body of work undertaken to date on libel law reform; from the consultative exercise by the UK Ministry of Justice, the Culture, Media and Sport Select Committee findings, other parliamentary inquiries, the judgments made by the courts in England and Wales and the academic literature on the emerging jurisprudence from the 2013 Defamation Act. This has been completed by the extensive academic knowledge of Dr. Scott who has written what should be seen as one of the most considered approaches to the law of libel since our campaign began.

The Campaign believes that the Minister for Finance should lay the Defamation Bill contained within Appendix 2 of the Report (with the amendments supported below) before the Assembly in the first quarter of 2017 and that it should be passed at the earliest opportunity. Reform can no longer wait.

A. Introduction

1. The Report opens with a number of broad points on reform of the law of libel which take into account the significant evidence base there is for reform in Northern Ireland, notwithstanding the detailed technical analysis it also contains.
2. The Campaign welcomes the recommendation in 1.12 that “a package of provisions equivalent to the Defamation Act 2013 should be introduced in Northern Irish law.”
3. It is worth reiterating, as the Report’s Introduction does in 1.04, the statistical evidence that the number of libel claims in Northern Ireland is higher than in England and Wales. As noted in the NILC Consultation Paper, the number of claims per capita in Northern Ireland is “relatively high”.² This had been conveyed anecdotally by defamation lawyers and members of civil society to the Campaign and it is useful to see this confirmed once again. Statistically, there are 6 times more claims per capita for defamation in Northern Ireland than in England and Wales³ - which demonstrates the real need for reform. In particular, there is a need for the Section 1 serious harm requirement to prevent trivial or vexatious claims.
4. Our research found that there is seemingly no good reason why there should be 6 times more claims in Northern Ireland, other than the fact the law allows more claims to proceed. This is best evidenced by the lack of cases that result in a determination for either party. The useful analysis from the Law Commission shows that of the 30 claims progressed to the High Court in Belfast in the last 3 years, less than 5 cases ended with a determination for either party.⁴ We particularly welcome the warning in the NILC

² NILC Consultation Paper 2.09

³ Ibid. 2.09

⁴ Ibid. 2.07

Consultation Paper that in the political context of Northern Ireland there is a “particular need to be vigilant” over claims against the media by politicians.⁵

5. We do, however, maintain our disagreement with the claim repeated in 1.16 of the Report that international human rights law does not compel reform of the law of libel in Northern Ireland. This is an adoption by Dr Scott of the position taken in the NILC Consultation Paper that the existing law comprises a "legally tenable balance" in regards to international and domestic human rights law.⁶ We agree with the contrary view of Lord Lester QC who has raised doubts over this balance⁷ and note also that this was considered by the UN Committee on Human Rights which criticised the libel laws of England, Wales and Northern Ireland in its 2008 report on the implementation of the International Covenant on Civil and Political Rights⁸.
6. The NILC Consultation Paper refers at 1.32 to Professor Gavin Phillipson’s criticisms of the UN Human Rights Committee and his scepticism is echoed in the Report’s conclusion that the current balance is “legally tenable”. Yet it is worth reiterating again that Professor Phillipson’s approach is controversial and was criticised by Parliament’s Joint Committee on Human Rights when it considered his evidence.⁹
7. From our reading of Dr. Scott’s “Recommendations”, we welcome the overall positive picture the Report paints in favour of Northern Ireland adopting Sections 2, 4, 6, 7, 8, 12, 13 and 14 from the Defamation Act 2013 into the law of Northern Ireland.
8. We also support the changes that the Report suggests to Section 3 (honest comment).
9. However, we disagree strongly with the Report’s conclusion that the arguments for the adoption of Section 1 and Section 9 are “less compelling”. The Report gives a number of valid reasons for adoption of both Sections.
10. While we disagree with the recommendation that adoption of Section 11 is “less compelling”, we understand the specific historical circumstances in Northern Ireland that mean there is a strong attachment to trial by jury. We refer to the reasons we gave during the consultation in support of the shift away from the presumption of trial by

⁵ Ibid. 2.45

⁶ Consultation Paper para 11

⁷ 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>

⁸ CCPR/C/GBR/CO/6 30 July 2008

⁹ 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>

jury, in particular the expense to both claimants and defendants of jury trials, but observe that if Section 1 is adopted, the case for Section 11 is less pressing.

The Campaign's preferred position is for the adoption of the draft legislation contained within Appendix 2 of the Report with the following amendments:

- The adoption of the Honest Opinion Defence as amended by Dr. Scott (Clause 3 of Appendix 1)
- The adoption of New Clause 10 as set out in Appendix 1: "Action against a person who was not the author, editor" etc in place of clause 5 of Appendix 2 but without sub-clauses (5)(a) and (b) (coupled with the abolition of the common law defence of innocent dissemination and the repeal of section 1 of the Defamation Act 1996).

11. This would build additional safeguards into the legislation, reflecting the consultation responses and analysis, while maintaining a relative uniformity of law between England, Wales and Northern Ireland, reducing confusion and legal uncertainty for publishers.

12. The above-stated position would also go some way towards reflecting the aspiration set out by Dr. Scott in 2.06 of the Report whereby Northern Ireland can "become known as a benchmark for other common law jurisdictions", a major achievement. However, for reasons we have summarised below, we do not go all the way with Dr Scott, in that we are not convinced that the reform he proposes in the form of new clauses 7 and 11 of his draft bill at Appendix 1 would constitute a workable scheme; although we do fully support the principle of seeking further means of supporting the early settlement of defamation complaints on the basis of a prompt and appropriately prominent correction or retraction.

B. Defamation Act 2013 Section 2: Truth

13. We agree with Dr. Scott's recommendation in 2.15 of the Report that a provision equivalent to section 2 of the Defamation Act 2013 should be included in a bill brought before the Northern Ireland Assembly.

C. Defamation Act 2013 Section 3: Honest Comment

14. Dr. Scott recommends two key changes to Section 3 of the 2013 Defamation Act: to extend the defence to "inferences of verifiable fact" (2.25 – 2.27) and to facts "reasonably believed to be true" at the time of publication (2.28 – 2.34).

15. This would build on the amendments suggested by Dr. Scott in the NILC Consultation Paper at 3.34-3.39 that the publisher of a comment made *contemporaneously* with a

privileged statement should be able to seek protection under a Section 3 defence instead of being confined to reliance on a Section 4 defence.

16. The amendment that was suggested by the NILC Consultation Paper at 3.38 – 3.39 to remove reference to section 4 from section 3(7) was considered by the Campaign at the time to be acceptable but we have noted that, at 2.37 – 2.38 of the Report, Dr Scott does not recommend taking the discussion further and we are content to support his conclusion.
17. The changes proposed to Section 3 in the Report and supported by the Campaign are highlighted below in bold:

(4) The third condition is that an honest person could have held the opinion on the basis of—

(a) any fact which existed at the time the statement complained of was published;

(b) anything asserted to be a fact in a privileged statement published before or at the same time as the statement complained of;

(c) any fact that the defendant reasonably believed to be true at the time the statement complained of was published.

And:

(8) For the purposes of subsection (2), a “statement of opinion” can include any inference of fact.

- **Amendment to Section 3 (4(b)):**

18. We agree that, as is noted at 2.35 of the Report, it would be a useful amendment to (4)(b) to put beyond doubt that honest opinions published contemporaneously with privileged statements would attract protection, as many opinion pieces or social media commentators will comment now in real-time on the publication of privileged statements (for instance statements in the Northern Ireland Assembly). In principle, such comment obviously should be protected. It seems to have been accepted that the omission to use wording making this explicit in the 2013 Act was an error and unintended. We believe that to make this explicit would be a useful protection also for those subject to defamatory comments, who could respond contemporaneously by way of comment to (for instance) an untruthful allegation published in privileged circumstances at less risk of opening themselves up to the possibility of a defamation action. We therefore agree with Dr. Scott’s recommendation that there should be a minor amendment to Section 3 (4(b)) to clarify this.

19. The NILC Consultation Paper at 3.24 – 3.28 made the case well for the addition of draft sub-clause (4)(c) to Section 3 noting that the Ministry of Justice consulted at the time of publication of the draft Defamation Bill on allowing an honest opinion defence on the basis of an “honest mistake” as to the basis of facts and that this attracted majority support among consultees.¹⁰ The government’s response at the time, rejecting the idea on the ground that this would complicate the law was rightly, in our view, noted by the NILC Consultation Paper as “contestable”; and the government’s later justification for its omission of such a provision, that adding it into the law would “undermine the need for a factual basis to an opinion”, was no more than a statement of the obvious. We agree with the NILC Consultation Paper at 3.28 that the “utility of the honest opinion defence to social media commentators remains significantly weaker than might have been the case.” We are glad that our viewpoint was supported by some other consultation responses and agree with Dr. Scott’s conclusion at 2.33 of the Report that the outcome of this consultation process should be better law.

- **New sub-clause Section 3 (8):**

20. The NILC Consultation Paper asked at Q.8 whether the defence of honest opinion should extend to encompass “inferences of verifiable facts” from underpinning facts. We agree with the Report that for the sake of clarity this provision should be added to Section 3.

- **Interplay between Section 3 and Section 4:**

21. As noted at paragraph 16 above, we are content with Dr Scott’s conclusion at 2.37 of the Report that the proposal outlined in this regard should not be taken further, to alleviate any potential practical difficulties that may arise.

22. Overall, the Libel Reform Campaign strongly supports the amendments to Section 3 recommended by Dr Scott’s Report.

D. Defamation Act 2013 Section 4: Public Interest Defence

23. We agree with Dr. Scott’s recommendation that Section 4 of the Defamation Act 2013 should be adopted in Northern Ireland. This is one of the most important provisions in that Act and received significant support in the consultation.

E. Defamation Act 2013: Sections 6 and 7

¹⁰ NILC Consultation Paper 3.28

24. On Section 6, we agree with the view expressed in the NILC Consultation Paper at 3.68 and referred to at 2.46 of the Report, that:

"It is notable that the privilege applies only to peer-reviewed publications that meet the conditions set out in subsections (2) and (3). It is not a general protection for academic speech. Section 6 would not have assisted any of the defendants in the recent scientific *cause célèbre*."

25. As noted in the NILC Consultation Paper, in *El Naschie v MacMillan Publishers Ltd*, the statements complained of were published in a peer-reviewed journal but in the editorial section and not the peer-reviewed section and so the case became about the integrity of peer review and self-publication rather than the academic matter at hand.

26. It is, and always has been, the view of the Campaign that the public interest defence is of more importance to protecting scientists and academics than Section 6. The Campaign never saw giving particular protections to peer-reviewed journals as a priority to protect science, particularly as so much useful scientific debate in the public interest (from criticisms of pseudo-science or dangerous medical treatments) is conducted outside of academic journals. We always argued for stronger defences in law to protect all scientists, regardless of where they published.

27. We, however, agree with Dr. Scott in 2.47 of the Report, that Clause 6 does have merit and should be adopted in Northern Ireland.

28. We believe Section 7 of the Defamation Act 2013 is useful. In particular, we believe there is particular merit in explicitly mentioning the Northern Ireland Assembly and all units of local government under clause 4 of Section 7.

29. We agree with Dr. Scott's recommendation at 2.49 of the Report that Section 7 should be adopted in the legislation to reform the law of libel in Northern Ireland.

F. Defamation Act 2013: Section 5

30. Many in Northern Ireland have raised concerns over the lack of protection for internet intermediaries under the existing law in Northern Ireland, which places tech firms, and in particular new media publishers, under a disadvantage as compared to similar firms located in England or Wales.

31. The approach outlined by Dr. Scott has merit in our view, as summed up at 2.63 of the Report:

“Ultimately, it should be for a court to determine rights. As a matter of policy, intermediaries should not be asked to do so. When they are so asked, it can only be expected that they will proceed not on the basis of the merits of the allegation made, but rather by reference to the understandable desire to limit their own legal risk as swiftly and efficaciously as possible.....”

32. Section 5 of the Defamation Act specifically leaves exposed to liability website operators who are not the authors of a defamatory comment because of the ways in which the defence can be defeated in sub-section (3):

(3)The defence is defeated if the claimant shows that—

(a) it was not possible for the claimant to identify the person who posted the statement,

(b) the claimant gave the operator a notice of complaint in relation to the statement, and

(c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

33. The Campaign worked to try to persuade the Ministry of Justice to adopt an approach as alluded to by Dr. Scott in 2.62 and 2.65, that is to ensure that only primary publishers, those who authored or edited a defamatory statement, could be held accountable for it.

- **Amendment to Clause 5 as suggested by the Campaign:**

34. Our compromise position was to advocate that the Defamation Act be brought into line with the Electronic Commerce (EC Directive) Regulations 2002 (2002 No 2013) which, in the case of hosting (section 19), requires actual knowledge of unlawful activity or information, thereby placing a higher burden upon the complainant. On this basis, the Campaign argued in favour of an amendment to the Defamation Act 1996 whereby, in subsections (1)(c) and (5) of section 1, the word “defamatory” would be replaced by the word “unlawful”.

35. Our proposed amendment took account of the fact that many claimants may simply contend that content is defamatory and serve notice upon website operators to that effect. Yet, content may be defamatory and true, or in the public interest (that is, there may be a defence available to the publisher of that content). By, in effect, requiring the notice to state that content is unlawful (defamatory and with no available defences) not only would greater protection be provided to the originators of the content as against their website operators, if the latter were inclined to take the easy option, but it would positively require complainants to think through their claim properly before serving on

a website operator a notice which could lead to the commencement of an ultimately defensible defamation action, so landing the claimant with an adverse costs order. Above all, however, it would protect website operators against vexatious complaints and claims from the growing reputation management industry.

36. Dr. Scott notes in 2.68 and 2.69 of the Report that serving notice of defamatory content upon anonymous users is less complicated than imagined, especially with new case law developments that allow for legal claims to be served through social media. If the primary publisher of a defamatory statement could not be identified, then orders could be addressed to "persons unknown". As Dr. Scott notes, if Section 13 of the Defamation Act 2013 is introduced into Northern Irish law, the claimant could seek summary judgment and a take-down order that could be presented to secondary publishers - allowing courts rather than private companies to decide whether there is merit in censoring online speech.

37. We agree with Dr. Scott in 2.70 of the Report that there is merit in requiring a claimant to do more than merely send a notice of complaint to online intermediaries, and that requiring a claimant to argue a *prima facie* case before the court would deter claims that lack merit, while still providing a remedy in those cases that do have merit.

38. Dr. Scott's proposed route forward set out at 2.73 – 2.74 of the Report is to expand the jurisdictional exclusion set out in Section 10 of the Defamation Act 2013 and:

- not introduce Section 5 of the Defamation Act 2013;
- remove the existing defences that limit intermediary liability (abolition of the common law defence of innocent dissemination and repeal of Section 1 of the Defamation Act 1996 so far as applicable to Northern Ireland);
- introduce an expanded equivalent of Section 10 of the Defamation Act 2013 to reintroduce the definitions of author, editor and publisher lost from the above-stated action.

39. This proposed expanded provision is set out by Dr. Scott in the form of a **new Clause 10** at Appendix 1 of the Report from which the equivalent of Section 5 has been omitted:

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

(1) A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of.

(2) For the purposes of this section, "author", "editor" and "publisher" have the

following meanings, which are further explained in subsection (3)—

“author” means the originator of the statement, but does not include a person who did not intend that his statement be published at all;

“editor” means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and

“publisher” means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.

(3) A person shall not be considered the author, editor or publisher of a statement if he is only involved—

(a) in printing, producing, distributing or selling printed material containing the statement;
(b) in processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part I of the Copyright, Designs and Patents Act 1988) containing the statement;

(c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;

(d) as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;

(e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

(f) in the moderation of statements posted on a website by others.

In a case not within paragraphs (a) to (f) the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement.

(4) Employees or agents of an author, editor or publisher are in the same position as their employer or principal to the extent that they are responsible for the content of the statement or the decision to publish it.

(5) Regulations may—

(a) define a category of persons who, while not being an author, editor or publisher as defined in subsections (2) and (3), will nonetheless be treated as a publisher for the purposes of defamation law generally.

(b) make provision for an appropriate defence of innocent dissemination applicable to any person who is treated as a publisher in accordance with Regulations made under this subsection.

(6) Section 1 of the Defamation Act 1996 is repealed insofar as it applies in Northern Ireland.

(7) The common law defence of innocent dissemination is abolished.

40. The Campaign sees merit in this approach, notes the failure of Section 5 of the Defamation Act to reflect the latest legal developments in this area of the law (in particular the E-Commerce Directive) but also recognises that a unique approach in Northern Ireland could add to the complexity for internet operators in fulfilling their legal obligations.

41. In Dr. Scott's draft clause 10 in Appendix 1, the inclusion of sub-clauses (5) (a) and (b) seem superfluous and we would recommend that if the Executive wishes to deem any additional persons that should be treated as a publisher, then it should legislate to that effect, in order to prevent Executive overreach without scrutiny.

42. Dr Scott's recommended inclusion in sub-clause (3)(f) of website operators that merely "moderate" third party content on their websites amongst those who would not be considered the author, editor or publisher of a statement would be welcome. It is harmful to impose liability on website operators for taking on responsibility for deleting unwelcome comments on their websites; whereas website operators who did not do so would escape liability.

The Campaign recommends adoption of the new clause 10, as outlined by Dr. Scott but without sub-clauses (5)(a) and (b), in place of Section 5, in the implementation of a new Defamation Act for Northern Ireland.

G. Defamation Act 2013: Section 1

43. We welcome the conclusion by Dr. Scott in the Report at 2.98 that Section 1 of the Defamation Act 2013 should be adopted into draft legislation for Northern Ireland. A clear majority of consultation responses were to the effect that Section 1 is operating effectively in England and Wales and is providing additional protection for freedom of speech.

44. Dr. Scott's analysis in 2.95 - 2.98 suggests that the concern earlier expressed in the NILC Consultation Paper that the reform "may have the undesirable effect of increasing the

complexity and cost of proceedings”,¹¹ is still only the subject of somewhat mixed evidence to date. To this the Campaign would add that it is still early days in the operation of section 1 and the English judges are still familiarising themselves with its implications and establishing the ground rules on a case-by case basis. The practical operation of the procedure is also currently under consideration by the Court of Appeal in the case of *Lachaux*, in which judgment has been reserved following a hearing in late November and early December 2016.

45. It was inevitable that the first cases on section 1 should have consumed more time and cost than is likely to be the case in the future and that, as the principles are established by the case law, the number of actions commenced which lead to a contested section 1 application will undoubtedly reduce. This process of settling down is precisely what happened in respect of the new offer of amends procedure in sections 2 – 4 of the Defamation Act 1996, which are now rarely the subject of a contested hearing because the legal advisers on both sides can accurately predict the likely outcome on the basis of the early test cases. The Northern Irish judges will, for their part, have the benefit of the English jurisprudence on section 1 from the very outset.
46. The serious harm test imposes a salutary discipline upon claimants and their legal advisers because it ensures they give early and thorough consideration to whether the publication in respect of which legal action is contemplated has actually caused serious harm to reputation, rather than merely causing offence, and whether there is a more proportionate route to resolving the matter. The need to focus on these matters at the very outset encourages a more cool-headed and less trigger-happy approach to the bringing of defamation actions where it is disproportionate to do so.
47. Section 1 also dovetails well with the fact that where there has been minimal actual harm to the reputation of the claimant, a claim can be struck out as an abuse of process under the principle established by the Court of Appeal in *Jameel v Dow Jones*.¹²
48. We also welcome the recommendation in both of Dr Scott’s draft bills to include a provision equivalent to Section 1 (2) on corporations (“Serious harm test: bodies that trade for profit”).

H. Defamation Act 2013: Sections 8, 9, 11, 12, 13, 14

¹¹ NILC Consultation Paper 4.21.

¹² The Report 2.85

49. The Campaign welcomes Dr. Scott's recommendation in the Report that Section 8 (2.110), Section 9 (2.115), Section 11 (2.122), Sections 12 and 13 (2.125) and Section 14 (2.106) are adopted from the Defamation Act 2013 into the law in Northern Ireland.
50. On Section 11, we note the evidence of the Media Lawyers Association referred to in 2.118 of the Report that the presumptive right 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 we strongly support requesting the Executive's acknowledgement of the importance of including the equivalent of Section 11 in a new law of defamation in Northern Ireland.

I. Single Meaning Rule and Bar to Claims on Corrected Meanings

51. In Chapter 3 of the Report Dr. Scott has outlined a proposed scheme that would involve the abolition of the single meaning rule coupled with a jurisdictional bar to claims in respect of which the meaning the subject of complaint has been corrected or retracted promptly (normally within 7 days) and prominently. He has incorporated this proposal into his draft Bill at Appendix 1 in the form of new clauses 7 and 11.
52. The Campaign in principle supports Dr Scott's aim of seeking further means of supporting publishers, on the one hand, to publish corrections or retractions in respect of defamatory imputations they either did not intend or do not wish to defend, and to do so very promptly, and incentivising complainants, on the other hand, to recognise the value of an early correction or retraction as a proportionate and sufficient remedy.
53. However, on careful detailed consideration of the proposed new clauses, the Campaign is reluctantly forced to the conclusion that the scheme as proposed will lead to satellite litigation – not merely in the early days while the provisions are tested in the courts – but routinely.
54. The Campaign also has reservations about losing the single meaning rule in the process. Although it is frequently criticised for its artificiality and it is sometimes unsatisfactory in its operation, when it is coupled with an early determination of meaning, which has been facilitated in England and Wales by the reversal of the presumption in favour of jury trial (which Dr Scott also recommends and the Campaign supports), it does have the capacity to limit the issues and, thereby, the costs. A meaning determination applying the purely objective single meaning rule is not, of itself, a costly or lengthy procedure or one requiring or permitting the introduction of evidence; and the result is the

weeding out of claims based on extravagant meanings and the preventing of defences which rely upon facts ranging far and wide beyond the real substance of the complaint.

55. It is also the concern of the Campaign that the proposed scheme will lead to a proliferation of corrections and retractions by hard-pressed publishers even in cases where the offending statements may not bear the meaning attributed to it by the complainant or may not even be defamatory. The publication of false corrections and retractions is no less damaging to the integrity of free speech than the publication of false allegations is to reputation. As the Campaign has been at pains to point out, one of the vices of a defamation law that is so out of balance that it compels publishers to surrender to claims that it would otherwise wish to defend, is that the public is liable to be misinformed as a result. In this instance it would be society that is the loser.
56. Moreover, a scheme which could be seen as encouraging less responsibility on the part of the publishers, because they can escape liability in any case by the simple device of publishing a correction or retraction within 7 days of publication, may also result in corrections and retractions commanding increasingly little public respect, being cynically viewed as the product of a quick exit by a publisher under pressure. This too would not be a desirable development and especially not if it results in complainants routinely feeling constrained to mount challenges to the jurisdictional bar in favour of a merits determination by the court which would command greater public respect.
57. The Campaign is therefore not convinced that the scheme overall will achieve its, undoubtedly laudable, aim.
58. It should not be overlooked that the offer of amends procedure available to publishers under sections 2 – 4 of the Defamation Act 1996 does go some way towards the aim identified by Dr Scott, although we recognise that it does not form a complete bar to proceedings as the claim can still proceed to a compensation hearing under section 3(5). To that extent, it obviously provides less of an incentive to publishers than would a scheme along the lines envisaged in Dr Scott's clause 11, but the 1996 Act does in section 2(4)(c) contemplate the possibility of a nil compensation award and already the courts have allowed discounts of up to 50% on the compensation that would be awarded as damages at a trial.
59. In the case of *Cooke v MGN* the judge threw out a case following an immediate take-down and a very swift apology by the newspaper that he considered be effective to remove any damage to reputation. As against discounts of up to 50% in offers of amends cases, that decision is a further powerful encouragement to publishers to take down offending content and to publish prompt and sufficient apologies.

60. The development of the Jameel abuse jurisdiction coupled with section 1 also provides increased protection against obviously unmeritorious or disproportionate claims.

LIBEL REFORM CAMPAIGN

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