

Review of the Defamation Act 2009 – Public consultation 2016

Organised by: the Department of Justice and Equality

Individual submission (rev.) by: Dr. Tarlach McGonagle¹

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¹ The author is a senior researcher/lecturer at the Institute for Information Law (IViR), Faculty of Law, University of Amsterdam. Website: <https://www.ivir.nl/staffpage/mcgonagle/>. E-mail: T.McGonagle@uva.nl. Twitter: @tarlachmc. He was Rapporteur of the Council of Europe's Committee of Experts on protection of journalism and safety of journalists (2014-15), which drafted the text that was adopted by the Council of Europe's Committee of Ministers as its Recommendation CM/Rec(2016)4 to Member States on the protection of journalism and safety of journalists and other media actors. The present submission has been drafted in a personal capacity.

Introduction

The decision to organise a public consultation to feed into the ongoing review of the operation of the Defamation Act 2009, pursuant to section 5 of the said Act, is to be commended. It provides interested parties with a valuable opportunity to contribute to the review process.

The present submission seeks to contribute to the review process by recalling the importance of Ireland's relevant obligations under the European Convention on Human Rights (ECHR). Those obligations, which are both negative and positive in character, are primarily shaped by Article 10 (right to freedom of expression) ECHR and its interplay with Article 8 (right to respect for private and family life). In its interpretation of these provisions, the European Court of Human Rights has elaborated detailed standards that govern national defamation (laws).

The importance of the principles and guidance developed by the Court is underscored in a recent Recommendation of the Council of Europe's Committee of Ministers that is addressed to the organisation's 47 Member States. In Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors, the Committee of Ministers recommends that member States "review relevant domestic laws and practice and revise them, as necessary, to ensure their conformity with States' obligations under the European Convention on Human Rights".² The envisaged reviews should focus on laws *and* their implementation. They should cover "existing and draft legislation, including that which concerns terrorism, extremism and national security, and any other legislation that affects the right to freedom of expression of journalists and other media actors, and any other rights that are crucial for ensuring that their right to freedom of expression can be exercised in an effective manner".

Defamation laws fall squarely within the scope of these reviews, as is explained at length in paragraph 6 of the Guidelines that are appended to the Recommendation:

As part of the reviews of laws and practices, member States which have defamation laws should ensure that those laws include freedom of expression safeguards that

² Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, 13 April 2016, para. 7(ii).

conform to European and international human rights standards, including truth/public-interest/fair comment defences and safeguards against misuse and abuse, in accordance with the European Convention on Human Rights and the principle of proportionality, as developed in the relevant judgments of the European Court of Human Rights. Furthermore, given the chilling effect that legislation criminalising particular types of expression has on freedom of expression and public debate, States should exercise restraint in applying such legislation, where it exists. States should be guided in this regard by the European Court of Human Rights finding that the imposition of a prison sentence for a press offence is only permissible in exceptional circumstances, notably where other fundamental rights have been seriously impaired, for example, in the case of hate speech or incitement to violence. Such legislation should be subjected to similar critical scrutiny in the context of the reviews of laws and practices.

Furthermore, as noted in the set of principles appended to the Recommendation, “[a]ctual misuse, abuse or threatened use of different types of legislation to prevent contributions to public debate, including defamation, anti-terrorism, national security, public order, hate speech, blasphemy and memory laws can prove effective as means of intimidating and silencing journalists and other media actors reporting on matters of public interest”.³

The review of the Defamation Act 2009 provides the Irish authorities with an early opportunity to check and reinforce the ECHR-compliance of a significant piece of legislation affecting the exercise of the right to freedom of expression in Ireland.

The present submission, in keeping with the spirit of Recommendation CM/Rec(2016)4, will first set out the key principles of the European Court of Human Rights’ case-law on freedom of expression and defamation. Drawing on those principles, a number of more specific concerns will then be identified and discussed briefly.

I. Key principles

³ *Ibid.*, ‘Principles’, para. 36.

The Council of Europe recently published an extensive study of the European Court of Human Rights' voluminous and ever-growing case-law on freedom of expression and defamation.⁴ The 12 key principles of that body of case-law may be summarised and explained as follows:

1. Freedom of expression

1. The right to freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights, doesn't just protect uncontroversial information and ideas. It also covers information and ideas that may offend, shock or disturb the government or any group in society. This is important because the values of **pluralism, tolerance and broadmindedness** are key features of democratic society.
2. Everyone should be able to participate freely and without fear in discussions and debates on **matters of public interest**. Politics, current affairs, health matters, religion, culture and history are all examples of topics of public interest, unlike individuals' strictly private relationships or family affairs.
3. While everyone – including bloggers, whistle-blowers, academics, members of civil society organisations, etc. - should be able to participate in public debate, it is particularly important for journalists and the media to be able to do so because of their ability to spread information and ideas widely, and thereby contribute to public opinion-making. They have the **task of imparting information** and ideas on matters of public interest, **which the public has a right to receive**. Journalists, the media and a growing range of other actors can also act as public watchdogs, by bringing information to light and by exposing wrongdoing and corruption by those in power.
4. When a law or other measure or sanction discourages the media from participating in public debate, very close scrutiny is called for, as there is a **“chilling effect”** on freedom of expression that affects society as a whole. Such interferences with media freedom cause others to become afraid to exercise their right to freedom of expression in a bold manner and as a result engage in **self-censorship**, which weakens public debate.

⁴ Tarlach McGonagle (with the collaboration of Marie McGonagle and Ronan Ó Fathaigh), *Freedom of expression and defamation: A study of the case-law of the European Court of Human Rights* (Strasbourg, Council of Europe Publishing, 2016), available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ac95b>.

5. In order to avoid a “chilling effect”, it is very important that any measures or remedies interfering with the right to freedom of expression are governed by the **principle of proportionality**.
6. Criminal measures have far-reaching consequences for those affected by them. Thus, by their very nature, criminal measures have a “chilling effect” on public debate. A prison sentence for a press offence will be compatible with freedom of expression only in exceptional circumstances, namely when other human rights have been seriously impaired, for instance in cases of **hate speech or incitement to violence**.

2. Defamation

7. The purpose of defamation laws is to **protect the reputations of individuals from injury**. **Remedies for defamation**, including an award of **damages**, must always be **proportionate to the injury to reputation suffered**. A defamatory statement is a false or untrue statement of fact that harms the reputation or good name of a living person. In exceptional circumstances, this may also apply to a company or other entity having a legal status, but a commercial reputation does not have the same moral dimension as an individual reputation. Defamation laws should only apply to the deceased in very exceptional circumstances. Defamation laws should not be used to protect (State) symbols, flags, anthems, etc.
8. **Politicians** (including heads of state and government and members of government), **public officials or public figures** (including business people and even celebrities) must **tolerate higher levels of criticism** than other individuals. By deciding to enter public life, they knowingly lay themselves **open to close scrutiny of their words and actions**. While they are entitled to protection of their reputation, even when they are not acting in a private capacity, the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.
9. Everyone who exercises the right to freedom of expression has certain **duties and responsibilities**, the scope of which varies in different contexts. Journalists and the media must not cross certain lines, in particular in respect of the reputation and rights of others. In principle, they are expected to act in **good faith** in order to provide **accurate and reliable information** to the public in accordance with the **ethics of journalism**.

10. **Facts** and opinions or **value judgments** are not the same: the existence of facts can be demonstrated, but it is not possible to **prove the truth** of opinions or value judgments. A requirement to prove the truth of a value judgment infringes the right to freedom of opinion. A value judgment should, however, have **adequate factual basis**, as even a value judgment without any factual basis to support it may be excessive.
11. It is important that defamation laws include a range of **defences** that safeguard the right to freedom of expression. Journalists and the media face deadlines and as **news is a perishable commodity**, to delay its publication, even for a short period, may well deprive it of all its value and interest. There must therefore be a range of defences available to them in legal proceedings concerning alleged defamatory statements, e.g., that there is a **high public interest** in the topics they are treating; the **truth** or accuracy of their statements; their **good faith** in publishing the statements; that their statements are **fair comments**, and that they have acted in accordance with their **duties and responsibilities**.
12. Contributions to public debate can be made by different actors, through different media and in different styles. The right to freedom of expression includes, especially for journalists and the media, the freedom to select, edit and present information and ideas in whatever way they like. This means that they may use **exaggeration, provocation, irony, satire or other styles or techniques**, as long as their expression is not “gratuitously” offensive. In principle, journalists, the media and **online intermediaries** should not be held liable for defamatory statements by third parties, unless there are exceptional circumstances which would warrant such liability. These freedoms are very relevant when considering the proportionality of interferences with the right to freedom of expression.

II. Specific concerns

Having set out the general principles and guidance of the European Court of Human Rights, a short selection of specific concerns arising in the context of the Irish Defamation Act will now be flagged for further consideration as part of the review process: defamation of a body corporate; changing technologies and forms of communication, and decriminalisation of defamation.

1. Defamation of a body corporate

The European Court of Human Rights has repeatedly recognised the public interest in commercial practices and the concomitant interest in being able to scrutinise such practices, *inter alia* through (critical) media reporting. It takes the view that “large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts” and, importantly, as in the case of the businessmen and women who manage them or are actively involved in their affairs, “the limits of acceptable criticism are wider in the case of such companies”.⁵

But the Court has also held that “in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good”.⁶ Thus, while a company undisputedly has a right to defend itself against defamatory allegations, there is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status. It reasons that: “whereas the latter might have repercussions on one’s dignity, for the Court interests of commercial reputation are devoid of that moral dimension”.⁷

The relevant section of the Irish Defamation Act - Section 12 - reads:

The provisions of this Act apply to a body corporate as they apply to a natural person, and a body corporate may bring a defamation action under this Act in respect of a statement concerning it that it claims is defamatory whether or not it has incurred or is likely to incur financial loss as a result of the publication of that statement.

That the “provisions of this Act apply to a body corporate *as they apply to a natural person*” (emphasis added) seems to be at odds with relevant case-law of the European Court of Human Rights. It would therefore be helpful if the review of the Defamation Act were to address this apparent discrepancy, with a view to ensuring that the Act and its interpretation reflect the strong protection for freedom of expression and public interest commentary on commercial

⁵ *Steel and Morris v. the United Kingdom*, no. 68416/01, § 94, 15 February 2005. See also: *Fayed v. the United Kingdom*, no. 17101/90, § 75, 25 August 1994.

⁶ *Steel and Morris v. the United Kingdom*, § 94.

⁷ *Uj v. Hungary*, no. 23954/10, § 22, 19 July 2011.

matters, given that commercial reputations are deemed to (ordinarily) lack the moral dimension inherent in personal reputations.

2. *Changing technologies and forms of communication*

As noted in the Department of Justice and Equality's announcement of the public consultation on the review of the Defamation Act 2009, the Act "effected a substantial consolidation and reform of Irish defamation law [...]". It also modernised Irish defamation law – by repealing its very outdated forerunner, the 1961 Act, and by showing an awareness of the changing nature of public (and quasi-public) communications, as facilitated by technological developments. It would be of great benefit to the review process if there were to be extensive attention to, and reflection on, the diverse relationships between different types of online intermediaries and content created by third-parties. It will thus be important to differentiate between different media and other actors according to their functions, impact, duties and responsibilities. Relevant principles of the European Court of Human Rights offer some useful guidance in this matter. One of the stated aims of the review process, i.e., "to review recent reforms of defamation law in other relevant jurisdictions", will likely also prove instructive in this regard.

The European Court of Human Rights has developed a body of case-law on liability for defamatory and other types of harmful and illegal content produced by third parties. One of its guiding principles in this matter is that:

News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of 'public watchdog' ... The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.⁸

This is a very important principle because it allows journalists to report on controversial opinions without the fear that those opinions will be imputed to them. In its *Thoma v. Luxembourg* judgment, the Court held that a "general requirement for journalists systematically

⁸ *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298.

and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation was not reconcilable with the press's role of providing information on current events, opinions and ideas".⁹

The Court also stated in its *Reznik v. Russia* judgment that "the extent of the applicant's liability in defamation must not go beyond his own words and he may not be held responsible for statements or allegations made by others, be it a television editor or journalists".¹⁰ The case concerned statements made by the applicant while participating in a live television debate, without being aware of "any footage that the editor had chosen to use as an introduction to the debate".¹¹

The Court has also found that, depending on the circumstances, a requirement for editors to distance themselves from the texts of authors that they publish may not be justified.¹² A relevant consideration is, however, the extent to which an editor/publisher provides an outlet or platform for publication and thereby participates in or facilitates the expressive act.¹³

These questions become more complicated in the online environment where the relationship between various types of Internet intermediaries and third-party content is less clear-cut or obvious. In the case of *Delfi AS v. Estonia*,¹⁴ the Estonian courts had held a large online news portal liable for the unlawful third-party comments posted on its site in response to one of its own articles, despite having an automated filtering system and a notice-and-takedown procedure in place. The Grand Chamber of the European Court of Human Rights found that this did not amount to a violation of Article 10 ECHR. The judgment has proved very controversial, particularly among free speech advocates, who fear that such liability would create pro-active monitoring obligations for Internet intermediaries, leading to private censorship and a chilling effect on freedom of expression. It should be pointed out, however, that the Court took the view that "the majority of the impugned comments" were not (merely)

⁹ *Thoma v. Luxembourg*, no. 38432/97, § 64, ECHR 2001-III.

¹⁰ *Reznik v. Russia*, no. 4977/05, § 45, 4 April 2013.

¹¹ *Ibid.*

¹² *Orban and Others v. France*, no. 20985/05, § 50, 15 January 2009; *Thoma v. Luxembourg*, *op. cit.*, § 64.

¹³ *Orban and Others v. France*, *op. cit.*, § 47, citing *inter alia*, *Süreker v. Turkey (no. 1)* [GC], no. 26682/95, § 63, ECHR 1999-IV and *Öztürk v. Turkey* [GC], no. 22479/93, § 49, ECHR 1999-VI.

¹⁴ *Delfi AS v. Estonia* [GC], no. 64569/09, ECHR 2015.

defamatory, but “amounted to hate speech or incitements to violence and as such did not enjoy the protection of Article 10”.¹⁵

In its *Delfi* judgment, the Court identified a number of specific aspects of freedom of expression on the Internet as being relevant for the concrete assessment of the interference in question: “the context of the comments, the measures applied by the applicant company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the intermediary’s liability, and the consequences of the domestic proceedings for the applicant company”.¹⁶ In subsequent case-law, like *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (hereafter, *MTE & Index.hu*) the Court has held that these criteria (as slightly adapted) are also relevant for assessing the proportionality of an interference with the right to freedom of expression in similar circumstances (“free of the pivotal element of hate speech” in *Delfi*).¹⁷

In *MTE and Index.hu*, the Court described the applicant websites as “protagonists of the free electronic media”¹⁸ and showed an awareness of the implications of imposing liability for third-party comments on Internet portals. It held that such liability “may have foreseeable negative consequences on the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether”, which “may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet”.¹⁹ Despite these re-affirmations of the importance of intermediaries for ensuring freedom of expression online, the Court’s case-law remains overshadowed by the uncertainties generated by *Delfi*.

The present review of the Defamation Act provides a timely opportunity to reflect on whether its provisions, including section 27 (‘Innocent publication’) - insofar as it relates to online publications, are aligned with the European Court of Human Rights’ general principles on freedom of expression and defamation. Binchy J’s recent High Court judgment in *Muwema v. Facebook Ireland Ltd.* provides a recent example of how the Act has been applied in respect of some of these issues.²⁰

¹⁵ *Ibid.*, para. 136.

¹⁶ *Ibid.*, §§ 142-143.

¹⁷ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, *op. cit.*, § 69.

¹⁸ *Ibid.*, § 88.

¹⁹ *Ibid.*, § 86.

²⁰ *Muwema v. Facebook Ireland Ltd.* [2016] IEHC 519.

3. Decriminalisation of defamation

Although the European Court of Human Rights has not unequivocally called for the decriminalisation of defamation, it has repeatedly “further observe[d] that the Parliamentary Assembly of the Council of Europe in its Resolution 1577 (2007) urged those member States which still provide for prison sentences for defamation, even if they are not actually imposed, to abolish them without delay”.²¹

Part V of the Defamation Act 2009, comprising sections 35-37, deals with criminal liability for defamation. Section 35 abolishes the common law offences of defamatory libel, seditious libel and obscene libel, which is a welcome development from the perspective of freedom of expression. Section 36 sets out the offence of publishing or uttering blasphemous matter. Section 37 provides for the seizure of copies of blasphemous statements. While Sections 36 and 37 have expressly been excluded from the scope of the present review, it is worth noting in passing that the ultimate removal of these sections would be in line with best European practices on freedom of expression.²² The offence of blasphemy under Irish law has been described as “anachronistic and anomalous”.²³

Concluding remarks

This submission to the Review of the Defamation Act 2009 seeks to set out – briefly and clearly - the key principles of the European Court of Rights’ case-law on freedom of expression and defamation. Besides the general value of the guidance offered by the same principles, in 2016 the Council of Europe’s Committee of Ministers called on all Member States to review their laws and practice in order to ensure their compliance with Article 10 ECHR. Defamation laws should have a central place in the envisaged State reviews.

²¹ See, for details of relevant case-law, T. McGonagle, *Freedom of expression and defamation*, *op. cit.*, p. 18.

²² As Article 40.6.1(i) of the Constitution renders the publication or utterance of blasphemous matter an offence, this article would have to be amended by way of a constitutional referendum. The present coalition government has formally committed to hold a referendum on the “question of amending Article 40.6.1(i) of the Constitution to remove the offence of blasphemy”: A Programme for a Partnership Government, May 2016, p. 153. If successful, such a referendum would allow for the removal of the constitutional criminalisation of blasphemy and pave the way for the abolition of the offence in the Defamation Act.

²³ Law Reform Commission, *Report on the Crime of Libel*, LRC 41-91, 20 December 1991, p. 522.

The submission then zones in on what the Court's principles have to say about three specific concerns arising in the context of the Defamation Act: corporate defamation; changing technologies and forms of communication, and decriminalisation of defamation.

First, the public has a clear interest in being able to receive and impart (critical) information about corporate activities and those involved in such activities. While corporations do have reputational interests, those interests are of a different order to the reputational interests of individuals. Accordingly, they should not enjoy the same level of protection as individuals' reputational rights. In other words, freedom of expression and robust public debate should not be curtailed in order to protect corporate reputations.

Secondly, the European Court of Human Rights' first forays into the topic of online freedom of expression and defamation have revealed how challenging the topic is and how the Court is struggling to repurpose its own principles for optimal application in the online environment. The Irish courts are also engaging with the topic – within the framework of the Defamation Act. Further reflection on how the European and Irish courts are dealing with these matters, supported by academic and comparative legal research, could help to refine legislative insights into freedom of expression and defamation in an increasingly diversified online context.

Finally, although Sections 36 and 37 of the Act have been formally excluded from the present review process, it merits restating that the offence of blasphemy, as shaped by Article 40.6.1^o(i) of the Constitution and the aforementioned provisions, is widely regarded as “anachronistic and anomalous”. The European Court of Human Rights has never made an outright call for decriminalisation of blasphemy laws, but other bodies, such as the Parliamentary Assembly of the Council of Europe, have. In the interest of ensuring a comprehensive and coherent review of the 2009 Act, it would be helpful if the Government were to press ahead with its stated intention to hold a constitutional referendum on the revision of Article 40.6.1^o(i). If the referendum were to lead to the removal of the constitutional provision on blasphemy, it could become rather straightforward to also remove its main legislative counterpart.