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The Defamation Act Review,
Department of Justice and Equality
Bishop's Square,
Redmond's Hill,
Dublin 2.

14th February 2017.

By registered & certified post, and email.

**Submission to the Minister for Justice, Equality & Law Reform, as invited, in
observation of the Government of Ireland, 2009 Defamation Act.**

(1) the 2009 Defamation Act ("the Act") is a deeply flawed and inadequate piece of statute, against which there is a strong argument that, since its enactment, it has had a regressive effect upon the practice of defamation litigation in Ireland;

(2) the flaws and inadequacy as mentioned above derive from, overall, the standard of consideration that seems to have been given to the Act when it was being drafted, whereby the Act, now in operation for more than six years, is:-

- (i) causing the frustration of otherwise legitimate cases;
- (ii) sewing confusion among litigants regarding existing and possible actions and causes of action,

and case law, including some still *sub-judice*, exists in regard to both (i) and (ii), above - that is, the contentions as above as still very much alive in the courts at present;

(3) in a democratic and free society like Ireland, those who find themselves having to litigate, either as plaintiffs or defendants, are entitled to a legitimate expectation that:-

- (i) it will not be unreasonably difficult to deal with any such case;
- (ii) that litigation will not end without a clear verdict, such as it might be.

Yet the two problems cited above are exactly what is arising at the moment and may lead to more serious, larger and higher profile challenges of the Constitutionality of the Act.

Most importantly, Irish law confers upon the person an inalienable right to protect and vindicate their good name and it seems that certain parts of the Act exist to swindle litigants out of such a right;

(4) Again, not only should the reasonable citizen have the expectations already mentioned at (3), above, but there should be a broader certainty that, basically, the law works for everyone, or nearly everyone - that the law does what it is supposed to do and that access to justice should not be reserved exclusively for those rich enough to be able to enlist a team of sufficiently knowledgeable lawyers capable of negotiating a litigious assault course - as has been constructed by the specific changes within the Act;

(5) there are two changes in the Act which fundamentally alter, for the worse, how defamation litigation works, in practical effect, in Ireland today:-

- (i) there is a statutory bar of one year to start a case, same bar taking effect from first utterance of any alleged defamation;
- (ii) dead people shall have standing to sue for defamation;

(6) (5.i) obviously creates a steep hurdle for any litigant because it forces a plaintiff to rush to sue even if they are not ready. More questionably, such a hurdle provides a recalcitrant defendant with an irresistible motive to delay, hide and obstruct, so as to thwart the ability of a litigant to start a case within one year. As the jurisprudence unfolds it seems that Ireland's Courts are taking a strict approach to the one year statutory bar, even though provision exists (again ambiguously drafted) for an extension of time to two year.

A bigger potential problem arises as a result of this. It seems that the net result of such a harsh restriction is to embolden those who wish to smear others and to demoralise those who find themselves at the bad end of defamatory remarks. Public perception matters and a perception that the Law has created a new trick for crafty defendants to evade liability, regardless of the circumstances, has the potential to cause serious public anger, possible outrage and a broader alienation of the ordinary people from those who govern on their behalf. Nowhere can those who drafted or who support such a law defend it on the grounds of it merely being a licence for shrewd and cynical defendants to get away with defaming others. Nowhere is there a credible argument in favour of a one

year bar versus, say, a two or three year bar, given the fundamental importance of retaining fair and workable defamation procedures in Ireland. That is, this statutory bar and its consequences are a classic example of the invidiousness of colourable legislation;

(7) Separately, the Act allows dead people to sue and seems to be an effort to begin watering down a fundamental feature of *habeas corpus* whereby the dead have no title in their own right. The chilling effect of such law is better articulated in a letter of mine which was published in the Sunday Times (Ireland edition) of 28th October 2012:-

Ill-judged law allows abusers to hide

ANOTHER excellent article from Justine McCarthy ("Regime sees victims punished by the state that failed them", Comment, last week) regarding the tragic case of Brendan McGovern.

In July 2009 the Oireachtas passed the Defamation Act which got a lot of attention for "criminalising blasphemy", although the chance of any such prosecution happening here is almost nil.

However, a lesser-spotted part of the act lets the estate of a dead person sue for defamation. This would be an invaluable boost for the estate of someone such as Jimmy Savile, whose alleged wrongdoing is getting aired precisely because English law does not let a dead person sue.

In Ireland, such a person's next-of-kin could start an action in his name, either for defamation or for other, broader injunctions such as a gagging order. While this might or might not be granted by the High Court, the mere existence of such legal provisions will inevitably chill discourse about abuse, and

continue to let abusers hide — and, as can be seen with Savile, protect the vested interests

This badly drafted and retrograde law curtails free expression rather than protects it.

Christian Morris
Dublin 13

Sunday Times Letters,
28th October 2012

Signed:- Christian Morris

CHRISTIAN MORRIS,
14th February 2017.