

**Milford
Charleville,
Co Cork.**

13 January 2017

Submission on 2009 Defamation Act Review:

Comments under the various proposed headings below:

Scope of the review

Find here a summary of the [main features of the Defamation Act 2009](#)

The following is an indicative list of some specific issues which may be considered under the review:

- Whether any change should be made to the matters which a plaintiff or a defendant is required to prove in a defamation case,
 - Generally, the plaintiff should be required to prove that a statement is defamatory and that it is untrue, if this is possible.
- Whether any change should be made to the persons currently entitled to bring an action for defamation,
 - Corporate bodies that perform governmental or regulatory functions should not be allowed to sue.
- Whether any change should be made to section 12 (which provides that a body corporate may bring an action for defamation, whether or not it would incur financial loss as a result of the statement it claims to be defamatory),
 - Other corporate bodies should not be entitled to damages unless any defamation has caused proven financial loss. If all businesses are subject to more robust commentary, then the press will be better to hold them to account. If all are subject to more robust reporting, then, a fair playing field is still maintained.
- The experience regarding the jurisdiction of the Circuit Court in defamation cases,
 - Because a lot of defamation cases are taken via the circuit courts, these cases should be subject to greater transparency. The court service should publish all documentation in relation to these cases, online, and all damages awards (and associated legal costs outcomes) should be published online.
- Whether any change should be made to the respective roles of the judge and the jury in High Court defamation cases,

- Better to disband juries for defamation actions. They are not qualified to balance conflicting constitutional rights: the right to good name *vis a vis* the right to a free press.
- Whether any change should be made to the level or type of damages which may be awarded in defamation cases, or to the factors to be taken into account in making that determination,
 - A defendant should not be penalised with aggravated damages for offering a robust defence. This violates a person's right to a fair trial and does not afford defendant 'equal protection'. There is no corresponding penalty for plaintiffs for pursuing a case that is marginally or seriously unsubstantiated.
- Whether any change should be made to the defences of truth, absolute privilege, qualified privilege, honest opinion, fair and reasonable publication on a matter of public interest, and innocent publication, as defined by the Act,
 - Qualified Privilege should be provided to persons in responding to public consultations undertaken by state agencies or departments.
- Whether the Act's provisions are adequate and appropriate in the context of defamatory digital or online communications,
- Website publishers should not be generally held responsible for online comments made by third parties. However, if a person posts a comment online, the website should allow the person posting the comment to un-post the comment. This is sometimes not possible, meaning that a comment which is accidentally posted is difficult to get removed.
- The experience in practice regarding the Act's provisions for an offer of amends, an apology, or lodgement of money in settlement,
- Whether the range of remedies (including interim, interlocutory and permanent orders) available under the Act is sufficient to provide accessible and effective redress for defamation,
- The experience regarding the operation of the Press Council (recognised under section 44 of the Act) and Press Ombudsman,
- Whether any further legislative or procedural measures should be taken with a view to encouraging the efficient, inexpensive and prompt resolution of defamation claims, reducing the need for court intervention, or otherwise increasing the accessibility or effectiveness in practice of defamation law for plaintiffs and defendants.

The following issues are the main problems with the Act:

1. **Honest Opinion.** (S.20) An honest opinion should only be required to be that. A person should not have to rely only on stated facts, and should only be held liable, if acting in bad faith. Hence the Act needs to remove three inappropriate conditions: (a) the need to state the facts upon which the opinion is based. And (b) the need to establish the truth of such facts, and (c) and the need to establish that, 'the opinion related to a matter of public interest'. An additional problem attaches to the term 'public interest'. It is unclear what this term means. The UN has made clear that the ICCPR requires that any interference in freedom of expression, must be prescribed by law, and any such laws must be clear. 'See General Comment 34 (Para 27):

'It is for the State party to demonstrate the legal basis for any restrictions imposed on freedom of expression. If, with regard to a particular State party, the Committee has to consider whether a particular restriction is imposed by law, the State party should provide details of the law and of actions that fall within the scope of the law.'¹

There are several examples of persons being held liable for damages, for comments that were made in good faith, and which would be acceptable in most countries. There is a public interest in the expression of honest opinions, and this should not be trammelled by unnecessary and restrictive conditions.

2. **Fair Comment:** This defence is far too conditional. The requirement that a statement be of public interest and also be of public benefit is too onerous. Politicians and those performing public roles, or public officials should enjoy a much lower level of protection, than ordinary members of the public. A good faith standard should apply to commentary. A plaintiff should be required to prove that a person acted with negligence or with malice. The requirement that a statement was 'was fair and reasonable to publish' is also too vague, and restricts political speech. The 'public benefit' requirement is too vague, and implies that there is no public benefit to facilitating freedom of speech.
3. **Excessive damages:** The ECHR requires that the right to free speech under Article 10 and the right to a good name under Article 8 should be given equal respect. This should mean, that even where defamation is found to have occurred, compensation (and legal costs) should not be such as to chill free-speech excessively. An upper cap should apply to damages, as applies to personal injuries, for example. Legal costs which are very high in Ireland also need to be curtailed to avoid a chilling effect on free speech. Hence, damages should be capped at €150,000 and legal costs which may be awarded to the plaintiff should be capped at €50,000, unless a defendant acted with proven malice, knowing a statement to be untrue and seriously defamatory.
4. **Live Interviews:** Broadcasters should not be held responsible for comments blurted out by interviewees in live discussions, particularly where the host takes steps to restrain the person making the comments and/or makes an effort to provide a contra viewpoint. This excessively limits public debate on matters of public concern.² This privilege would correspond to website hosting leeway. A *per se* approach to defamation is not proportionate. Negligence should have to be proven.

Hugh O'Driscoll

¹ Human Rights Committee, 102 nd session, Geneva, 11-29 July 2011, General Comment No. 34

Article 19: Freedoms of opinion and expression; General remarks:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrdB0H1I5979OVGGB%2bWPAXiks7ivEzdmLQdosDnCG8FaJ7cpkH%2fr9YlpwV%2bAPs%2bmcJcH5I4VEHaUJAAZCeS1gKdFOTIUSHQDT3EiNHS2mKIF>

² See ECHR case of *Jersild v Denmark*, No.15890/89.