The experience regarding the jurisdiction of the Circuit Court in defamation cases:-

We are of the view that the decision to increase the jurisdiction of the Circuit Court in defamation cases has been largely successful. In addition, we have found the application for a Declaratory Order pursuant to Section 28 of the Act, which is unique to the Circuit Court, to be a very useful, efficient and cost effective option for clients in certain cases. It offers injured parties who are willing to forgo any claim for damages an opportunity to seek swift redress for damage caused to their reputation.

However, this type of application is somewhat risky for Plaintiffs as in order to prevent a Declaratory Order being made a Defendant only needs to show that he has an arguable defence. In essence a Plaintiff is putting all of his or her eggs in one basket in bringing an application for declaratory relief (i.e. if he or she fails there is no other option open to them). It can therefore only be deployed in those cases where success is effectively guaranteed thereby reducing its utility.

Whether any change should be made to the respective roles of the judge and the jury in High Court defamation case:

We firmly believe that the presumption in favour of a jury trial should be maintained in High Court defamation cases. In our experience, juries are better placed than judges to determine what "*an ordinary reasonable reader*" would have understood the words to mean. In addition, in circumstances where allegations have been made which impugn an individual's reputation that individual should have the right to be judged by a jury of their peers. There is also a strong argument to be made that jury trials improve access to justice by placing the citizen at the heart of the justice system. This is particularly significant in circumstances where a Plaintiff is not entitled to legal aid to bring his or her own defamation action and the financial hurdles facing them are being increasingly raised as a result of proposed reforms and other steps.

However, we also recognise that in some instances in the past juries have made excessive and disproportionate damages awards, which have perhaps been punitive rather than compensatory in nature. The risk of such awards could be reduced by providing a mechanism for the judiciary to issue more detailed guidance to a jury on the range of damages permissible.

Whether the Act's provisions are adequate and appropriate in the context of defamatory digital or online communications:-

We believe that the Act's current provisions are woefully inadequate in dealing with the publication and dissemination of false and defamatory material on the social networking sites, ISPs and by bloggers generally, and that urgent steps should be taken to remedy the situation and to ensure that online publishers are subject to the same degree of regulation as traditional media.

While we accept that a Plaintiff will have to prove publication, for traditional media publications this is generally not a problem because you simply have the paper or broadcast to hand to show at trial. However, internet publication is different and the Act fails to take account of this. In a recent Court of Appeal case, the Court found that we had not proved publication in respect of comments posted online. We had to be able to show the number of "hits" the site had from Ireland to prove publication, although we could point to twelve contributors who had recorded their location as Ireland. The Court would not infer publication in this jurisdiction

simply because the comments were posted online. We have sought to appeal that decision to the Supreme Court on the basis that it was an interlocutory application and we should not have been required to prove publication at that stage, however we can see this causing problems for Plaintiffs in the future as it will lead to Plaintiffs probably having to seek non-party Discovery from ISPs in California etc. which will be an onerous and expensive process. We believe that the Act should be amended to take in to account the challenges online defamatory comments pose to potential Plaintiffs.

Online publication and the application of defamation law is a continuing challenge for legal practitioners. The Defamation Act is incapable of addressing this satisfactorily. Many issues arise as a result, for instance ascertaining which jurisdiction a Plaintiff should initiate proceedings in and whether or not an ISP should be included in the proceedings, particularly where the author of the defamatory publication is not readily identifiable. It is often the case that online publishers do not face the same degree of regulation as traditional media, which is wholly unfair.

In terms of whether the Act is adequate and or appropriate in relation to defamatory digital or online communications, we would highlight S. 27 of the Act – the defence of innocent publication. The recent decision of ***Muwema v Facebook Ireland*** has raised some concerns regarding the ability of internet intermediaries who host defamatory publications on their platforms to reply upon this defence. As you will be aware, in this case it was held that Facebook were entitled to avail of the defence of innocent publication. If the Court's analysis of S.27 is correct in this case then individuals who are the victims of defamatory postings online will have great difficulty in obtaining redress unless the author behind the posting can be easily identified. In such circumstances, we would be of the opinion that a review of S.27 should be carried out with a view to bringing greater clarity to the provision.

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':-

Section 31 of The Defamation Act 2009 has specifically dealt with the issue of damages, however it has not progressed further than what was already generally accepted by the Courts by the time the law was enacted. There is in our opinion a requirement for the Court to be able to go further to guide juries and take steps to prevent the awarding of excessive damages which are clearly punitive in nature, rather than compensatory - or most importantly, awarded with the Plaintiff's vindication in mind.

While it was clear that the act intended to address and curtail the excessive damages awards, judgments such as ***McDonagh v Sunday Newspapers*** highlight that juries need further guidance in deciding on the level of damages. In that 2008 High Court case, the jury awarded €900,000 - more than twice the existing record at the time. This decision was ultimately appealed to the Court of Appeal, where it was found by J Hogan in October 2015 that the jury's decision that the Plaintiff was not a drug dealer was 'perverse' and could not stand. The Court of Appeal directed a new trial on the loan shark allegations only.

Cases such as the McDonagh proceedings are a practical cause of concern to legal practitioners who have genuine difficulty advising clients as to potential awards/exposure in their defamation claims due to the unpredictability of awards made by juries. Undoubtedly it is also

an issue for the State and the taxpayer, who have to fund the ensuing appeals following such decisions.

The experience regarding the operation of the Press Council (recognised under section 44 of the Act) and Press Ombudsman

The Press Council and Ombudsman provide an excellent and often very effective, low cost, fast alternative to litigation. Our firm has utilised this option for many of our clients and have considerable confidence in the system.

Helpfully the Press Council not only cover those publications that are members (and most newspapers are) but it also covers any tweets and Facebook comments made by journalists on their newspapers' official accounts.

The Press Council also offers mediation as part of their conciliation process which we again feel is extremely useful and can assist in reaching an agreement between the Parties without having to pursue litigation.

The Press Ombudsman/Council complaints procedure can be utilised directly by members of the public directly or indeed they are happy to liaise with lawyers. The process is fast (complaints are usually decided within two months), free and a client can achieve the result they want through this process (clarification/apology) much quicker than through the Courts. Obviously the Press Ombudsman do not award compensation and therefore it may not be appropriate in all circumstances.

We are surprised at the level of complaints made to the Press Ombudsman (278 in 2015, 350 in 2014, versus the number of cases before the Courts, which would suggest to us that either people are not aware of the service or are not being advised in relation to same. This route is always considered by our office when we are approached by a new client and should be considered by all lawyers.

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.

Following on from our comments on the Press Ombudsman/Council, we do believe that lawyers should at least be obliged to advise their clients on the option of a complaint to the Press Ombudsman as a means of resolving complaints/grievances before pursuing legal proceedings.

Mediation should be a statutory requirement, or at the very least encouraged by way of sanctions imposed by the Court such as penalising a party from a costs point of view, should they fail to consider mediation as an option, where a request is made from the other party to the dispute.