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**Submission on review of the Defamation Act 2009**

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### **The role of a free press:**

A free press plays a vital role in any democratic society. It provides a means whereby citizens can engage in vital debates, it can protect citizens interests, act as a watchdog on the institutions of State, aid good governance, promote accountability and transparency and monitor those whose actions can affect the citizenry. Across Europe freedom of expression has seen significant declines over the last few years. "According to Reporters Without Borders's Press Freedom Index, which measures trends in media freedom at both the global and regional levels, all but two European Union-member states (plus Iceland and Norway) have a lower press freedom score in 2016 than they did in 2013. In some cases, there has been marked backsliding: Germany went from a score of 10.24 in 2013 to 14.8 in 2016 (the lower the score, the more respect for press freedom); the United Kingdom has gone from 16.89 to 21.7; and Poland is among the worst cases, jumping from a respectable 13.11 to a deeply worrying 23.89. These scores reflect changes in important indicators such as media independence, self-censorship, and rule of law, among others." Europe's Freedom of Speech Fail - <http://foreignpolicy.com/2016/07/07/europes-freedom-of-speech-fail/> While Ireland moved up two places in the Press Freedom Index, from 11th to 9th place in 2016, concern was expressed about 'Ireland's highly concentrated media ownership'.

Changes in legislation which affect media thus have to be carefully examined to see if they can have unforeseen consequences in terms of curbing press freedom. The Defamation Act of 2009 in Ireland was broadly welcomed with some caveats. As

barrister and Associate Professor Law (TCD) Eoin O'Dell in an initial analysis pointed out : "The Defamation Act 2009 modernises the law. However, it ducks some important reforms and bungles others, while some of its most significant provisions raise constitutional problems.

For example, it fails to account for internet service providers (ISPs) or to rebalance the burden of proof from the defendant to the plaintiff. The centrepiece defence of fair and reasonable publication is unworkably narrow."

( <http://www.irishtimes.com/news/crime-and-law/defamation-act-a-welcome-but-imperfect-reform-for-libel-cases-1.1269685>)

One definition of Defamation Law is that 'It is an attempt to strike a balance between the right to free expression and restitution for individuals who have been harmed by that free expression.' (Canadian Journalists for free expression.). The fact that journalism is itself going through a time of turbulent change has meant that limits on press freedom can have wide raging consequences. Issues currently causing concern in Irish media include the fact that advertising revenue is being eroded as news providers face competition from large online companies, while print media face the challenge of finding ways to monetise content in a climate where print sales are declining, broadcast media are being challenged for audiences and advertising share in a crowded market. The fact that large conglomerates such as Facebook and Google see themselves as being technology rather than media companies has meant that native media are at a double disadvantage. They take on all the responsibility of providing fair and impartial news, and deal with the risks of litigation, while the online conglomerates consider themselves to be service providers rather than being creators of content with all of the responsibilities that that implies.

As media online diversifies it is also important that small native independent news outlets some of whom specialise in investigative journalism, are encouraged to adhere to the ethics and practice of traditional journalism and also benefit from public interest defences. The Press Council has made it clear that it wishes to embrace new as well as legacy media, and no doubt it's submission will cover this. One question that may also be addressed in the current review is do definitions of 'media' cover journalists who are bloggers or have specialist websites or citizen journalists? In the US for example "whether a blogger is considered part of the media depends on the specifics of the website. The more closely a blog resembles the traditional press, the more likely a court will consider it a part of the media. Courts have expanded the definition of media to include some forms of blogging by looking at (1) the content of the website, (2) the format of the website, and (3) the journalistic credentials of the creator of the defamatory statements. The court in Obsidian followed the trend of defining media in terms of traditional journalists. Regardless of the outcome for the specific websites at trial, these cases, including Obsidian, are part of a trend of courts expanding the definition of media to include some forms of blogging." (Washington Journal of Law : 8 WASH J.L. TECH. & ARTS 573 (2013)

<http://digital.law.washington.edu/dspace-law/handle/1773.1/1242>).

### **Online comments and defamation:**

Providers of news websites both small and large are in a difficult position in that they may be held liable for commentary below the articles they put up, if such commentary is defamatory, yet reader engagement and debate are a vital part of the democratic process. The problems of monitoring those comment sections is exemplified by the recent decision of VICE.com to close down their comments section.

If that debate is shut down on reliable news websites in Ireland because of fear of litigation, then it also places them at a disadvantage to those like Facebook and others who enjoy the protection of being considered to be ISP's. As Mr Justice Binchy pointed out in *Muwema V Facebook Ireland Ltd* (2016) IEHC 519 the 2009 Act "now provides a shield against damages (as indeed do the E-Commerce regulations to defendants meeting its requirements and the same shield also prevents the court from granting injunctive relief to persons claiming to be defamed." (A and L Goodbody Irelandip.com September 2016)

In the UK for example in relation to anonymous postings, section 5 of the 2013 Defamation Act provides a new defence for website operators who comply with the Defamation (Operators of Websites) Regulations 2013. The regulations set out a procedure whereby a prospective claimant can send a notice to the website operator. If the notice is compliant, the website operator will have to hand over the poster's name and address (with the poster's consent), remove the posting or lose the defence." (Law Society Gazette).

Section 10 of the UK 2013 Defamation act "prevents a claimant from pursuing a defendant who was 'not the author, editor or publisher of the statement complained of unless it is not reasonably practicable for an action to be brought against the author, editor or publisher'. In the context of online publication, if the name and address of a third party who has posted a comment or article on a website can be ascertained without too much difficulty then only the poster, and not the operator, should be sued (although if such a claim is successful the court can under section 13 order the operator to remove the material). Section 10 also provides protection for other intermediaries, such as distributors and newsagents." (Law Society Gazette)

### **Public Interest Journalism:**

Any change in legislation needs to take into account the fact a citizen's right to his or her good name should be balanced with both the public interest and the right to freedom of expression. Any review of the current Defamation Act should analyse whether media stakeholders have found that it offered protection for responsible public interest journalism, or did it discourage or limit or overly circumscribe the defences needed for such journalism. While industry stakeholders will be making their own submissions, as journalism academics in contact with a wide variety of practitioners, we would argue that 'libel chill' can affect the practise of good journalism. The fear of long and expensive trials where juries can and have awarded very large payouts, may be an inhibiting factor in terms of journalists pursuing certain stories. As Daithi O'Ceallaigh Press Council Chairperson pointed out at the launch of the Press Council Report 2015, there is a need for the Government to review damages awarded in libel cases, "It does appear to be that sometimes in this country damages awarded are not quite commensurate with whatever misdemeanour may have been committed." (<http://www.independent.ie/business/media/press-council-calls-for-libel-payouts-overhaul-34753625.html>)

Notwithstanding the rights of citizens, the issue of jury trials in defamation cases needs to be examined and analysed in terms of whether it has best served the public interest. In the UK the 2013 Defamation Act reversed the presumption of trial by jury in libel cases. The outcome of this change was explained by Master of the Rolls Lord Dyson thus: " a change has been made to Rule 26.11 to reflect the removal by the Act of the presumption to trial by jury in defamation cases. This will have the effect of giving judges greater scope to achieve early resolution. Previously some issues could

not have been decided until a decision on whether there would be trial by jury had been taken. I am confident that the courts have the powers they need to ensure early resolution of defamation cases, and are fully aware of the importance of using these powers. The exercise of these powers will not be appropriate in every case, but it should be the aim wherever possible, Early resolution is desirable in defamation and privacy cases, as in other areas of litigation, to sort out disputes quickly and economically. It is particularly important in defamation cases, however, in view of the very high costs that can arise."

<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Statements/mor-defamation-statement-02012014.pdf>

### **Responsible Journalism defence:**

A point that may be raised in other submissions is that of the 'responsible journalism' defence. In Canada the Supreme Court in 2009 "confirmed a new defence of responsible journalism (Grant v. Torstar Corp. 2009 SCC 61, and Quan v. Cusson, 2009 SCC ) ie a new defence of responsible communication on matters of public interest. This new defence will protect journalists, publishers, and, importantly, citizen-journalists and bloggers, from a defamation claim if the defendant can show that he or she acted responsibly in reporting on a matter of public interest even if the facts turn out to be wrong." The defence does have a number of tests which a trial judge can consider, much of which would be considered good journalistic practise in terms of how stories are checked and researched. The Canadian Supreme Court also "recognized the concept of “reportage”": a journalist or publisher will generally not be liable for quoting defamatory statements made by a person, if the defamatory

statements are repeated in a fair manner, and are repeated in order to report on what was said in a given dispute."

(Borden, Lardner, Gervais LLB-Canada).

The concept of responsible journalism itself also shines a spotlight on journalism education and training. If actions are to be considered responsible all along the chain of news and content creation that implies that all involved are aware of what these best practises should be, and receive adequate training to enable them to carry out their role in a professional manner.

**Further consultation:**

Finally we would also ask that there be some form of further consultation process so that interested stake-holders can debate all of the issues raised in the various submissions