



GOOGLE INC.'S RESPONSE TO THE TÁNAISTE AND MINISTER FOR JUSTICE AND EQUALITY'S REVIEW OF THE DEFAMATION ACT 2009

Google welcomes the opportunity to provide comments on the many important issues raised by the Tánaiste and Minister for Justice and Equality's public consultation on the reform of defamation law in Ireland (the "**Public Consultation**").

As the development of information technology, the internet and social media empowers individuals with more effective tools with which they can share and access information, we believe that all of the relevant stakeholders must work together to ensure that the correct balance is maintained between the rights of individuals to take action to protect their reputation where appropriate, and the rights of individuals to express themselves freely without being unjustifiably impeded by actual or threatened legal proceedings.

We believe, therefore, that Ireland should ensure development of a legal framework that facilitates free expression online whilst giving individuals the tools to enable them to protect their reputation. Such a framework should discourage those who would seek to use defamation law to stifle legitimate public debate and criticism, whilst also helping to educate the new generation of authors online that they remain responsible for the content that they produce. Such a framework should reflect the laws governing e-commerce in the EU (particularly, the E-Commerce Directive, Directive 2000/31/EC), which provide clarity to internet intermediaries, such as Google, regarding the legal protection regime that applies to the activities on their services.

We also believe that it is important for the development and maintenance of a vibrant digital economy that pressures to shift liability for online content away from those who are actually responsible for generating and posting that content are properly scrutinised and ultimately resisted. In the main, internet intermediaries are neither the primary nor secondary publisher of content, nor the authors or editor of content. Innovative new online products and services, such as tools and platforms for users to create, share and find content, cannot be expected to develop if they are not provided with legal protection. The services that many of us take for granted today would not exist without such legal protection.

We welcome and support all efforts by the Tánaiste and Minister for Justice and Equality to engage with stakeholders in considering the desirability of reform in the area of defamation law in Ireland.

We would like to take this opportunity to outline our views on a number of the issues raised in the Public Consultation. Informing our view is our knowledge and experience of the practical implications associated with these issues.

Consistency with European Legal Frameworks

We believe that it is essential that any amendments or new legislative provisions made to the law on defamation in Ireland are consistent with the regime set out in the E-Commerce Directive. This was established in the late 1990s following a careful assessment of all of the relevant factors to ensure that the resultant online intermediary liability regime was practical, uniform, acceptable to industry and also protective of consumers, citizens, institutions and businesses. Such factors remain just as relevant today as they did in 2000. As an OECD report on the role of internet intermediaries stated in 2011:

“[s]ince growth and innovation of e-commerce and the Internet economy depend on a reliable and expanding Internet infrastructure, an immunity or “limited liability” regime was, and is, in the public interest”¹

Unlike traditional print media, the internet allows for a multiplicity of content types on a single page or within a single service. A website or webpage may contain content authored or edited by the website owner, along with material licensed from third parties and also user-generated content, which the website is hosting as an intermediary. It is essential that any legislative reform pay attention to these different activities to ensure that the law properly recognises the unique role of online intermediaries (as opposed to a publisher or editor) and that liability is attributed appropriately and in line with the E-Commerce Directive.

It is essential that Irish law be consistent with EU law – including those frameworks that specifically concern the internet, such as the E-Commerce Directive, but also relevant frameworks in other fields, such as privacy and data protection, jurisdiction and applicable law. In particular, we would highlight the need for national legislation to reflect the ‘*notice and takedown*’ procedures specifically envisaged by the E-Commerce Directive and E-Commerce Regulations² for information society service providers (ISSPs) in addressing notifications of allegedly unlawful information; this system strikes a careful balance between the interests of persons affected by unlawful information, ISSPs and internet users.

Online intermediaries should be afforded at least as much protection under domestic law as under European law. With that goal in mind, consistency of terminology is a crucial attribute. We would therefore recommend that any legislative reform in this area use the language and terminology already used in the E-Commerce Directive, or at least explains clearly how the legislative language relates to the E-Commerce Directive language (for example, by adopting a definition of “Internet Service Provider” that expressly includes, but is not limited to, those providing the services covered in Articles 12-14 of the E-Commerce Directive). Doing so will not

¹ The Role of Internet Intermediaries in Advancing Public Policy Objectives: Forging partnerships for advancing policy

² The European Communities (Directive 2000/31/EC) Regulations 2003

deprive claimants of a cause of action, and will help to ensure that the legally responsible party in defamation cases (e.g. the author of the content) can be correctly identified and pursued, and reduce the potential for conflict between domestic and international law.

Also important in this context is the principle of technology neutrality and maintaining the same thresholds for defamation, whether committed online or offline. We do not believe that new rules in this area should seek to differentiate between conduct that occurs in different media; rather these should be drafted in a technology neutral fashion focusing on the defendant's conduct, and not the tools that are employed. This will also ensure that legislation does not become outdated but continues to work effectively as technology continues to evolve.

Freedom of Expression

We believe that any reform of defamation law must be carefully implemented in order to avoid undue interference with the right to freedom of expression, including the right to seek, receive and impart information online. Without sufficient and clear protection from liability, internet intermediaries may well simply decide that the easiest path to take is to delete or block content upon receipt of an allegation that the content is defamatory, even where that content is not obviously unlawful.

In the context of defamation law reform in England and Wales, some have appeared to suggest that a 'take down first, ask questions later' approach to allegations of online defamation is an appropriate one, suggesting that the content authors can always complain if they take issue with the removal of their content. Google firmly believes that such an approach is not appropriate, as it fails to attempt any meaningful balancing of the rights at issue, and dismisses the potential "chilling effect" of such hasty removals.

We welcome the recognition in the Public Consultation that there is a need for the law to strike a proper balance between protecting the Article 8 ECHR right to the protection of one's reputation whilst guaranteeing the exercise of Article 10 ECHR rights to freedom of expression.

Google takes the issue of online defamation seriously. We appreciate that there is a delicate balancing act to be done in seeking to protect an individual's reputation from harm caused by the publication of false statements, whilst preventing a "chilling effect" on freedom of expression with the censorship of meritorious communications for fear of potential claims. The challenges of striking this balance have been discussed at length by the UN Special Rapporteur on Freedom of Expression³, who has noted that the internet has become a key means by which individuals can exercise their right to freedom of opinion and expression, as guaranteed by Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

³ Frank La Rue Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression A/HRC/17/27 (2011) 43.

The right to freedom of opinion and expression is as much a fundamental right on its own accord as it is an “enabler” of other rights, including economic, social and cultural rights, such as the right to education, the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications, as well as civil and political rights, such as the rights to freedom of association and assembly⁴.

Any reform of the law of defamation must therefore avoid imposing undue restrictions on freedom of expression which go further than is necessary to achieve the desired objective of vindicating a person’s reputation when defamatory statements have been published.

The Defamation Act 2013 of England & Wales

The Defamation Act 2013 of England and Wales (the “**2013 Act**”) introduced significant improvements to the defamation law of England and Wales. The reforms brought about by the 2013 Act provided welcomed legal clarity and codification of the law in England and Wales by defining some of the boundaries of free speech, protecting an individual’s reputation from harm caused by the publication of defamatory statements, and recognising the need to educate those who create content that they remain responsible for that content.

We believe that the 2013 Act has made significant progress in improving the defamation law of England and Wales (particularly in the context of addressing defamatory digital and online communications). Google supports the view that Ireland should not be seen to be left behind by these significant developments adopted in England and Wales in this important area of law.

There are also areas in the 2013 Act which can be further improved upon by Ireland in its reform of defamation law, such that Ireland can become known as a benchmark for other common law jurisdictions.

Publication and Threshold Test

We strongly support the adoption of a statutory threshold requiring a certain level of harm to reputation in order that a defamation action may be brought in Ireland.

We believe that the codification of a threshold test that focuses on the seriousness of the allegation raises the bar in defamation cases in a meaningful way and to an appropriate level which should not deter potential claimants from bringing legitimate defamation claims to vindicate their rights but will help discourage trivial or vexatious claims from being brought before the Irish courts.

As well as helping to ensure effective and appropriate use of court resources, the introduction of an appropriate threshold test can be expected to discourage those who might seek to use defamation law: to suppress legitimate criticism; to stifle those who would seek to remind readers of facts of genuine public interest that the subject in question might find uncomfortable; or, to stamp out online expressions of heart-felt opinion about the actions or policies of those in

⁴ *Ibid*, paragraph 22.

the public sphere. Even if the subject is not so discouraged, the introduction of such a threshold test, as well as effective court procedures to dispose of trivial claims at an early stage, would greatly assist to halt the progress of any such claims and thus diminish their adverse effects.

Just as the rights of individuals to express themselves online should be afforded appropriate protection against those who would seek to misuse the law, so individuals who are genuinely the subject of unlawful defamatory content should be able to take timely and effective action against those responsible for authoring and posting that content, in order to secure the required vindication in the courts. The *Brett Wilson LLP v Persons Unknown*⁵ case illustrates how courts can address issues of non-compliant or anonymous authors, and help ensure that those who are defamed can secure vindication.

We support the proposal that bodies trading for profit should continue to be permitted to bring actions for defamation, and that such actions should also be subject to a statutory threshold of harm (e.g. serious financial loss, as introduced in the 2013 Act), as well as appropriate restrictions where the defamation relates to trading activities. Increasingly, businesses find it commercially advantageous to have an engaging online presence and to maintain effective communication with their current and prospective customers. A business' online presence and reputation can be an important aspect of its current commercial potential. Accordingly, if, for example, a rival business is damaging another business' reputation by deliberately publishing defamatory comments, the impacted business should be able to bring a claim in defamation against that rival business to prevent further damage. Equally, however, where a customer of a business experiences bad customer service, or has otherwise been significantly let down by that business, the individual concerned should be able to express online his or her genuine opinions without fear of his or her legitimate criticism being suppressed by a meritless claim brought, or threatened, by that business.

Internet Intermediaries

Defamation Act 2013 of England & Wales - Sections 5, 10 & 13

We strongly support approaches that encourage and facilitate the placing of responsibility for defamatory material on the individual internet users who posted that content online. Such approaches encourage individuals to be responsible online citizens, and ensure that citizens who do not act responsibly are held accountable for any online misconduct. In this regard, we would support the introduction of a provision equivalent to Section 10 of the 2013 Act ("**Section 10 Defence**"), which makes clear that claims should not be brought against parties that are not the author, editor or publisher of the statement complained of where the claimant is able to bring an action against the author, editor or publisher. As internet intermediaries are, in most cases, not the author, editor or publisher of the content complained of, this provision ensures that claimants pursue the individuals directly responsible for posting the offending content online. In

⁵ [2015] EWHC 2628 (QB)

this context, the *Brett Wilson LLP v Persons Unknown*⁶ case helps demonstrate that it remains entirely practicable for a claimant to bring a successful action against an individual even when their identity remains unknown.

In the event that the (known or unknown) author of the content either does not engage with the proceedings brought against him or her by the claimant, or refuses to comply with any subsequent court order, Section 13 of the 2013 Act provides the claimant with the ability to invite the court to order the operator of a website on which the defamatory statement is posted to remove that statement. This approach ensures that defamation disputes (particularly those in which the content is not obviously unlawful) are addressed in the appropriate forum, i.e. the court, and that a successful claimant can secure both the vital vindication that he or she seeks, as well as removal of the statement in issue⁷.

Turning to Section 5 of the 2013 Act ("**Section 5 Defence**"), we strongly support the adoption of similar provisions in Ireland that help protect website operators against claims brought in respect of third-party content hosted on their websites. Where an action is brought against a website operator (for example an operator of an online forum, blog site, social media site or a site which facilitates the posting of user-generated video content) in respect of a statement posted on the website, it will be a defence under Section 5 for the website operator to show that it did not post that statement itself. In circumstances where the actual poster of an offending statement is identifiable, Section 5 of the 2013 Act therefore provides a complete defence for website operators and is a welcomed reform on that basis. The existence of such a defence should discourage vexatious claims which target website operators instead of targeting the source of the defamatory content, i.e. its known author. The defence should also help remove one of the barriers that may discourage new businesses from entering the internet economy.

However, in order for website operators to avail themselves of the Section 5 Defence in England and Wales in circumstances where the poster is anonymous, they must comply with the onerous procedures set out in the Defamation (Operators of Website) Regulations 2013. In practice, these labyrinthine procedures place a complex and disproportionate administrative burden on website operators, and need to be carried out within unreasonably short timeframes if the defence is to be relied on (instead of simply requiring the operator to act "*expeditiously*" as per the E-Commerce Directive). In some instances, the procedures are simply impracticable, such as the requirement to anonymise a complaint, at the complainant's option, before sending it on to the original author. This makes it impossible for the author to determine who has submitted the complaint, and, correspondingly, makes it impossible for the author to determine whether the complainant truly has any rights to assert (assuming that the complaint remains intelligible in such circumstances).

The difficulty of meeting the short timeframes associated with the steps in this process (e.g., 48 hours), whilst handling the large volume of complaints often received by larger website operators, and, time differences associated with operations of multinational companies being

⁶ [2015] EWHC 2628 (QB)

⁷ See further commentary on Section 13 of the 2013 Act below, page 11

spread across multiple jurisdictions, means that website operators' compliance with these procedures is, in reality, exceedingly difficult and burdensome. As a result, many website operators may prefer to avoid the impracticable procedures set out in the Regulations in respect of the Section 5 Defence and continue to rely on the existing defences, where such defences are required.

Accordingly, whilst we would support the introduction of a Section 5 website operator style defence into Ireland, we would strongly encourage a full review and redrafting of the implementing procedures to be adopted in Ireland in order to provide website operators with a balanced and viable defence.

E-Commerce Directive

As noted above, it is vital that any amendments made to, or new legislative provisions concerning, defamation law in Ireland are consistent with EU law, and in particular the requirements of the E-Commerce Directive. In particular, we would highlight the need for national legislation to reflect the '*notice and takedown*' procedures specifically envisaged by the E-Commerce Directive; this regime contained in Articles 12-14 (together with the ban on imposing general monitoring obligations contained in Article 15) strikes a careful balance between the interests of persons affected by unlawful information, internet intermediaries and internet users.

When applying Articles 12-15 of the E-Commerce Directive, it is important to note the obvious desirability, particularly from a public policy perspective, of not penalising internet intermediaries that introduce voluntary measures to detect and tackle illegal or harmful online material. Such responsible intermediaries should not be prevented from benefitting from the E-Commerce defence regime on the dubious grounds that such measures change the overall nature of their service and thus prevent that service from being considered as inherently technical, automatic and passive in nature. In this regard, we would also welcome in Ireland the recognition provided under Section 5(12) of the 2013 Act, that moderation by the operator of a website of statements posted on it by others, does not invalidate the Section 5 website operators' defence. Far from punishing website operators for exercising responsible online citizenship, responsible moderation should be rewarded by the maintenance of the defence.

Search Engine Operators

The Scottish Law Commission requested in its Discussion Paper on Defamation in March 2016⁸ for input in relation to defences that might be available to intermediaries who set hyperlinks, operate search engines or offer aggregation services. While we believe that it remains important to question any underlying assumption that intermediaries might be considered liable in the first place, and thus be deemed to need any defence, we also believe that an appropriate framework of defences has been established by the E-Commerce Directive, and that Articles 12-15 of the

⁸ Scottish Law Commission, Discussion Paper on Defamation (Discussion Paper No. 161), see para 7.40

E-Commerce Directive provide a robust and well thought out regime, which is flexible enough to cover all such services, and has withstood the test of time.

In relation to the application of this existing framework of defences to intermediaries who, for example, operate search engines, we note that the CJEU decision in *Papasavas* (C-291/13) clarified that:

“Article 2(a) of Directive 2000/31 must be interpreted as meaning that the concept of ‘information society services’, within the meaning of that provision, covers the provision of online information services for which the service provider is remunerated, not by the recipient, but by income generated by advertisements posted on a website”.

Following this, it was held in the *Mosley v Google* case⁹ that Article 13 of the E-Commerce Directive (the “Caching” defence) affords legal protection to internet service providers providing search engine services, such as Google. A pragmatic view shared by Advocate General Maduro in *Google France SARL v Louis Vuitton Malletier SA*¹⁰:

“In my view, it would be consistent with the aim of Directive 2000/31 for Google’s search engine to be covered by a liability exemption. Arguably Google’s search engine does not fall under Article 14 of that directive [the “Hosting” defence], as it does not store information (the natural results) at the request of the sites that provide it. Nevertheless, I believe that those sites can be regarded as the recipients of a (free) service provided by Google, namely of making the information about them accessible to internet users, which means that Google’s search engine may fall under the liability exemption provided in respect of ‘caching’ in Article 13 of that directive. If necessary, the underlying aim of Directive 2000/31 would also allow an application by analogy of the liability exemption provided in Articles 12 to 14 thereof.”

Policing the Internet

Google believes that intermediaries should not be forced to police the internet. This is particularly the case in the context of allegations of defamation, which can be highly fact dependant and can involve complex legal defences regarding which the internet intermediary cannot be expected to possess all, or any, of the relevant supporting information. An intermediary simply cannot be expected to know something of the strength of possible defences such as truth or fair comment for every complaint. It would not appear to us to be desirable to effectively outsource the judicial function of national courts in such cases to internet intermediaries, by making intermediaries decide what should stay online and what should not, in circumstances where the unlawfulness of the content is not obvious. Equally, it is hard to see how it would be in the genuine interest of a nation to impose obligations on each intermediary to review and moderate its content (even if such an exercise was feasible given the scale at which popular intermediaries operate) when such an imposition would force many intermediaries

⁹ *Mosley v Google Inc. & Anor* [2015] EWHC 59 (QB), para 34.

¹⁰ [2011] Bus LR 1, para 144

(particularly those who are starting up) to take the easiest path and delete content irrespective of whether it is obviously unlawful or not.

For the reasons set out above, Google highly commends the E-Commerce Directive regime to the Tánaiste and Minister for Justice and Equality and trusts that, whilst it was established more than 15 years ago, the careful and respectful balancing of rights that it embodies will act as a guiding framework for the reform of defamation law in Ireland.

Other Remedies

Publishing Notices Online

While we strongly support the premise that it is for the courts to adjudicate on whether content is defamatory and should therefore be removed for being unlawful, we do not support the idea of posting notices alongside allegedly defamatory material for a number of reasons outlined below.

This question was recently considered by the Northern Irish Law Commission in its review of Defamation Law in Northern Ireland¹¹. The resultant report¹² published by the Department of Finance acknowledging that all respondents had outlined the significant practical and technical difficulties of such an approach and that this option had been contemplated and rejected in the UK Government's passage of the Defamation Act 2013.

First, we would be concerned that adding notices to a third party's content on the basis of a mere allegation of defamation would result in undue interference with their freedom of expression. We can foresee circumstances in which someone would make a multitude of vexatious defamation allegations on dubious grounds, with intermediaries therefore being required to apply notices to significant amounts of content. This would result in labelling that content as inherently suspicious without any form of conclusive evidence that the content is indeed defamatory or whether a defence (such as truth) may apply.

Second, there are practical and technical considerations that make adding any such notice prohibitively complex and inappropriate. We cannot see how intermediaries would be in a position to add (and subsequently remove) notices to third parties' content. For example, if an intermediary's service is hosting a video that is the subject of an allegation of defamation, the intermediary does not have the contractual or technical ability to modify that video content to include such a notice. It is also unclear – given the complexity of the internet value chain – which party would be required to post such a notice. For example, in the case of a piece of RTÉ Player content that is embedded on the page of a blog or social media platform, where would the responsibility for applying (and removing) the notice lie?

¹¹ See Northern Irish Law Commission Consultation Paper on Defamation Law in Northern Ireland [NILC 19 (2014)], November 2014, Question 16 (paras 3.73 - 3.81)

¹² See Report published by the Department of Finance entitled "Reform of defamation law in Northern Ireland Recommendations to the Department of Finance" by Dr Andrew Scott, June 2016 (see footnote 52 therein).

Some online formats also make the business of attaching a notice uniquely challenging – for example applying a notice to a search engine result. Further, it should be noted that the internet is increasingly becoming a mobile experience, with internet users turning to smartphones, tablets and wearable devices to view content. Given the reduced screen sizes of mobile devices, it will be readily apparent that publishing notices will not be practicable in the mobile environment.

It is also unclear how long any such notice (or multiple notices) would have to remain on a piece of content before it could reasonably be removed (for example, if the person making the claim decided at some point not to continue to pursue a take-down action in court). In addition, it would be very difficult to ensure that the notice was transferred across to any subsequent site on which the content might appear.

For these reasons, we would not support a proposal obliging website operators to attach notices to allegedly defamatory content. Our strong preference is to leave content accessible to users, in its original form, until a court process determines whether the material should be left up or taken down on a proper evaluation of the evidence. In our view, this strikes the appropriate balance between the rights of the multiple parties in this process.

Power of Court to Order Publication of its Judgment & Removal of Defamatory Content

We consider it contrary to public policy and the principle of freedom of expression for a court to be able to order a website operator to publish a summary of its judgment. However, if the decision is made that it is desirable to adopt in Ireland remedial powers of court similar to those as set out in Sections 12 and 13 of the 2013 Act, we believe that these should not extend to intermediaries.

As highlighted above, internet intermediaries are rarely able to defend a defamation claim on the grounds of truth, because they do not know whether the material published is true or not. We feel strongly that in these circumstances it is wrong that an internet intermediary could be forced by the courts to publish material in circumstances where it has no knowledge of the facts underlying the claim.

Further, requiring an intermediary to publish such material raises many issues, for example, assuming that the summary is to be published in the same place as the words complained of, if the author of the words was not sued, or given an opportunity to defend his or her position, why should the claimant be entitled to force the publication of material on the author's blog/website that the author might not agree with?

If the power to publish a summary of a judgment is introduced in Ireland, it is suggested that this power be amended so that it only applies to claims against the primary publisher/author of material, and not against any internet intermediary.

As regards Section 13 of the 2013 Act, which concerns the power of the court to order removal of defamatory content from a website, we believe that it is entirely appropriate in circumstances where: (a) a claimant has secured a final injunction to prevent publication of an online statement by the author; and (b) the author has declined to remove that statement, that there be a statutory provision empowering the court to order the website operator to remove the specific statement complained of from the identified web page. Such an order may of course be unnecessary to the extent that some website operators would voluntarily remove the content on sight of the third party court order. We would note however, that it would be wrong as a matter of principle for a website operator to be ordered to remove material in circumstances where the court either refuses to grant an injunction against the author of the defamatory material, or lacks the jurisdiction to do so. Section 13(1) of the 2013 Act currently fails to make reference to the court granting any such injunction in an action for defamation, accordingly we would encourage the drafting of any new legislative provisions in Ireland equivalent to Section 13 of the 2013 Act to include reference to this.

Lastly, it is also essential that website operators are given precise details of the location of any material that they are being ordered to take down. Without this specific information, it is impracticable (and sometimes impossible) for many website operators to identify the material complained of, and there is a risk that the wrong material may be taken down. With websites, this will typically be a URL, although this will not necessarily be the case with other platforms so we would suggest that any order made against a website operator must set out the specific location on the website of the defamatory statement to be removed.

Jurisdiction and Jury trials

We would have concerns with national defamation legislation being reformed to have extraterritorial effect, given the disparate views on what constitutes free speech in different jurisdictions and the difficulty that internet intermediaries have in navigating these conflicting legal rules.

The publication of material on the internet raises complicated jurisdictional issues. Material published online may be accessible to users in countries throughout the world. If the courts in a given jurisdiction can control what content can be seen by citizens in every other jurisdiction, then this must work reciprocally - it follows that if content were censored so that it complies with the laws of every country, the richness of content available online would be severely curtailed and may result in the “lowest common denominator” effect, whereby only content that is permissible under the most restrictive regulations world-wide is displayed on the internet. In fact, Internet users in Ireland would find it a disproportionate interference with their freedom of expression if website operators were required to censor content on their sites so that they complied with certain countries’ laws.

The same applies to residents of other countries in the world who may consider Ireland’s laws more restrictive of free speech than their own. It may be that, in future, the liability of an intermediary for online content will adapt through EU-level harmonisation or international treaty.

Consequently, if a statutory test for establishing jurisdiction in defamation actions is introduced in Ireland it should be made clear that the test is just one hurdle that claimants must pass, and that they are also required to satisfy any other tests imposed by common law or other sources. This will help to ensure that Irish law remains "future proof" and adapts as the common law and international position changes.

We would be in favour of supporting the introduction of a threshold test for establishing jurisdiction in defamation actions equivalent to Section 9 of the 2013 Act, which would be intended to address the phenomenon of "libel tourism", and would compel the court to refuse jurisdiction unless it is satisfied that Ireland is 'clearly the most appropriate place' for the action to be brought.

Any reform should also make it clear that the country of origin principle applies in cases of defamation law. That principle, contained in Article 3(1) of the E-Commerce Directive, effectively provides that an information society service should follow the laws of the member state in which it is established, not the laws of each member state to which it provides its services. The E-Commerce Directive identifies a limited number of exceptions to that principle. Defamation is not among them and should thus be covered by the country of origin principle. We would therefore recommend that the application of the country of origin principle to defamation cases should be made clear in the reform of defamation law in Ireland. This would give greater certainty to claimants and defendants and minimise the unnecessary cost to each party in the event that proceedings are founded upon the wrong choice of laws.

We also support the abolition of the presumption of jury trial, and the retention of a discretionary power to order trial by jury in exceptional cases.

Harmful Communications and Digital Safety

We welcome and support all efforts by Government to engage with stakeholders to consider appropriate protection, remedies and forms of redress for individuals who are the victims of online abuse.

There are a number of points contained within the recent Report of the Law Reform Commissions on Harmful Communications and Digital Safety (the "**Law Reform Commission Report**") that we support strongly, and which we believe will contribute to enhanced legal clarity and the greater protection of individuals from cyber-harassment.

In particular:

- We welcome an approach where the allocation of liability for harmful digital content is placed on individual internet users themselves who are responsible for posting the content online.

- We support an approach that encourages and facilitates the resolution of cyber-harassment disputes directly between complainants and individuals who have made harmful digital content available online.
- We welcome the recognition that there is a need for enhanced awareness and education regarding harmful digital content. We support an approach that includes national initiatives that serve to educate internet users on what it means to be a responsible online citizen; on the resources and tools available to protect their privacy and safety online; and how to deal with and report cyberbullying, inappropriate content and online abuse. Google provides users with tools to control what information they share online and with whom, and to block and remove contact with individuals who harass them online. We work to educate users on use of these tools and safe internet use generally.
- We also welcome consideration of additional measures by Government to address the posting online of videos or images with embarrassing and intimate content, often referred to as “revenge porn”, which amounts to an egregious invasion of an individual’s privacy.

However, there are a number of issues raised in the Law Reform Commission Report on which we have some concerns and which we feel merit deeper consideration as the review progresses:

- We note that the Report recommends that part of the Digital Safety Commissioner’s role would include the publication of a statutory Code of Practice on Digital Safety that would set out nationally agreed standards on the details of an efficient take-down procedure. We believe it is essential that any amendments or new legislative provisions made to the law on harassment are consistent with EU law, and in particular the requirements of the E-Commerce Directive. In particular, we would highlight the need for national legislation and/or statutory codes to reflect the ‘*notice and takedown*’ procedures specifically envisaged by the E-Commerce Directive and E-Commerce Regulation for ISSPs in addressing notifications of allegedly unlawful information (contained in Articles 12-14 of the E-Commerce Directive, together with the ban on imposing general monitoring obligations contained in Article 15) which strikes a careful balance between the interests of persons affected by unlawful information, internet intermediaries and internet users. This will help ensure clarity in interpretation and reduce the potential for conflict between domestic and European law.
- We believe that any extension of the law on harassment must be carefully limited in order to avoid imposing undue interference with the right to freedom of expression (including the right to seek, receive and impart information online), which go further than is necessary to achieve the desired objective of addressing cyber-harassment and harmful digital content online.

- We believe that further, complementary steps could be considered to provide legal clarity on how updated or new offences might be investigated and prosecuted, and how the law applies to the different parties involved.
- We also have concerns with national harassment legislation being amended to have extraterritorial effect, given the disparate views on what constitutes free speech in different jurisdictions and the difficulty that internet intermediaries have in navigating these conflicting legal rules.

Non-Legislative Action

The publication and sharing of content by internet users raises a number of legal and social challenges. Keeping legal frameworks up-to-date is a key part of meeting these challenges. Additional steps can also be taken to complement the law and help users, An Garda Síochána and prosecutors make the law function well in practice.

For example, some countries have issued guidance to police authorities and prosecution services. This outlines what laws can be used to pursue a particular case and in a way which protects the individual from threats or targeted harassment online while protecting the right to freedom of expression, which includes the lawful expression of unpopular or unfashionable opinion. Guidance can thus help avoid over-reaching in the prosecution of new laws. Targeted awareness raising and education among vulnerable groups is also important. Finally, bringing selected test cases can be a powerful deterrent and inform the public at large about how the law applies in the digital world.

We believe that the Tánaiste and Minister for Justice and Equality should have regard to the scope for these and other non-legislative measures to strengthen the legal framework and ensure legal clarity for all parties involved.

Jurisdictional issues and cyber-harassment

The publication of material on the internet raises complicated jurisdictional issues. We welcome the Law Reform Commission's recognition that, in the specific context of harmful internet behaviour, the possible extension of Irish harassment law to activity committed outside the State may involve a conflict between behaviour that constitutes an offence under Irish law but which may be regarded as the permissible exercise of free speech in another jurisdiction. Indeed, material published online may be accessible to users in countries throughout the world.

As noted above, if the courts in a given jurisdiction can control what content can be seen by citizens in every other jurisdiction, then this must work reciprocally - it follows that if content were censored so that it complies with the laws of every country, the richness of content available online would be severely curtailed and may result in the "lowest common denominator" effect, whereby only content that is permissible under the most restrictive regulations world-wide is displayed on the internet.

We note that the primary objective of this review on harmful communications and digital safety is to provide recourse for victims in Ireland and legal clarity for prosecutors. We support this goal but urge the Tánaiste and Minister for Justice and Equality to consider the risk of unintended consequences. Jurisdiction in the digital environment is a complex issue and touches on a number of other aspects of the law including extradition of suspects, limitations to intermediary liability and remedies for the victim. There are also practical difficulties associated with cross-border enforcement of local law. To be successful, this would require diplomatic engagement with third countries.

These factors all need careful consideration in order to frame the law with the required level of clarity. We welcome and support all efforts by the Tánaiste and Minister for Justice and Equality to engage with stakeholders in considering the desirability of reform in these areas of law in Ireland, and we stand ready to inform this discussion.