MGN LIMITED

REVIEW OF THE DEFAMATION ACT 2009

SUBMISSION

January 2017

Introduction

MGN Limited is the publisher of a number of newspapers and news websites including the Irish Daily Mirror and the Irish Sunday Mirror, www.irishmirror.ie, www.dublinlive.ie and www.belfastlive.co.uk.

MGN Limited has been a defendant to defamation proceedings brought under the Defamation Act 2009 and its predecessor, the Defamation Act 1961. These submissions are based on its experiences and observations of the operation of the Irish defamation regime generally, its experience of the application of the 2009 Act and its consideration of the provisions of that Act.

MGN Limited has contributed to the submissions made by NewsBrands Ireland and supports the submissions made by NewsBrands Ireland save and insofar as they may be contradicted by anything set out below.

It is our view that the defamation regime in Ireland does not serve the interests either of plaintiffs or defendants, in that it is exceptionally slow, inefficient, extremely expensive and begets unhappy results where awards are often obviously excessive or verdicts defy reason.

In this regard, although there have been few cases which have proceeded to trial under the 2009 Act, we do not believe that the changes introduced by that Act will reduce the particular concerns arising in jury trials.

A plaintiff is entitled to expect that a complaint of defamation will be dealt with by the defendant publisher in a timely manner and in the event that a resolution is not achieved by mutual agreement, that the complaint can be brought to trial with reasonable expedition and be determined as swiftly and economically as is reasonably practicable.

A defendant is entitled to expect that where it has a defence to an action that it will be able to rely on its defence at trial and will not be forced by the economic pressure of very high costs and the risk of excessive damages to compromise the action and settle because it is cheaper to do so. It is also entitled to expect that where it has defamed a person that the level of damages and associated costs will be proportionate to the injury actually suffered.

The operation of the defamation regime in Ireland does not balance the right of a person to their good name with the right of freedom of expression. We contend that the right to one's good name is not superior to freedom of expression.

Summary of submissions

a. Abolition of jury trials for defamation actions
b. Introduction of a pre-action protocol
c. Introduction of a serious harm threshold
d. Capping general damages at a fixed monetary sum
e. Amendment of the rules for lodgements
f. Amendment of Section 23, the effect of an offer to make amends
g. Amendment of Section 26, fair and reasonable publication
h. Summary disposal
i. Preliminary issues
j. New provision to allow a court at the conclusion of a case to review all offers for the purpose of awarding costs

Note: for convenience "he" and "his" are used rather than "he or she" and "his or her".

The abolition of jury trials for defamation actions

MGN Limited supports the abolition of juries in High Court defamation actions save in exceptional circumstances for the following reasons:

1. The jury in a defamation action is not representative of Irish society. High Court defamation actions are invariably tried at the Four Courts in Dublin. Juries for trials in Dublin are selected from Irish citizens within the Dublin borough. This is not a cross section of Irish society, yet the notion that a jury is representative of a cross section of society is a key justification for using a jury in the first place.
2. Proceedings in a jury trial are significantly slower than non-jury actions and therefore are much more time consuming and expensive.
3. A jury verdict is not transparent. The jury does not provide reasons for its determination and the parties cannot be certain that their case has been understood or given appropriate consideration. Where a figure for damages is awarded there is no explanation of how it has been assessed, calculated or chosen.
4. An appeal against a verdict is highly likely where the verdict is not explained and falls outside the parameters of reasonable, expected outcomes of the parties. Appeals add further delay, costs and uncertainty.
5. The preservation of jury trials for defamation actions in the High Court is inconsistent with the abolition of juries for all other cases in the High Court save for civil assaults and it cannot be said that in any other cases where juries were previously used that a High Court judge sitting alone has been incapable of rendering a fair verdict in accordance with the evidence.
6. The use of a jury in a High Court defamation action is inconsistent with the position in the Circuit Court where all civil actions are determined by a judge alone.

7. The purpose of a defamation action is the vindication of the plaintiff's good name (if successful) and it does not require the verdict of a jury to do this. The notion that a plaintiff is entitled to the vindication of his peers harks back to another era. Vindication is secured by a verdict given in public and by the level of damages awarded, not by being uttered by a jury.
8. In a case where a plaintiff is concerned with their reputation within a particular sector or society, rather than the public at large, the contribution of a jury is even more remote.
9. A jury does not bring to the decision making process any relevant and unique quality, feature or benefit beyond the capacity of a judge sufficient to outweigh the additional costs, delays and uncertainties of a jury verdict. The extent of public participation in the civil legal system provided by sitting as a juror is slight and infrequent. Defamation actions are rarely fought on the meaning of the words, rather on the application of some other defence, so the need to determine the "ordinary meaning" of the words complained about, where the views of a cross section of the community might arguably be relevant, is uncommon. A judge alone may reasonably be expected to know the ordinary meaning of words.
10. Jury decisions can be irrational and conflict with the evidence in the case.
11. The level of awards made by juries often appears to be out of proportion to the harm actually done. This is not counterbalanced by the provision in the 2009 Act that a jury can be addressed on the issue of damages, because the existing catalogue of awards is based on decisions made where the jury could not be addressed on the issue and so the starting reference position is distorted.
12. It is impossible for the parties to identify and deal with possible prejudice of jurors. This is of particular concern for publishers of tabloid newspapers.
13. It is to be doubted that a jury actually understands the complex legal issues entailed in certain defences (e.g. honest opinion, fair and reasonable publication, what comprises public interest) and properly applies the principles to the issues. The defences are complex and difficult for practitioners - it is unreasonable to expect a jury to have to grapple with them and apply them correctly.
14. Jury decisions are extremely unpredictable. It stands to reason that if jury decisions were predictable, defendants would not have fought any cases in which very high damages were awarded. Predictability is a legitimate aspiration of the legal system; the absence of predictability in a jury trial undermines faith in the system and undermines the ability to conclude litigation - because of the incidence of appeals against jury verdicts.
15. Jury unpredictability gives a plaintiff negotiating leverage disproportionate to the merits of the case. The defendant is faced with the burden of a double risk, a high award and costs of trial in the event of losing. This provides the plaintiff's advisers the opportunity to "hold out" for increased offers for damages and costs disproportionate to the merits of the case. Lodgements or offers without prejudice save as to costs are insufficient to guard against such economic pressure. The leverage

is increased where a defendant believes it has a sound defence to the claim, because the likelihood of a trial is higher and the risks more acute. Rather than run the defence, the consequences of losing are so severe that the defendant is inclined to "buy off the risk"; the economic burden displaces a sound defence.

16. The increasing level of jury awards has given rise to a substantial increase in expectation for all complainants as to the level of damages in defamation cases. The increased expectation makes it more difficult to negotiate with plaintiff advisers within the defendant's advisers' assessment of the range of value of the claim.
17. A successful appeal against an excessive award has resulted in a order for a retrial and the costs of the appeal are to be borne by the defendant, as will the costs of the retrial. This is a double penalty for an excessive award.
18. A jury action in defamation cases causes inconvenience for the jurors, the disruption of their lives, the expense and inconvenience for them and their employers which is not outweighed by any perceived public benefit in obtaining a jury verdict (which is then often appealed against).
19. The certainty of a jury verdict has been argued to be one important advantage of a jury trial, i.e. there is a clear and certain verdict given "here and now" at the end of the trial which would be absent if the outcome had to await the writing of a reasoned judgment. However, the lengthy period between publication and trial dissipates the benefit of a "here and now" determination. If the jury verdict is then appealed, as it so often is, the final decision is further postponed, often by many years. The conclusiveness of a verdict is far more likely to be achieved through a reasoned judgment, which decreases both the prospect of an appeal and the prospect of a successful appeal, and would give confidence to both parties that their arguments have been fairly considered in the context of the evidence, that the appropriate legal principles have been applied and that the relevant law has been taken into account as expeditiously as the legal system will allow.

These points are indicative of the very significant problems presented by the jury system in defamation cases. The supposed benefits are far outweighed by the detrimental aspects of a jury trial. It is submitted that there is a compelling case to be made for the abolition of juries in High Court defamation actions save in the case of actions taken by members or former members of the judiciary or members and former members of the Oireachtas.

Pre action protocol

The introduction of a pre action protocol would assist in achieving a more consistent approach to dealing with complaints alleging defamation by encouraging the complainant to identify at the earliest opportunity the substance of the complaint, its foundation and what is required to be done by the publisher to resolve it and for the publisher to set out its position with equal clarity.

Frequently correspondence is used as a precursor to litigation rather than as an opportunity to make a genuine effort to resolve the matter without recourse to litigation and to consider alternative means of dispute resolution.

In addition, MGN Limited submits that where a complainant is seeking damages the complainant should be required to state at the earliest opportunity what sum the complainant is willing to accept in damages and the sum required for costs if the case is to be settled at that time.

Both parties should be required to set out their respective positions clearly in their correspondence, which, at the conclusion of the case, should be taken into account by the court in considering any costs order.

Serious harm threshold

MGN Limited supports the introduction of a serious harm threshold to prevent the commencement of frivolous actions or actions where the costs of defending the action are likely to significantly outweigh the likely damages if the claim were to succeed.

Capping general damages

MGN Limited supports the introduction of a cap on an award of general damages for defamation. We believe the cap should be stated as a fixed sum, which can be subject to review at regular intervals, and the figure should not exceed the maximum allowed for general damages in a personal injury action.

Lodgements

The benefit of a lodgement from the defendant's position is it can be protected against the continued accrual of costs in a case after the date of a lodgement if the plaintiff is not awarded more than the sum lodged.

The disadvantages are that a lodgement in a defamation action can only be made at the time of delivering the defence and the protection is lost entirely if the lodgement is beaten by any amount.

The "penalty" for lodging a sum that falls even slightly below the amount awarded will be that the defendant will bear all the costs accrued in the intervening period - which may well exceed the difference between the sum lodged and the award by a considerable margin. That is, the costs incurred in obtaining a slightly higher sum than the sum lodged may be out of all proportion to the increase in damages.

MGN Limited advocates a change to the lodgement procedure to limit the amount of costs recoverable after a lodgement has been made so that, where the sum awarded at trial exceeds the sum lodged, the costs recoverable after the date of the lodgement should not to exceed the

difference between the amount of the lodgment and the award. Additionally, if the difference is within a margin of (say 10%) of the sum lodged that costs shall not be awarded.

The purpose of this proposal is to encourage a plaintiff to accept a reasonable lodgement and not to continue with a claim in the hope or expectation of securing a modest increase in damages where the costs incurred in so doing would be disproportionate to the increase obtained.

The court should also be informed whether the sum lodged had been offered to the plaintiff at an earlier stage, and to consider whether in all the circumstances the rejection was unreasonable or not.

We submit that a lodgement should be allowed at any stage in the proceedings after an appearance has been entered and before the conclusion of the trial. Although the advantage of a lodgement is diminished the later it is made, a reasonable lodgement may still encourage a plaintiff to terminate the litigation and end the accrual of additional costs and save the court time.

Permitting a lodgement to may be made prior to delivering a defence is of particular importance in the context of the making of an offer to make amends, dealt with under the next headong.

Section 29.—(1) of the Act provides:
In an action for damages for defamation the defendant may, upon giving notice in writing to the plaintiff, pay a sum of money into court in satisfaction of the action when filing his or her defence to the action [emphasis added].

So far as we are aware, a defence is no longer filed, rather it is delivered to the other side. This raises the question as to when and how a lodgement can properly be made at all in light of the express wording of the section.

Offer to make amends

MGN Limited believes that the provisions of the Defamation Act 2009 dealing with the effect of an offer to make amends are in need of significant amendment if the provisions are to be effectively invoked.

A defendant should always be given an opportunity to "get out" of a case and avoid litigation where it is willing to provide the plaintiff with all the remedies the plaintiff is justly entitled to. The benefit is that the plaintiff obtains a prompt commitment to vindication and to receive all appropriate remedies and costs and the matter is brought to a swift resolution without litigation and with a consequential saving by avoiding unnecessary litigation costs, which is to the benefit of both parties.

An effective procedure of this kind would be of particular advantage in cases where a defamation arose as a result of negligence or in other situations where the defendant did not have a defence which was likely to succeed, but would not be invoked in a situation where a defendant believed that it had a sound defence to the claim.

It stands to reason that to be effective the procedure must be advantageous to both sides so that they are willing to engage in the process in the first place.

When it was enacted, it was believed that the provisions in Sections 22 and 23 introduced just such a procedure. However, for the reasons set out below it is clear they do not achieve that goal.

The provisions in Sections 22 and 23 were originally envisaged as a replacement to the offer of amends provision under the 1961 Act, which had been enacted to deal with unintentional defamations, where the defendant was not aware that the statement complained of referred to the plaintiff or that it was defamatory of him. That provision was rarely if ever used because the circumstances which it catered for were uncommon and its benefit dubious.

Sections 22 and 23 do not seem to be quite so restrictive and appear to facilitate a speedier resolution of a complaint between the parties where the appropriate concessions are made and the offer to make amends is accepted: the plaintiff will not progress the proceedings further, and that the parties will engage in a process of negotiation to agree the various issues and there will be no court intervention save in the absence of agreement on the particulars.

This would be of benefit to both sides if in the absence of agreement on damages it was to determined by way of an assessment before a judge sitting alone, so that the process would be foreshortened and less costly.

The Court of Appeal in *Higgins v Irish Aviation Authority* recently upheld the High Court determination that in the event that an offer to make amends is accepted but the parties cannot agree on the sum for damages the assessment is to be made in the High Court by a jury.
The impact of this decision is that the benefit of an offer to make amends is lost, because the assessment procedure will entail a jury action and the reason for a defendant making such an offer in the first place is to avoid that outcome.

The offer to make amends once accepted is binding - there is no means for either side to withdraw - and while that may be consistent with the principle underlying the procedure, if a plaintiff's requirement for damages significantly exceeds the defendant's valuation then the defendant is currently left in the position that there is no prospect of avoiding a jury assessment.

This difficulty is further compounded by the fact that an offer to make amends can only be made before a defence is delivered (this entirely proper and correct), but a lodgment can only be made when delivering the defence. Therefore a defendant making an offer to make amends faces the difficulty that if the offer is accepted then in the absence of agreement, damages will be assessed by jury trial without the protection of a lodgement so that its liability to bear the costs of the entire assessment process is inevitable. The plaintiff could reject any proposed figure for damages with impunity and the defendant has lost the only benefit of making the offer to make amends in the first place.

This is so even if it is accepted that a defendant is entitled to a discount where it has made an offer to make amends at an early stage. If the parties cannot agree on damages any discount that may have been anticipated will be lost in bearing the costs of the trial on assessment.

A further difficulty with the procedure is that although a defendant can rely on the fact that it made an offer to make amends as a complete defence to the claim if it is not accepted, this appears not to apply in a case where a defendant is guilty of negligence in publishing the defamatory statement.

Section 23 (2) provides: Subject to subsection (3) it shall be a defence to a defamation action for a person to prove that he or she made an offer to make amends under *section 22* and that it was not accepted, unless the plaintiff proves that the defendant knew or ought reasonably to have known at the time of the publication of the statement to which the offer relates that

(a) It referred to the plaintiff or was likely to be understood as referring to the plaintiff, and

(b) It was false and defamatory of the plaintiff [emphasis added]

A plaintiff is not in any way prejudiced by accepting an offer to make amends irrespective of how the defamation arose in the absence of actual malice. There appears to be no sensible reason to preclude a defendant from relying on an offer to make amends where it is negligent or guilty of a want of care. The applicability of the procedure in such cases would undoubtedly benefit the plaintiff, who will have a clear resolution of the matter in his favour through the commitment of the defendant to provide all appropriate reliefs and the assurance that in the event agreement on specific aspects is not forthcoming, that the court will determine the matter promptly. The defendant will be in a position to foreshorten proceedings, which is inevitably to the plaintiff's benefit, and reduce its own cost exposure without depriving the plaintiff of the reliefs to which he is entitled.

The section also refers to the defendant's knowledge, but while the defendant may have a vicarious liability for its servants or agents, a defendant should not be deprived of the benefit of the offer of amends procedure because it has such a liability in respect of the knowledge of a servant or agent.

The UK Defamation Act 1996 provides an offer to make amends procedure but there are crucial distinctions.

Firstly, proceedings are heard and determined by a judge alone.

Secondly, the procedure applies to any case where the defendant has published a defamatory statement without actual malice and so the procedure can be utilised by any such defendant who accepts that it has published a defamatory statement and has no defence likely to succeed.

Thirdly, there is a presumption that the defendant has not acted with actual malice.

Finally, a defendant obtains a substantial discount, up to 50%, on the damages awarded when assessed by a judge.

MGN Limited submits that offer to make amends procedure in sections 22 - 23 of the 2009 Act should apply in any case where the defendant has not acted with actual malice, that an assessment of damages in default of agreement should be made by judge alone (and repeats its submission that juries should be abolished in defamation cases), that if it is intended that a discount should be given on the damages payable by a defendant who makes an offer to make amends that should be expressly stipulated, and that where an offer to make amends is to be made, a defendant is entitled to make a lodgement and that there should be a presumption against actual malice on the part of the defendant for the purposes of this provision.

Section 26 Fair and reasonable publication

The purpose of Section 26 appears to be to protect statements made in furtherance of public debate and the threshold to meet the requirements of the defence ought not to be set at a level that does not protect such statements and dissuades publishers from engaging in or promoting public discussion.

Section 26 currently imposes too many conditions for this defence to be effective. The conditions are set out in different subsections and are necessarily distinct in meaning, yet these distinctions are not clear and the subtlety and complexity of the provisions make them difficult to understand or to apply.

A publisher must know at the time publication is being decided upon whether the defence of fair and reasonable publication will apply and whether it is likely to succeed. The difficulties in understanding and applying the section arise both at the publication stage and again at trial.

Without confidence at the time of publication that a defence of fair and reasonable publication would succeed, the likelihood is that the publisher would forego publication, which negates the purpose for which the section has been enacted.

Section 26 (1) involves separate assessments involving: good faith, public interest, public benefit, all the circumstances of the case, what is reasonably sufficient, and fairness and reasonableness. These criteria lack definition, the distinctions are unclear and confusing and one (reasonably sufficient) so vague as to be impossible to assess objectively. In addition, the assessments of 26(1) are cumulative; the defence requires that each test be passed, and a plaintiff has only to show that one criterion has not been met for the defence to fail.

The consideration of what is a matter of public interest has been considered in a wealth of case law in common law jurisdictions and it is submitted that the question of whether a subject is one of public interest should be a low hurdle - and one which ought not to be left to a jury. The recent *O'Brien v Associated Newspapers* decision demonstrates the hazard of trying to clear this hurdle before a jury.

The nature of the assessment at the publication stage is subjective - and a defendant who publishes a statement honestly believing that its publication is for the purpose of discussing a subject of public interest and that discussion is for the public benefit ought not to fail in their defence because a different decision maker might have come a different conclusion.

It is submitted that the defence of fair and reasonable publication should be lost only if no reasonable person could have honestly come to the conclusion that publication was fair and reasonable.

In addition to the tests in section 26 (1), 26 (2) provides: "for the purposes of this section the court [and in the case of a jury trial, the jury] **shall**, in determining whether it was fair and reasonable to publish the statement concerned, take into account such matters as the court [and in the case of a jury trial, the jury] considers relevant <u>including</u> any or all of the following: [(a) to (j)] " [emphasis added].

This provision is imperative and in order to consider whether any of the matters listed in the subsection are relevant, the jury must have regard to each one in turn and then determine whether to take it into account or not.

It is <u>not</u> intended that the trial judge is to direct a jury on these matters and so act as a filter for irrelevant criteria, because the definition of "court" includes "jury" where a jury is sitting. In order to take these considerations into account or not, the jury must be informed that these are matters to which it may have regard. Beyond that, the section implies that there may be other matters to which the jury may have regard, other matters that form part of the circumstances of the case.

This process is too complex for a jury - because there is no weighting, no hierarchy, the matters to be considered are entirely at the discretion of jury, "such matters as [the jury]

considers relevant including any or all of the following", a defendant cannot be certain a jury will not take into account irrelevant criteria.

Ultimately every element of the case is to be considered in determining whether it was fair and reasonable to publish (not merely the criteria in section 26 (2)) and a defendant can never be confident (especially at the time of publication) that it will meet the test for each consideration to which the court/jury may have regard.

The more matters to which a judge or jury are to have regard to, the less likely it is that the defendant will meet the defence requirements. This is a very unbalanced position, weighted heavily against publication.

Plaintiff's failure to respond

The consideration in 26 (2)(h) is of the extent to which the plaintiff's version of events was represented in the publication concerned and given the same or similar prominence to the statement concerned.

However, where a plaintiff fails or refuses to provide an explanation or response, 26 (3) provides that the failure or refusal of a plaintiff to respond to attempts by or on behalf of the defendant, to elicit the plaintiff's version of events, shall not

a) constitute or imply consent to the publication of the statement, or

b) entitle the court [the jury, if jury trial] to draw an inference therefrom.

In Section 31 in the assessment of damages, one of the matters a jury shall have regard to is 31 (4) (g) the extent (if any) to which the plaintiff caused or contributed to or acquiesced in, the publication of the defamatory statement. This section can clearly conflict with 26 (3) prohibiting any inference being drawn from the plaintiff's failure or refusal to respond.

26 (2) (h) places an onus on a defendant to put the plaintiff's side, yet the failure of the plaintiff to respond cannot lead to any inference being drawn, so falling short in presenting the plaintiff's side despite all attempts may lead to a loss of the defence.

These provisions are weighted in favour of the plaintiff - who can decide not to respond and then assert that his version of events was not properly represented - because no inference can be drawn from the plaintiff's refusal.

It has to be wondered whether a defendant could actually call evidence of attempts to contact the plaintiff because the only purpose of giving such evidence is to invite the inference that the defendant acted reasonably, it necessarily gives rise to an inference about the plaintiff; since no inference can be drawn from the failure or refusal of a plaintiff to respond, it is arguable that such evidence creates a dichotomy and is likely to be inadmissible.

Where the statement relates to a matter of public interest, the failure or refusal of a plaintiff to provide a response may thwart publication altogether. This is so even though the purpose of the defence in Section 26 is intended to promote the disclosure of matters relating to subjects of public interest for the purpose of discussing them.

Therefore it is submitted that where a statement relates to the discussion of a matter of public interest the refusal or failure of the plaintiff or his representative to respond should be taken into account in determining whether the publication is fair and reasonable and section 26(3) be repealed.

Summary disposal

MGN Limited submits that Section 34 of the Act should be amended to permit any party to the proceedings to apply for summary disposal at any stage.

Preliminary issues

Meanings are commonly pleaded at length and multiple meanings are often attached to a single allegation. In the UK, courts commonly deal with applications to narrow the meanings pleaded and to eliminate duplicated meanings and ones that are too tenuous. This does not happen in Ireland.

The High Court is very reluctant to do anything that could be seen as usurping the jury's function and this is especially true where there is a dispute about meaning.

Whether words are capable of bearing a defamatory meaning is a matter solely for a judge, but whether the words actually bear a defamatory meaning is a matter for the jury in a jury action.

The disadvantage of a trial where meaning remains in dispute is that in the event that a jury determines that the words do not bear the meaning contended for by the plaintiff all the other issues dealt with at trial would have been irrelevant, wasting time, effort and expense.

On the other hand, if particular defamatory meanings were determined to be present at a preliminary hearing, the defendant would be in a position to consider whether to defend the case on the basis of meanings found to be present and if not negotiate on that basis and avoid the time, effort and expense of a trial on the other issues.

The appropriate time to determine meaning would be <u>before</u> the time for delivering a defence, especially in the light of the current provisions on offer to make amends and lodgements.

The "single meaning rule" in defamation provides that words are to be taken to bear one meaning, and where the parties contend for different meanings, the current position is that the conflict will be resolved at trial in favour of one side.

Where meaning is disputed, a full trial could readily be avoided, or at least have the issues more focused, if the parties were able to have the meaning of particular statements determined in advance without having to hear evidence on other matters that may not ultimately be necessary to deal with.

MGN Limited has earlier stated its belief that juries should be abolished for High Court defamation actions. An additional benefit of doing so is that it would facilitate the hearing of preliminary issues on meaning, which could then be actively encouraged as clarity about the meaning of the statement complained about may assist the resolution of a case whether by means of an offer to makes amends or otherwise.

Review of all offers made in negotiations

The general procedure on costs is that "costs follow the event" - loser pays. MGN Limited is aware of a number of occasions where the court has exercised its discretion not to award costs against an unsuccessful plaintiff where this publisher has been the defendant. We do not believe this is unique to us. The effect of this is that a plaintiff is commonly more willing to push a case to trial and a defendant is more reluctant to do so. The position is heightened where the plaintiff is a person of limited means, because there is no reality in being able to recover costs against such a party even were a court to make an order. The apparent "deep pockets" of media publishers is seen as justification for not allowing them costs, but the risks media publishers encounter in litigation are greatly unbalanced and threaten the ability of such publishers to remain in business.

Defendants generally do not persist in litigating cases where they do not have a defence likely to succeed unless the plaintiff has rejected what the defendant believes to be a reasonable offer.

It is submitted that where at the conclusion of a case in which damages have been awarded to the plaintiff, before making any order in respect of costs and the proportion of costs (if any) to be allowed, the court must have regard to whether or not the defendant made any offer to settle the case on terms to include a payment to the plaintiff, and to review all offers made or refusals to make an offer to settle the complaint and all rejections of or counter proposals to such offers, whether made without prejudice save as to costs or otherwise.

The purpose of such a provision is to enable a judge to consider the conduct of both parties and whether their attempts to engage with the other side for the purpose of resolving the matter were genuine and reasonable and to allow any party in the action to adduce correspondence in support of the granting of an order for costs in their favour or of the

reduction of the proportion of costs awarded against them where they have shown that they have behaved reasonably even though they have been unsuccessful or that another party to the action has behaved unreasonably or in a way that has unreasonably or unnecessarily added to the costs of the action.

Ultimately the purpose of the modifications recommended by MGN Limited in relation to a pre-action protocol, lodgements and costs is to encourage the parties to engage in reasonable, honest and bona fide efforts to resolve the dispute and to ensure that the parties do not unduly suffer a significant financial burden for continuing to litigate where they have behaved reasonably and that losing of itself ought not to be sufficient reason to impose the entire costs burden onto the losing side.

The other recommendations are intended to facilitate speedier, more efficient and more focused litigation, to achieve a greater level of predictability and certainty in outcome, and to provide a more balanced and fairer process for the resolution of defamation claims.