

Submission to the Statutory Review of the Defamation Act

National Union of Journalists

Introduction: The National Union of Journalists (NUJ) welcomes the opportunity to contribute to the statutory review of the Defamation Act 2009, announced by the Tánaiste and Minister for Justice and Equality on 1 November 2016.

The NUJ represents the vast majority of professional journalists in Ireland, including reporters, editors, journalists in newspapers, magazines, broadcasting and online as well as public relations professionals, copywriters.

Our members include journalists engaged on a variety of contracts of service by media organisations, and freelancers.

The NUJ would welcome reform of the Defamation Act 2009. While the 2009 Act represented a significant improvement on the Defamation Act 1961 the review provides an opportunity to further update the law to protect and exchange the right to freedom of expression.

Unlike organisations representing proprietors and other interests the NUJ is less concerned with the costs and damages associated with defamation than issues concerning the public interest.

President Michael D Higgins described the importance of freedom of speech and the role of the journalist when he addressed the World Congress of the International Federation of Journalists in Dublin in 2013, thus:

We know that access to information is fundamental in the empowering of citizens, allowing them not only control of their lives, but the authority to participate, to shape their societies and protect themselves from abuse of their rights. We also know that the public has to be afforded the capacity to form judgments from an array of political viewpoints offered through an increasingly diverse range of media tools. To be the arrow not the target, as the late Raymond Williams put it in his last address to media workers and film workers, we know that it is critical that journalists can and must be allowed to speak the truth without fear or sanction; and that citizens must be allowed to evaluate and weigh an array of accurate and impartially provided evidence, and come to independent conclusions of their own.

It is with these comments in mind that we suggest that those involved in the review

process view it as an opportunity to address not simply the legal issues associated with the Defamation Act, as important as they are, but to look at the wider environment in which the news media operates and to address a range of issues that have the effect of curtailing freedom of the press, and the consequent impact that has on the public's right to be informed.

There has long been at best grudging attitude towards the concept of freedom of expression, reflected in the Dáil debates on the draft Constitution in 1937. The Constitutional guarantee of freedom of expression is heavily qualified and there is, in our view, a compelling case for a stronger Constitutional commitment to the principle of Freedom of Expression.

As John M Kelly noted in *Fundamental Rights in the Irish Law and Constitution*¹:

Some inkling of what Mr. de Valera intended by the lengthy qualification about the common good is afforded by one interesting exchange:
Mr de Valera: 'I say that the right of citizens to express freely their convictions and opinions cannot, in fact, be permitted, in any State. There are opinions which go to the very root...if we believe in order, are we going to permit free expression of such opinions as that it is inconsistent with man's nature that he should be governed at all. Are we going to have anarchical principles for example, generally propagated here? I say no.

While acknowledging the importance of protecting a person's good name and reputation we hold that the balance between the private right to ones' good name under Article 40.3.2 of the Constitution should be circumscribed with reference to the public interest enshrined in Article 40.6.1, which guarantees the right of citizens to express freely their convictions and opinions.

A similar balancing has been evident for many years at the European Court of Human Rights, where the Court tends to favour the public right to freedom of expression in Article 10 of the European Convention on Human Rights over more individual rights under Article 8.

The NUJ welcomed the inclusion for the provision of a Press Council/Ombudsman system in the 2009 Act and we would wish to see it strengthened.

The NUJ shares with media organisations and representative bodies a belief in the need for libel reform. We believe that the PCI has been successful and as a founding member of the steering committee which proposed the current model we favour regular reviews of the structure and the operation of the co-regulatory system.

The industry must remain committed to providing adequate funding for the office of the Press Ombudsman and the Press Council of Ireland and to ensuring that the structure remains fit for purpose.

We abhor the fact that some people holding senior positions within media ownership and management have chosen to continue to seek redress in the courts while ignoring the Press Council.

Media organisations, including significant shareholders, must lead by example if the PCI model is to retain public confidence.

We are also mindful that its very success might mean less support, both morally and financial, as sectors of the media forget that the Press Council /Ombudsman system came into being with the threat of privacy legislation hanging over it, and as far as we are aware, that threat has not gone away.

We would like to see the definition of the Press Council broadened so as to ensure it can accept into membership online media and other forms of electronic publishing. Much of the social media world is unregulated.

We believe that there are digital publications and journalists in the digital area who want to be trusted by the public. In a world of fake news stories and stories of dubious providence, voluntary regulation might provide that trust, where it is warranted.

We would also recommend the Council investigate the development of some form of individual membership that reflects the world of journalists using blogs and other forms of online publishing. This would, crucially, extend the benefits of the Defamation Act 2009 to individual journalists who subscribe to the code.

We hold that it is the adherence to a code of ethics that will define the professional journalist and separate those who do journalism professionally and in the public interest from much of the noise that is taking place in the media world. We believe that regulatory systems, such as the Press Council, will contribute to that.

The 2009 Act was an improvement on the 1961 Act, but there is still a legal deficit in the area of digital media. Our members working for newspaper web sites and other web publishing news organisation are being forced to curtail their readers' right to free expression for fear of libel. It is far safer to disallow reader's comments, thereby curtailing a valuable area of debate, rather than risk a libel. Some protection should

be granted to those publications who take down offensive or libellous material when it has been brought to their notice.

Our submission will offer a more detailed legal analysis of the present Act and what changes we would like to see. However, we will, again, point to one other issue that has a chilling effect on press freedom, that of ownership. Our concerns over the concentration of media ownership are well known. Our present libel laws coupled, with an unacceptable level of media ownership concentration means Ireland is increasingly being criticised internationally. The annual analysis for the Press Freedom Index, 2016, drawn up by Reporters without Borders highlighted the concentration of media ownership and defamation as contributing to what it called a 'hostile context'.

We invite members of the Oireachtas committee on Justice and Equality to hold public sessions to allow those who wish to either make submissions or elaborate and be questioned on the submissions being made to this review process.

We also encourage the government to again consider the case made to i for the establishment of a Commission on the Future of the Media in Ireland, looking at all aspects of the media including the regulatory frameworks, education, training, access to employment, technological challenges and the role of national and regional media, across all platforms, in facilitating democratic engagement.

In this regard it is worth noting that while this is a legal review there is also a role for the Committee on Communications, Climate Action and Environment in reviewing the impact of the defamation regime on the operation of the media in Ireland.

The committee is well placed to promote public discourse on the future of the media in Ireland.

This submission has been drafted with the assistance of Andrea Martin and Sarah Kieran of Media Lawyer solicitors, who have provided a legal overview.

¹J M Kelly, Fundamental Rights in the Irish Constitution and Law,, Allen Figgis & Co, 1967)

Legal Overview

The core principle underpinning this submission is the protection and promotion of the right of freedom of expression, both for our members and the public who are entitled to receive the information imparted through the media.

Experience of defamation actions, both before and since the introduction of the Defamation Act, 2009 shows that the disproportionate financial risks to which both defendants and plaintiffs are exposed in the context of defamation actions is having a chilling effect on freedom of expression and the rightful vindication of reputation where that is merited. This submission proposes and endorses measures directly relevant to managing that risk in a manner that promotes both the protection of reputation and the right of freedom of expression.

Serious Harm test

The NUJ supports the introduction of a 'serious harm' threshold that a plaintiff should be required to establish in a defamation action. Such a test would be similar to that as introduced by the UK in its Defamation Act 2013. This Act specifically introduced an obligation for a claimant to show that the publication resulted in *serious harm* in order to succeed in a defamation action. In 2015 Thompson Reuters published a review of Defamation claims taken in 2014 in the UK which demonstrated a significant decline in the number of claims taken which it attributes to this provision (27%)¹. This, it is submitted, would not be onerous on a genuine claimant and would provide protection against; (a) the issue of defamation actions with little merit but issued on an *in terrorem* basis (ie to intimidate a publisher in an attempt to prevent future publication about an individual or a particular topic) and, (b) the use of this jurisdiction as a haven for libel tourism².

Fair and Reasonable Publication on a Matter of Public Interest Defence

It is submitted that this defence introduced at s.26 of the Act, is narrowly drawn to the point of inefficacy as a defence. It provides for an unduly restrictive list of criteria which a court is required to consider in determining whether this defence should succeed in a defamation action. This does not necessarily facilitate discussion of matters genuinely in the public interest. It is significant to note that despite the availability of this defence for the last 5 years, it has not been meaningfully pleaded or explored in any case law to date, with defendant publishers preferring – with good reason – to rely on the more established and comprehensive common law “qualified privilege on a matter of public interest” aka Reynolds defence. This section

¹ <https://inform.files.wordpress.com/2015/09/thomson-reuters-press-release.pdf>

² <http://www.irishtimes.com/news/crime-and-law/libel-tourism-may-become-our-newest-cottage-industry-1.1992393>

26 defence as currently drafted provides criteria for the defence that are subjective to the point of being unworkable. The NUJ submits that it needs to be re-drafted in favour of a statutory defence clearly predicated on the public interest which recognises in a comprehensive and objective manner the crucial role of the media in a democratic society, imparting information in a responsible manner in the public interest.

It is frequently overlooked in the course of defamation actions, that the section 26 'fair and reasonable publication defence' is denied to a defendant publisher where a plaintiff seeks a Declaratory Order pursuant to section 28 (1) of the Act (see section 26 (4) of the 2009 Act). Section 28 provides for 'fast track' Declaratory Orders in the Circuit Court for plaintiffs, where "the statement is defamatory and the respondent has no defence to the application". It is submitted that there is no basis for the denial of a 'fair and reasonable publication defence' to a defendant publisher where a Declaratory Order is sought – a fair and reasonable publication defence ought to be regarded as being as persuasive as any other in such an action. The NUJ therefore urges the amendment of section 26 (4) to remove the final clause which currently states that a section 28 application shall not be regarded as a 'defamation action' for the purposes of section 26.

Offer of Amends

The introduction of the Offer of Amends procedure at sections 22 and 23 of the Act was introduced as a defence to promote the expeditious settlement of disputes. Section 23 (1)(a) provides for the evaluation of damages or costs to be paid where the parties cannot agree on that quantum in the context of an offer of amends. Confusion has arisen on whether that quantification determination should be made by a judge sitting alone or by a jury. The recent Court of Appeal of *Higgins v The Irish Aviation Authority* [2016] IECA 322 confirmed that a plaintiff has a right to have this determination made by a jury. The effect of this determination, and the original decision of the High Court in the case, has effectively neutralised the Offer of Amends procedure where agreement cannot be reached on quantum. Defendant publishers are unwilling to engage in this procedure, and make it their sole ground of defence (as they must do under section 23 (5) if they are pleading the Offer of Amends defence), in circumstances where the quantification of compensation, if it cannot be agreed, must be submitted to a hearing before a jury.

It is submitted that it would be more appropriate and effective to amend the 2009 Act to the effect that any court determinations in the context of an Offer of Amends should be made by a judge sitting alone. Indeed, the Court of Appeal itself acknowledged that the intention of the legislature in passing the 2009 Act was to ensure that there is a quick and cost effective method of settling disputes by way of

Offer of Amends procedure but that the relevant provision (s.23) fails to specify that such hearings should be before a judge sitting alone. It is submitted that this be rectified.

Honest Opinion

The statutory definition of 'honest opinion' is confusing and in some respects unhelpful. It is queried, for example, how a defendant is supposed to "believe in the truth of an opinion" at the time of publication (see section 20 (2)(a) of the 2009 Act). An opinion is just that and is not susceptible to factual assertion as 'true' or 'untrue'. This wording of this section should be re-visited to establish more clearly the parameters of genuine 'opinion'.

Furthermore, section 20 effectively reversed the common law position that prevailed prior to the introduction of the 2009 Act in the context of the former 'fair comment' defence, whereby the good faith of the publisher in publishing a statement was presumed and it was a matter for a plaintiff to bring evidence to prove malice on the part of a publisher in attempting to defeat the defence. Section 20 (1) requires a defendant publisher to "*prove that, in the case of a statement consisting of an opinion, the opinion was honestly held*".

It is submitted there was no basis on which to assume bad faith on the part of a defendant publisher or shift the burden of proof of good faith onto a defendant publisher by section 20 (1); good faith on the part of a responsible publisher should be assumed and if absent, can readily, it is submitted, be established by a plaintiff. Section 20 (1) should be redrafted so as to re-establish the pre-2009 position whereby good faith on the part of a publisher is presumed and it is a matter for the plaintiff, not the defendant publisher, to prove otherwise.

Blasphemy

The current statutory prohibition at sections 36 and 37 of the Act introduced at committee stage of the legislative process should be repealed. The indictable offence, carrying a maximum fine of €25,000 has not been invoked to date but the NUJ is aware anecdotally that the presence of a 'blasphemy' offence on the Irish statute books is having a chilling effect on freedom of expression in some instances.

It is an unfavourable reflection on our democracy that the presence of these provisions on our statute books has been cited by the Index of Censorship as having a negative international effect, with the Organisation of Islamic Co-operation citing Ireland's law as best practice and proposing the adoption of its precise wording to limit human rights on freedom of conscience in its 57 member states. Such provisions have no place in a liberal democracy.

The NUJ has consistently called for a Constitutional referendum to be introduced to amend Article 40.6.1° of Bunreacht na hÉireann to remove the reference to blasphemy being an offence which shall be punishable by law. The NUJ calls once again on the Government to prioritise the referendum to so do, which is part of the current Programme for Government.

Honest Court Reporting

The work of court reporters forms a core pillar of the constitutional requirement of the public administration of justice. It has been judicially stated that in a modern democracy, where most people learn about the courts from the press, that “the press are the eyes and ears of the public”³ in the open administration of justice.

There have been occasions on which defamation actions have been brought arising from genuine and honest mistakes made by court reporters in their reporting. In December 2015 the Attorney General referred to the role of court reporter as one of the “most challenging roles in journalism”. She called for a reform in defamation law to allow for a “simple oversight, omission or error” in such situations. The NUJ supports the introduction of such a provision.

The NUJ submits that the current statutory qualified privilege attaching to fair and accurate court reports should be extended to include court reports containing a factual error genuinely and honestly made in a court report where that error is corrected promptly following notification of same to the publication concerned and the correction published in a similar manner and with a similar public ‘reach’ to that of the original erroneous report.

Press Conferences

The privilege attaching by virtue of section 18 / Schedule 1, Part 2, paragraph 5 of the 2009 Act to fair and accurate reports of press conferences as defined in paragraph 5 needs to be extended to;

- Press Releases issued at or instead of such press conferences; and
- Press Conferences held in jurisdictions worldwide and not merely in the State or another EU country.

The latter consideration will be particularly relevant in the context of Brexit and the non-membership of the EU of Great Britain. Similarly, recent experience shows that

³ The Irish Times Ltd v Ireland & Ors [1998] 1 I.R. 359

matters with significant domestic relevance and public interest can occur in places well outside the jurisdiction of the Republic of Ireland, as happened in Rio de Janeiro during the 2016 Olympics.

Live Broadcast Defence

The Legal Advisory Working Group Report on Defamation 2003 (convened to advise the Government on the drafting of what became known as the Defamation Act 2009) recommended that a defence for live broadcasting be introduced. Strangely, and with no explanation, no such provision appeared in any draft of the Bill that ultimately was passed as the Defamation Act, 2009. This leaves genuine broadcasters who have taken all reasonable measures to avoid defamatory statements being made live on air, exposed to liability should a maverick contributor make such a statement on air, despite those reasonable measures being taken.

The availability of live discussion on air, whether on television or radio, gives an immediacy and vibrancy to debates that inform the public. To stifle such debate for fear of strict liability on the part of broadcasters is, it is submitted, unduly restrictive and – as has already been done in the UK – a defence of innocent publication in the context of a live broadcast should be available to broadcasters.

Such a provision should also provide that the implementation of technology that provides for a few seconds' delay on a broadcast should not be considered as rendering a broadcast other than 'live' for the purposes of such a defence.

User Generated Content

It is submitted that any moderation or modification of third party user generated content on a website or blog should not deprive the host or writer of that blog of the benefits of any defence for online publishers such as that available by virtue of Regulation 18 of the E Commerce Regulations (SI 68 of 2003) known as the 'hosting defence'.

Prohibition of restriction on speech in settlement agreements

It is essential in the interests of preserving the constitutional entitlement of freedom to express convictions and opinions to impose a statutory ban on any term of a settlement agreement where a defamation action has been brought or threatened by a claimant, that would inhibit or restrict the publication of any information or reference to the plaintiff or any particular matter relating to the plaintiff in the future beyond prohibiting the repetition of the statement that gave rise to the threat or issue of proceedings in the first place.

Press Council

As already noted the NUJ is fully committed to the maintenance of the current Press Council of Ireland/Ombudsman model.

It is submitted that in an era of ever-increasing self-publication, blogging and 'citizen journalism' that it should be open to individual journalists and self-publishers to become members of the Press Council and subscribe to the standards of the Press Council Code of Conduct. Such a measure will enhance the quality and integrity of online journalism carried out by individuals.

The NUJ's Code of Conduct has set out the main principles of British and Irish journalism since 1936. The code is part of the rules and all journalists joining the union must sign that they will strive to adhere to it.

Members of the National Union of Journalists are expected to abide by the following professional principles:

A journalist:

1. At all times upholds and defends the principle of media freedom, the right of freedom of expression and the right of the public to be informed.
2. Strives to ensure that information disseminated is honestly conveyed, accurate and fair.
3. Does her/his utmost to correct harmful inaccuracies.
4. Differentiates between fact and opinion.
5. Obtains material by honest, straightforward and open means, with the exception of investigations that are both overwhelmingly in the public interest and which involve evidence that cannot be obtained by straightforward means.
6. Does nothing to intrude into anybody's private life, grief or distress unless justified by overriding consideration of the public interest.
7. Protects the identity of sources who supply information in confidence and material gathered in the course of her/his work.
8. Resists threats or any other inducements to influence, distort or suppress information and takes no unfair personal advantage of information gained in the course of her/his duties before the information is public knowledge.
9. Produces no material likely to lead to hatred or discrimination on the grounds of a person's age, gender, race, colour, creed, legal status, disability, marital status, or sexual orientation.
10. Does not by way of statement, voice or appearance endorse by advertisement any commercial product or service save for the promotion of her/his own work or of the medium by which she/he is employed.
11. A journalist shall normally seek the consent of an appropriate adult when interviewing or photographing a child for a story about her/his welfare.
12. Avoids plagiarism.

