

SUBMISSION TO THE DEPARTMENT OF JUSTICE
ON THE REVIEW OF
THE DEFAMATION ACT 2009

FROM THE

PUBLIC RELATIONS INSTITUTE OF IRELAND



Table of Contents

Executive Summary.....	2
Background	3
Introduction	4
Online Defamation.....	5
Legal Process.....	6
Press Council.....	7
Legislative Review	8

Executive Summary

Public relations and communications professionals have unique exposure to Ireland's defamation legislation; on one-side they are conscious of it in terms of the protection it offers to their client or employer's reputation, but on the other side, they are exposed to it in terms of their own publishing on social media, in press releases or website content.

Based on that experience, the **Public Relations Institute of Ireland (PRII)**, the professional body for Irish public relations and communications professionals, makes the following proposals to the Department of Justice's Defamation Act 2009 review:

1. Section 27 of the 2009 Act (which allows for the defence of innocent publication by internet service providers and social media platforms), should be made contingent on such bodies complying with new, statutory requirements in terms of how they handle complaints concerning defamation;
2. that trials before the High Court for defamation be, in general, only tried before judges;
3. that the Press Council be given the ability to levy fines;
4. that the provisions of the 2009 Act be updated so that all publishers are eligible for membership of the Press Council, including broadcasters such as RTÉ in respect of their online content;
5. that the public relations and communications profession be represented on the Press Council; and
6. that there be a statutory review of the legislation every three years by the Minister.

Background

The **Public Relations Institute of Ireland (PRII)** is the professional body for public relations and communications practitioners in Ireland. With just under 1,000 individual members, it is dedicated to promoting the professional practice of public relations and communications in Ireland.

The PRII works to promote:

- wider recognition of the role of public relations in business and civic society;
- higher standards of professionalism;
- better qualifications for PR practitioners; and
- to be an effective forum for members to share common interests and experiences.

PRII members are public relations and communications professionals from a broad range of backgrounds and roles, working in consultancies, industry, government, semi-state, voluntary and business organisations.

The depth and scope of our members' backgrounds and working briefs reflect a considerable broadening of the role and responsibilities of professionals from the traditional media relations base, and highlight its cross-functionality with a variety of disciplines including journalism, advertising, marketing, legal, financial, healthcare and commercial functions. Members of the Institute subscribe to a number of codes of ethics and best practice including the [Code of Lisbon](#), the [Code of Athens](#) and the [PRII Code of Practice for Public Affairs and Lobbying](#). These codes promote integrity and clear understanding in the implementation of public relations programmes and activities.

Introduction

The PRII, as the representative body for communications and public relations professionals, is uniquely placed to offer a perspective on this legislation that encompasses both sides of the defamation coin. Over the past decade, the engagement of most PRII members with defamation law has changed significantly. While traditionally members will have engaged with defamation primarily from the perspective of defending the reputation of their employer or client, the rise of online publishing has changed that dynamic. Members are now increasingly likely to be exposed to defamation risk themselves through the publishing of online content.

When this review was announced, the PRII carried out a survey of our members on their views on the matter. The first question respondents were asked was:

As a communications professional, when you think of defamation legislation and how it applies to your work, is your principle concern related to:

- *how defamation legislation relates to the protection of the reputation of my client/employer;*
- *how defamation legislation relates to me as a professional who publishes material (e.g. social media, press release, website content); or*
- *both equally.*

The clear majority, 70% of respondents, answered that they were concerned about both equally. 22% answered their concern was from a reputation management perspective, while 8% were concerned primarily from a content publication viewpoint. There is no other profession that is as exposed to both the use of defamation as a tool to defend a client or employer's reputation, but also exposed to its risk.

Therefore, the PRII welcomes this review of defamation legislation. The survey highlighted that there was broad consensus among our members on several topics under consideration in this review. There was general agreement that there was need for reform regarding:

- how online defamation is treated;
- the Press Council's powers; and
- reform of the judicial process.

Those areas will form the basis of the Institute's submission. In terms of other issues involved in the review there was no such agreement.

Online Defamation

In general, respondents were split (45% to 55%) as to whether current Irish defamation legislation provides an effective remedy for those who believe their reputation has been negatively impacted. However, when specifically looking at the issue of whether the legislation effectively deals with online defamation, respondents had significant concerns. 83% of respondents do not believe that online defamation is adequately dealt with under the current legislation. Specific issues highlighted from respondents include:

- [Current defamation legislation] does not take into account the online realm where defamation potentially lingers in the social media air for mass audiences to witness.
- [Defamation in] the online world is immediate, so any remedy to it needs to be faster.
- The error usually appears higher in search engines than the correction/apology and is challenging to remove.
- Processes [from social media platforms] are slow to access and not user friendly.
- [Social media platforms] can be very difficult to deal with.
- [Social media platforms are] too slow and too hard to get through to the companies to communicate the concern, and there is a lot of red tape.

The main concern of respondents was that when a defamatory comment is made online, the processes from the social media platforms, particularly in relation to having that comment removed, were difficult to use and navigate.

Currently [Section 27 of the Defamation Act](#) provides for the defence of innocent publication. This is a defence used by internet service providers (ISPs), search engines or social media platforms where they can prove that they were not the author, editor or publisher of the defamatory content. Between this and the European Ecommerce Directive, ISPs who do not have any editorial control have a very strong defence. Social media platforms and search engines have an increasingly well-established defence if they act in an appropriate timeframe once it is brought to their attention.

This defence of innocent publication should continue to be available. If it were to be removed it would undermine Ireland's attractiveness as the European centre for such technology companies. However, the defence should be contingent on there being standard principles and timelines in relation to how such complaints are dealt with and remedied. Such standards are being developed through precedent but this should be replaced by processes set out on a statutory basis.

These statutory guidelines would include the following matters:

- how complaints are to be made;
- the timeline for resolution of complaints;
- how issues can be expedited in particular and defined circumstances;
- how an item will be removed, including any follow up or related material; and
- the requirement for there to be a named person responsible for dealing with such complaints.

This would provide certainty to ISPs, search engines and social media platforms in terms of their legal obligations and how such matters should be dealt with it. Similarly, it would provide greater clarity to those whose reputations are impacted as to how their complaints will be dealt with across the board, and not vary from one company to another.

Legal Process

In terms of the legal process and the issue of awards, respondents were asked the following question:

Currently defamation cases that are tried in the High Court are done so before a jury. Do you believe that such defamation cases should be tried before a jury, or should be just tried by judges?

There was strong support (78%) from respondents in terms of the proposition that such cases would generally be tried by judges. Questions were also asked on the related matter of having a cap in terms of defamation awards. The level of support for a cap was not as strong, but it did enjoy the support of 65% of respondents. However, when asked what type of cap should be in place, there was no strong agreement and neither was there strong support for emulating the generally accepted UK cap of £275,000 that the newspaper industry has been calling for here.

However, one respondent suggested as guiding principle in terms of awards that could be employed:

“Where there is evidence the impacted person has suffered a financial loss as a direct result then that loss should be covered. However, where no financial loss has occurred then the amount should be enough to have an impact on the offender, and make them consider such an action more carefully in the future.”

We are also conscious that loss of reputation is a matter of concern and welcome further discussion on how impacts on reputation can also be remedied.

Press Council

The Press Council was an innovation of the 2009 Defamation Act, and one that in general, members believe is an effective forum. However, very few members report having used it in terms of defending their client or employer's reputation and many report that while it is effective within its remit, it is often not the most appropriate body to pursue an issue. This is borne out by the relatively small number of complaints that are processed by the Press Council each year, and the high proportion of those complaints that are out of scope. According to the Press Council, 278 complaints were processed in 2015. Of those, 48% were outside the remit of the Press Council/Press Ombudsman and only 34 (12%) of cases resulted in a determination by the Press Ombudsman.

The PRII propose that there should be specific consideration of the Press Council's remit within this review. This remit may need to be expanded to make it a more viable alternative to court proceedings. One factor which may make it a more viable alternative would be to give it the ability to levy fines on publishers. This is supported by 85% of the respondents, and would provide a more effective sanction against publishers than the current regime. Therefore, it is suggested that the Press Council and the Press Ombudsman have the ability to levy fines of up to €25,000 with the option that such a fine would go to the complainant or to an agreed third party.

Two other issues need consideration in relation to the Press Council. Firstly, the references to it in the Act need to be updated to take account of the fact that a significant proportion of publishing is now conducted in an exclusively online fashion and the delineation between newspapers, magazines, broadcasters, etc. is no longer as clear cut as it was, even as recently as 2009. While the Press Council does include within its membership some online-only publications, and includes the online content of 'traditional' newspapers and magazines, even its name reflects an era of publishing which has radically changed. The legislation, and the organisation's name, should be clear that membership of the Press Council is open to all publishers of regular content in Ireland, irrespective of the format, who sign up to its Code of Standards.

Within that same context there are publishers, most notably RTÉ, that lie outside the Press Council's remit despite being producers of large volumes of content and holding a dominant space within the marketplace. As was stated in the 2015 Annual Report of the Press Council, by its then Chairman Dáithí Ó Ceallaigh:

"Their broadcasting operations are regulated by the Broadcasting Authority of Ireland, their publishing operations are not regulated by anyone. This means that if a member of the public wishes to complain about something published online by a broadcaster there is no independent complaints handling process available."

These organisations should be able to join the Press Council and be encouraged to do so.

The PRII also proposes that the membership of the Press Council be amended. As highlighted previously, public relations and communications professionals have a unique perspective to bring to the issue of defamation law. No other sector is exposed to both sides of the defamation coin to the same extent. Therefore, the PRII proposes that one member of the Press Council be a person who represents the interest of communications and public relations professionals.

Legislative Review

The PRII has been actively engaged in relation to the Regulation of Lobbying Act, which is currently undergoing its first statutory review. Under the Act there is to be a review of the legislation every three years by the Minister, who is required to consult with the relevant stakeholders and lay a report before the Oireachtas. This will help ensure that the Minister and Oireachtas is aware of any deficiencies in the legislation at regular intervals. Based on the experience of the Regulation of Lobbying Act to date, such a clause would be a useful addition to this legislation as well.