

**Independent News and Media
(Editorial)**

**Submission to the review of the
Defamation Act 2009 – publication
consultation**

31st December 2016

Table of Contents

1.0 Context of the Review.....	P. 3
2.0 The under-protection of the right to free speech.....	P. 6
3.0 Independent News and Media.....	P. 9
4.0 NewsBrands.....	P. 12
5.0 Juries.....	P. 12
6.0 Damages.....	P. 15
7.0 User generated comment.....	P. 17
8.0 Serious harm.....	P. 19
9.0 Operational realities.....	P. 20
10.0 Legal costs.....	P. 21
11.0 Errors.....	P. 22
12.0 Press Ombudsman.....	P. 22
13.0 Ireland's reputation.....	P. 23
14.0 Conclusion.....	P. 24

Independent News and Media (Editorial)

Submission for Review of the Defamation Act 2009

– public consultation

1.0 Context of the Review

1.1 On 1st November 2016, the Tánaiste and Minister for Justice and Equality, Frances Fitzgerald T.D., announced the commencement of a public consultation process, as part of the statutory review of the Defamation Act 2009. Organisations or individuals wishing to contribute to the review were invited to send a submission by 31 December 2016.

1.2 Under section 5 of the Defamation Act 2009, the Minister for Justice and Equality is required to review the operation of the Act within five years of its passing. The review would normally have commenced in July 2014, but was deferred by the Government who cited other “urgent legislative priorities”.¹

1.3 Independent News and Media welcomes this long overdue review, which must underpin the values of transparency, freedom of expression and public interest journalism, all of which are integral to a healthy democratic society. Independent News and Media notes that this review is taking place at a time when there are continuing serious concerns about the size and the scale of libel awards in Ireland. Put simply, this is

¹ Department of Justice and Equality Press Statement, ‘Tánaiste announces statutory review of Defamation Act 2009 and public consultation process,’ (1 November 2016).

having a chilling effect on the media's role as a watchdog for the public. Excessive awards could lead to the closure of newspapers, a consequent loss of jobs and, at the same time, negatively impact on Ireland's democratic system and our international reputation. It is worth noting that the European Court of Human Rights has accepted in recent years that excessive awards undermine the right to free speech and a free press.²

1.4 NewsBrands Ireland, formerly National Newspapers of Ireland, which represents sixteen national newspapers and websites, has also warned that the level of awards in defamation cases presents a huge challenge to freedom of expression in Ireland. In a statement welcoming this current review of the Defamation Act 2009, NewsBrands Ireland said: "The costs involved and the level of awards made place an enormous burden on publishers. Since 2010, defamation actions have cost NewsBrands members in excess of €30 million. Awards made in Ireland are wholly out of kilter with other jurisdictions, including the UK, where effectively a cap of £275,000 (€305,000) exists, though the reality is that awards rarely exceed £100,000 (€110,700), a fraction of the levels awarded in Ireland."³

1.5 Ireland's defamation regime is arguably the most stringent in Europe and this is a stain on our international reputation and damaging our human rights credentials. An oppressive defamation regime that seeks

² Irish Times, 'World Press Freedom Day: Time to review defamation legislation,' (3 May 2016).

³ Irish Independent, 'Libel laws face review as "awards in Ireland are wholly out of kilter,"' (2 November 2016).

to continue to impose unsustainable damages on media organisations is undermining journalists in their essential democratic duty to hold to account those in positions of power and influence.

1.6 The Parliamentary Assembly of the Council of Europe adopted a resolution which “condemns abusive recourse to unreasonably large awards for damages and interest in defamation cases and points out that a compensation award of a disproportionate amount may also contravene Article 10 of the European Convention on Human Rights”.⁴

1.7 The Council of Europe has also called on member states to “set reasonable and proportionate maxima for awards for damages and interest in defamation cases so that the viability of a defendant media organ is not placed at risk”⁵ and to “provide appropriate legal guarantees against awards for damages and interest that are disproportionate to the actual injury.”⁶ The Defamation regime that exists in Ireland does so in stark contrast to the Council of Europe’s resolution.

1.8 Independent News and Media believes that the current review of the Defamation Act must lead to the provision of adequate and effective safeguards against disproportionate awards in defamation actions. Although the Defamation Act 2009 allows judges to give more directions

⁴ Parliamentary Assembly of the Council of Europe, Resolution 1577, Text adopted by the Assembly on 4 October 2007 (34th Sitting).

⁵ Parliamentary Assembly of the Council of Europe, Resolution 1577, Text adopted by the Assembly on 4 October 2007 (34th Sitting).

⁶ Parliamentary Assembly of the Council of Europe, Resolution 1577, Text adopted by the Assembly on 4 October 2007 (34th Sitting).

to juries on the assessment of damages, this has brought about only limited changes and libel awards remain much higher in Ireland than elsewhere in Europe.

1.9 NewsBrands Ireland has pointed out that the decision of the Supreme Court in December 2014 “to award €1.25million in a case which it accepted was not the most serious of defamation actions puts Ireland wholly out of kilter with its neighbouring jurisdictions. The award is approximately ten times higher than would have been made in the UK”.⁷ NewsBrands also suggests that the substantial level of awards in defamation cases is impacting on democratic discourse in Ireland and “given the costs involved, many newspapers simply won’t take the risk of publishing an article, no matter how certain they are of their facts”.⁸

2.0 The under-protection of the right to free speech

2.1 Freedom House, an independent international watchdog dedicated to the protection and expansion of democracy around the world, notes in its 2016 assessment of Ireland’s “Freedom of the Press status” that “archaic defamation laws continue to place the burden of proof on defendants.”⁹ In explaining the context for this review, the Tánaiste stated that “defamation law needs to strike the right balance between two important rights - the right to freedom of expression in a democratic society, and the right to protect your good name and reputation against

⁷ NewsBrands Ireland, ‘Defamation,’ Available at <http://newsbrandsireland.ie/policy-issues/defamation/>

⁸ NewsBrands Ireland, ‘Defamation,’ Available at <http://newsbrandsireland.ie/policy-issues/defamation/>

⁹ Freedom House, Ireland: Freedom of the Press, Available at <https://freedomhouse.org/report/freedom-press/2016/ireland>

unfounded attack.”¹⁰ In May 2014, the late Supreme Court Judge, Adrian Hardiman, suggested that there was an “inherent tension” in Irish defamation law because of “the competing constitutional values of the citizen’s right to his good name (Article 40.3.2) and the right ‘of the citizens’ to express freely their convictions and opinion (Article 40.6.1).”¹¹

2.2 Professor Neville Cox, a barrister and the Dean of Graduate Studies in Trinity College Dublin, and Eoin McCullough, a leading Senior Counsel, in their detailed analysis of Irish defamation law, suggest that, vis-à-vis other major constitutional democracies, “the protection of free speech under the Irish constitution is a comparatively weak one” and they point out that there have been “many concerns expressed that, certainly before enactment of the 2009 Act (and quite possibly after it), [that] the law was nonetheless, over-protective of the plaintiff’s right to a good name and under-protective of the defendant’s right to free speech”.¹²

2.3 The under-protection of the right to free speech is a matter that this review process must finally resolve. Even prior to the enactment of the 2009 Act, “calls were made in the last three decades for some kind of reform of defamation law that would improve the position of defendants

¹⁰ Department of Justice and Equality Press Statement, ‘Tánaiste announces statutory review of Defamation Act 2009 and public consultation process,’ (1 November 2016).

¹¹ Neville Cox & Eoin McCullough, *Defamation: Law and Practice*, (Clarus Press, Dublin, 2014), p. vii

¹² Neville Cox & Eoin McCullough, *Defamation: Law and Practice*, (Clarus Press, Dublin, 2014), pp. 3-4

and especially media defendants”.¹³ Notable among these calls were the Law Reform Commission’s Report on the Civil Law of Defamation (1991) and the report of the Minister for Justice’s Legal Advisory Group on the Tort of Defamation (2003).

2.4 Cox and McCullough point out that “it was in the context of these imperatives that the Defamation Act of 2009 was enacted. It was originally presented as a sweeping legislative reform of the tort to reflect an ideological perspective that was more supportive of the right to free speech”.¹⁴ Indeed, when the Defamation Bill of 2006 was first published, there was a perception that the shift in favour of media freedom was such that it was “deemed necessary to create a Press Council for the purposes of ensuring an internalised level of media control”.¹⁵ A Press Council was established in 2007 and Independent News and Media works in strong co-operation with this statutory body, however, by 2009, when defamation legislation was finally enacted, replacing the Defamation Act 1961, “a good deal of the reforming impetus that had heralded the Bill’s original publication had been lost”.¹⁶

2.5 According to Cox and McCullough, the 2009 Act, ultimately did not “reshape” defamation law in any way and “rather it was an attempt to codify the law as it had developed through judicial interpretation over the

¹³ Neville Cox & Eoin McCullough, *Defamation: Law and Practice*, (Clarus Press, Dublin, 2014), p. 5.

¹⁴ Neville Cox & Eoin McCullough, *Defamation: Law and Practice*, (Clarus Press, Dublin, 2014), p. 9.

¹⁵ Neville Cox & Eoin McCullough, *Defamation: Law and Practice*, (Clarus Press, Dublin, 2014), p. 9.

¹⁶ Neville Cox & Eoin McCullough, *Defamation: Law and Practice*, (Clarus Press, Dublin, 2014), p. 10.

previous 50 years”.¹⁷ The same experts also state that the Defamation Act 2009 “has arguably not altered the balance that Irish defamation law draws between free speech and the right to a good name in any meaningful way”.¹⁸ Until the unfair, anti-democratic and damaging under-protection of free speech is meaningfully addressed, Irish defamation law will continue to be unfit for purpose and will consider to generate considerable controversy.

2.6 In welcoming this review process, the Press Council of Ireland said that “central to any proposed changes in the Defamation Act must be the protection of the right of freedom of expression.”¹⁹ Independent News and Media fully concurs with that view.

3.0 Independent News and Media

3.1 Independent News and Media is the largest national newspaper publisher in the Republic of Ireland. It publishes four national print titles – the Irish Independent, Sunday Independent, Herald and Sunday World – and three news websites – independent.ie, sundayworld.com and herald.ie. Independent News and Media publishes 13 regional titles and associated websites which are contributing to a separate submission under the auspices of the umbrella group, Local Ireland.

¹⁷ Neville Cox & Eoin McCullough, *Defamation: Law and Practice*, (Clarus Press, Dublin, 2014), p. ix.

¹⁸ Neville Cox & Eoin McCullough, *Defamation: Law and Practice*, (Clarus Press, Dublin, 2014), p. 5.

¹⁹ Press Council of Ireland Statement, ‘Review of the Defamation Act 2009 – Public consultation,’ (1 November 2016).

3.2 The four national print titles present a diverse range of news and opinion and inform the public debate in Ireland. They are indigenous titles that form part of the cultural fabric of our society. Independent News and Media employs approximately 1,000 people.

3.3 Independent News and Media is a public limited company but at its core is the pursuit of independent, public interest journalism. Our submission does not seek to excuse any instances of poor journalism or the publication of articles found to be dishonest, inaccurate or cause unnecessary distress or damage to the reputation of an individual or an organisation. We are however determined not to be deflected from our mission of keeping our readers and audiences informed and to provide fearless commentary in the public interest. The introduction to our Editorial Code of Practice states the following: “Independent News and Media (INM) is pledged to be professional, courageous and relentless in its pursuit of truth and of news. It is also committed to independence, fairness and balance in informing people of events and issues about which they have a right to know.”

3.4 Journalism holds the rich and powerful to account and is fundamental to the proper, transparent functioning of democracy. Defamation laws that stymie fearless investigative journalism and promote self-censorship are not serving the public interest. As 2016, the year in which Ireland commemorated the centenary of the Easter Rising, draws to a close, it is worth reflecting on words on the nature of freedom by Leonard Hoffman, the British Lord Justice of Appeal, as cited by Mr Justice Nial Fennelly in an Irish Supreme Court judgment. Hoffman

said: “A freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published.”²⁰

3.5 Working within the confines of Ireland’s draconian defamation regime is a maze-like occupational hazard for our journalists and unduly curtails freedom of expression. Our defamation laws are out of step with our neighbouring common law jurisdictions in England and Wales and Scotland and with the rest of the European Union. In France and Belgium, for example, damages are frequently awarded in symbolic values only (i.e, €1). In the Netherlands, the average is between €1,000 and €5,000; €25,000 would be seen as an extremely high amount. In Sweden, the highest awards will usually be the equivalent of €10,000 to €15,000. In Germany, libel in cases involving the media are usually resolved at an injunction phase, making a damage award the exception rather than the rule.²¹ In Ireland, grossly excessive defamation awards are a disproportionate financial burden at a time when the very viability of funding for public interest journalism is under considerable threat.

3.6 Independent News and Media acknowledges that defamatory statements without justification, of course, require redress. This has to be done in a proportionate manner and in a way that does not fundamentally threaten the right to freedom of speech, the role of the Press as a watchdog and the very viability of media organisations.

²⁰ Neville Cox & Eoin McCullough, *Defamation: Law and Practice*, (Clarus Press, Dublin, 2014), p. 6.

²¹ Information provided by the International Press Institute.

4.0 NewsBrands

4.1 Independent News and Media strongly supports the central tenets of the NewsBrands Ireland submission to which we have contributed. The key points were:

- the abolition of juries for defamation trials;
- a limitation on damages;
- clarity on liability for user generated comment;
and,
- the introduction of a ‘serious harm’ threshold.

4.2 In support of these proposed changes to the Defamation Act, we add the following observations in sections 5, 6, 7 and 8 of this submission.

5.0 Juries

5.1 The continuing use of juries to decide defamation trials means that the process is seen by publishers as somewhat akin to a game of ‘Russian roulette’. It is also out of line with other civil law cases where juries are not used. The mere fact that a jury can decide a defamation case and the unpredictability of this mean that publishers are on the back foot when they receive legal complaints. This is a fundamental problem for the justice system and this has a chill effect on the freedom of speech which is enshrined in the Constitution of Ireland (Bunreacht na hÉireann) and European Convention on Human Rights.

5.2 The unpredictability of decisions on liability and damages and the length of the process make legal costs unnecessarily punitive and prohibitive. A view is often taken to settle seemingly unworthy claims at an early stage to avoid staggering costs mounting. This has a cumulative effect of encouraging complainants to seek legal advice in the first instance rather than seek alternative remedies.

5.3 The unpredictability and the unsustainability of jury awards in defamation cases is explored by Cox and McCullough, who state: “The fact that it is juries who determine quantum may also explain the size of awards in some defamation cases. It is notable, after all, that one of the reasons why the Courts Acts 1998 removed the jury from most tort actions was precisely because of the unsustainably high level of damages awarded by juries in such actions. As Price, Duodu and Cain pithily comment, ‘Twelve ordinary people who for once in their lives have the opportunity to be bountiful on someone else’s behalf tend to err on the side of generosity.’ The Courts Act, however, excluded (inter alia) defamation cases from the general rule that tort actions would be heard without a jury and thus the question of how much should be awarded in damages is one for the jury. The essential reason for leaving the question of quantum of damages in defamation cases to the jury is that it is seen as appropriate in such cases that the question of quantum (like the question of whether or not there has, in fact, been a defamation) should reflect community values.”²²

²² Neville Cox & Eoin McCullough, *Defamation: Law and Practice*, (Clarus Press, Dublin, 2014), p. 391.

5.4 Juries mean that defamation cases take longer to conclude, especially as often complex legal arguments have to be explained in detail, which would not always arise in cases heard by a judge alone. The argument that the jury reflects community values does not take into account the fact that a plaintiff who is genuinely concerned with vindicating his or her good name would be no less vindicated by a verdict from a judge than by a verdict from a jury. There are real concerns about the lack of transparency in a jury, often with very little legal experience, making a substantial award and not having to detail their decision-making process. This would be alleviated if the award was made by a judge and accompanied with a statement explaining the judicial logic for the decision.

5.5 Cox and McCullough state that the role of the jury in assessing damages “renders such awards unpredictable and, in particular, means that awards in one case are not a reliable guide to the probable award in the next.”²³

5.6 Independent News and Media firmly believes that defamation trials by jury should be abolished in favour of a hearing before a judge.

²³ Neville Cox & Eoin McCullough, *Defamation: Law and Practice*, (Clarus Press, Dublin, 2014), pp. 390-1.

6.0 Damages

6.1 Independent News and Media's submission to the European Court of Human Rights in the Leech –v– Independent Newspapers case summarises our position. The disproportionate nature of damages is having a chill effect on freedom of speech. It does the justice system no credit that there is no effective scale for damage to a person's reputation, in comparison to personal injuries.

6.2 Awards are also unpredictable – which damages trust in the system. Our submission to the ECHR states: “The inherent and total unpredictability of damages awards in itself amounts to a contravention by Ireland of Article 10 of the Convention (Freedom of Speech)... Publishers in Ireland thus find themselves in the position that they do not know and cannot know (even within the range/parameters of ‘tens of thousands’ to ‘hundreds of thousands’ of euro) what sum they may be held liable to pay. Irish law with regard to damages in defamation thus is entirely lacking in accessibility, foreseeability or clarity.”

6.3 The growing perception that Ireland is a “plaintiff-friendly jurisdiction,” undoubtedly assisted by large awards of damages, is seen as a key factor in Ireland overtaking England for the dubious distinction of being Europe's libel capital. The UK already has moved to counter the practice of libel tourism, where plaintiffs have little connection with the country, through its Defamation Act 2013.

6.4 In 2014, Hollywood stars Justin Timberlake and Jessica Biel lodged defamation proceedings in the High Court in Dublin, after claims they were defamed in an article in the European edition of Heat magazine, which is published by a German-based company.²⁴ According to McCarthy, this was a “high-profile example that may mark the emergence of a trend of foreign defamation plaintiffs choosing to litigate in Ireland” and he pointed out that “even though Ireland is not the magazine’s biggest European market and not the location of its editorial offices, the litigants chose Ireland as the forum for their defamation action. Although the matter was subsequently settled out of court with an apology, it may be a harbinger of things to come. Following the UK reforms, it seems Dublin may replace London as the destination of choice for defamation plaintiffs.”²⁵

6.5 The Joint Declaration on International Mechanisms for Promoting Freedom of Expression signed by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media; and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression states: “Civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual

²⁴ Irish Independent, ‘Jessica Biel and Justin Timberlake launch Dublin High Court proceedings,’ (10 October 2014).

²⁵ Hugh McCarthy, ‘Libel tourism may become our newest cottage industry,’ published in Irish Times (10 November 2014).

harm caused and the law should prioritise the use of a range of non-pecuniary remedies.”²⁶

6.6 Ireland’s draconian defamation regime is seriously out of step with the principles set out in the above joint declaration. This is a matter that this review process needs to address. The review process should also look at putting a maximum cap on the scale of damage awards and, in particular, examine the defamation regimes in Austria and Malta, which currently provide statutory caps on non-pecuniary damages in defamation cases involving the media.²⁷

7.0 User generated comment

7.1 NewsBrands’ submission is well argued. Facebook and other social media/online ‘hosting’ sites are effectively given carte blanche while traditional/legacy news publishers are punished for what people say in comments posted on their sites. This again is not helping to support indigenous, public interest journalism. The playing field is already vastly uneven and this is just exacerbating the situation.

²⁶ Joint Declaration about Censorship by Killing and Defamation (2000), available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=142&IID=1>.

²⁷ In Austria, damages are capped at €20,000 in most circumstances, and at €50,000 for particularly harmful instances of defamation. In Malta, non-pecuniary damages are capped at €11,646.87. See International Press Institute, ‘Out of Balance: Defamation law in the EU in the context of press freedom,’ Available at <http://ipi.freemedia.at/ecpm/key-findings/damages-and-costs.html>

7.2 INM believes that specific protection should be afforded to news websites for third party comments. The relevant provisions of the UK Defamation Act 2013 should be considered by this review process.

7.3 The problem of Fake News on social media sites has got a lot of attention, since the recent Presidential Election in the United States. Fake News is often sensationalist, defamatory and full of misinformation. It conflicts with the commitment of reputable media organisations to serve the public interest, to report truthfully and to meet the highest standards of journalism. Fake News sites are increasingly impinging on the commercial viability of reputable media organisations by forcing downwards their readership figures and online audience numbers.

7.4 The phenomenon of Fake News must be contrasted to the checks and balances used by Irish media organisations, which employ fact checks, verification and other tests to news stories before publishing. Fake News is a phenomenon aimed at driving audience numbers using emotional algorithms and often employed to undermine the democratic process. In many cases it is generated outside the jurisdiction where it is published.

7.5 It is important that this review process addresses the issue of Fake News and is informed by the ongoing debate in other European Union countries. In a very recent case with potential consequences for social media networks, an Austrian court ordered Facebook's Irish subsidiary

to remove fake and hate posts immediately.²⁸ In Germany, there are reports that ministers are preparing to introduce a bill in 2017 that will order Facebook to compensate people who've been affected by fake or defamatory stories passed around on the site. According to Thomas Oppermann, the Chairman of Germany's Social Democrats, a coalition partner of Chancellor Merkel, the Government is considering a bill which will ensure "if Facebook does not immediately delete the affected report within 24 hours, Facebook will have to pay up to €500,000."²⁹ The proposed new law would also require Facebook and other social networks to set up a "legal protection unit" in Germany for people affected by the stories, according to Oppermann. These local offices would allow companies like Facebook to respond faster to complaints against defamation and fake news.³⁰ Meanwhile, Germany's head of domestic intelligence, Hans-Georg Maassen, has said that "Facebook is earning an awful lot of money with fake news," and "a company that earns billions from the internet also has a social responsibility."³¹

8.0 Serious harm

8.1 This is a common-sense argument. For a case to be deserving of damages and the courts, a 'serious harm' test should be applied as was introduced in the Defamation Act 2013 which now operates in England and Wales. Otherwise, Ireland has the Press Ombudsman's Office,

²⁸ Irish Times, 'Austrian Greens score court victory over fake Facebook news,' (12 December 2016).

²⁹ The [London] Independent, 'Germany may fine Facebook up to 500,000 Euros for every fake news article it publishes,' (20 December 2016).

³⁰ Forbes.com, 'Germany Wants Facebook To Pay For Fake News,' (19 December 2016).

³¹ Forbes.com, 'Germany Wants Facebook To Pay For Fake News,' (19 December 2016).

established by statute, to adjudicate on complaints and seek redress. All Independent News and Media publications operate within the Code of Practice for journalists in Ireland. Adverse decisions of the Press Ombudsman are published prominently where they were published.

8.2 The 2013 UK Defamation Act sets a threshold test whereby a plaintiff must demonstrate ‘serious harm’ to their reputation in order to succeed. McCarthy has pointed out that “this change means that plaintiffs now face a more onerous evidential burden. For companies this requires evidence of serious financial loss, which is difficult to prove in practice. The equivalent provision in the Irish Defamation Act 2009 does not require serious harm and defines a defamatory statement as one that ‘tends to injure a person’s reputation in the eyes of reasonable members of society.’ Significantly, the Irish Act further states that ‘defamation is actionable without proof of special damage,’ meaning financial damage need not be proven. Based on these differences, the defamation plaintiff will face a lower hurdle in Ireland than in the UK.”³²

8.3 This review process must actively consider the ‘serious harm’ provisions in the UK legislation, with a view to similar provisions being brought forward into Irish law.

³² Hugh McCarthy, ‘Libel tourism may become our newest cottage industry,’ published in Irish Times (10 November 2014).

9.0 Operational realities

9.1 Revenues and budgets in the newspaper industry in most countries have fallen steeply in the last decade. This makes it a tougher task to produce quality journalism. However, the reality is that the ongoing financial burden of fighting defamation claims also has a major impact on this. Money that is spent fighting and settling cases is money that should be spent on quality journalism.

9.2 At the same time, the ever-present threat of expensive litigation is always at the back of one's mind when working in newspapers. It inevitably leads to caution – perhaps too much caution. Cox and McCullough have reflected on the fact that media caution, arising from fear of massive damages, is doing a disservice to the wider community: “The quantum of damages awarded to successful plaintiffs can often be very high and extremely unpredictable – much higher (in terms of general compensatory damages) than that which would be awarded, for example, in a case of the most serious personal injuries.... One can postulate that the prospect of becoming liable to pay large sums in damages for publishing a statement known to be true, but which cannot be proven to be true, even if the story is one of public importance, is one which may discourage any publisher from doing so.... moreover, where the story in question is one with a ‘public interest’ element to it, the fact that it is *not* published in such circumstances will mean that society as a whole may be impoverished.”³³

³³ Neville Cox & Eoin McCullough, *Defamation: Law and Practice*, (Clarus Press, Dublin, 2014), p. 5.

10.0 Legal costs

10.1 The costs of litigation are prohibitive and growing. If a case runs it is not uncommon for costs to be in the region of €200,000 or more. This is a cloud that hangs over all interactions with complainants. Lawyers often operate on a no win, no fee basis and the financial burden falls unduly on the publisher.

10.2 Protecting freedom of speech and people's reputations should not be reduced to a grubby bidding war. It seems that often complainants' first recourse is to send a legal letter. While they are, of course, entitled to do this, it seems that the propensity for doing so at such an early stage is fuelled by the image of defamation as 'easy money'.

11.0 Errors

11.1 Genuine errors should be recognised in some way. Tánaiste and Minister for Justice and Equality Frances Fitzgerald has cited the example of court reporters. They provide an essential public service which allows justice not only to be done but to be seen to be done. However, one slip of the pen can be very costly. A recent expensive settlement by Independent News and Media followed a case where a name was wrongly transcribed in the middle of the story. This should have been simple to rectify with a correction.

12.0 Press Ombudsman

12.1 The Press Ombudsman's office is vastly under-used by the Irish public. In our opinion, this is due to the fact that many complainants see going legal as a way to get 'easy money'. The Ombudsman offers an effective remedy to reputational damage. The legislative framework for this body and the adherence of newspaper publishers should be a source of pride to this country. If one looks to the UK, for example, the disrupted, confused and disputed nature of press regulation stands in stark contrast.

12.2 By signing up to the Code of Practice and adhering to its principles, Independent News and Media shows it is a responsible publisher.

12.3 However, Independent News and Media would deal with perhaps a dozen or so complaints via the Ombudsman each year and most of these would be from lobby groups/politicians. Any reform of the Defamation Act should encourage complainants to seek redress through the Office of the Press Ombudsman – perhaps with this being a consideration when it comes to the amount of damages being considered. Certainly, the fact that a publisher signs up to the Press Ombudsman and adheres to its rules should mitigate to some degree the idea that it has published a story irresponsibly.

13.0 Ireland's reputation

13.1 Ireland has a reputation abroad of being a place where defamation pay-outs and associated legal costs have lost the run of themselves. As mentioned elsewhere in this submission, there is also a potential danger that the Republic of Ireland could become the destination of choice for libel tourism. This is damaging to the country's reputation abroad and could ultimately discourage businesses from operating here.

13.2 McCarthy observes that "the opportunity for foreign defamation litigants to forum shop in the UK has been greatly restricted following the substantial reforms implemented through the UK Defamation Act 2013. The UK Act has significantly recalibrated the law such that it is now much more difficult for a plaintiff to succeed. These developments may hold far-reaching implications for Ireland. Relative to the UK, Ireland now appears to be the more plaintiff-friendly jurisdiction, and consequently it is likely that Irish courts will see an increased volume of such litigation."³⁴

14.0 Conclusion

14.1 The Press is the eyes and the ears of the public and holds the powerful to account. It is increasingly recognised that newspapers and their constituent websites provide an invaluable service for a functioning democracy. Our outdated defamation regime ties the hands of the Press behind its back. This does not serve democracy well. This is especially the case at a time when our very funding models are

³⁴ Hugh McCarthy, 'Libel tourism may become our newest cottage industry,' published in Irish Times (10 November 2014).

challenged. Ironically, while revenues have seen continual decline in recent years in most cases, defamation costs have risen exponentially.

14.2 Independent News and Media treats all complaints seriously and engages with the Press Ombudsman's Office on complaints received by the office. We expect to operate within the confines of a reasonable defamation regime. The health of a country's democracy can be seen in the health of its Press. The Joint Committee on Communications, Climate Action and the Environment will be considering the potential for public funding for public interest journalism this year.

14.3 One fundamental way to protect the vibrancy of the Press without employing public funds is to bring our defamation laws into line with the rest of the European Union. This is a golden opportunity for the government to show Ireland as a shining light for freedom of speech and reinforce the position of the independent Press Council of Ireland.

14.4 A proper reform of the State's defamation legislation to bring it into line with other countries is long overdue and very necessary. The Defamation Act 2009 is hugely deficient in a number of important aspects. This review process is therefore welcome.

14.4 Ireland's defamation regime needs to be overhauled to uphold the freedom of the press. This is important not just so the media industry can thrive and serve the public interest, but also as it is fundamental to

ensuring that we have a vibrant and democratic republic. In the inspiring words of the President of Ireland on May 3rd, 2016:

“This year, 100 years since the momentous event of the 1916 Easter Rising, we are reminded of the importance of a free and democratic society and of the central role that journalism must play in the quest for a full and accountable democratic republic. Press freedom and the right to information have a direct relevance to achieving the vision of a true Republic. They are central elements, too, in creating the kind of sustainable and equal societies we all aspire to for our future.... Today, let us strengthen our resolve to defend the rights of a free press and let us celebrate the possibilities of quality journalism as we build an inclusive society to the benefit of all.”³⁵

³⁵ Office of the President of Ireland, ‘Statement by President Michael D. Higgins, to mark World Press Freedom Day,’ (3 May 2016).