The Irish Times

Submission to the review of the

Defamation Act 2009

Executive summary

The Irish Times welcomes the broadness of the remit of the review into the Defamation Act (2009). In our submission we consider:

1. The provisions of the Act;

2. The failure of the Act to contribute to addressing a malign and unreformed defamation regime;

3. The need to update the legislation to reflect the digital transformation which is taking place in the news publishing industry.

Summary of Recommendations

- The introduction of a "serious harm" threshold for the bringing of a defamation action.

- The abolition of juries in defamation cases or, at a minimum, in the determination of quantum.

- The setting of a ceiling on awards in defamation cases so that no award of general damages in a defamation action can exceed the highest permissible award in a personal injuries action.

- The removal of ambiguity and inequality of treatment on defamation liability for user generated comment. Either by removing all liability on hosting sites, whether newspaper sites or social media sites, for matter posted on them by third parties. Or by limiting equally the liability for both, when sites can demonstrate that they have prompt and transparent takedown procedures for dealing with potentially defamatory material.

- The introduction of protections for honest court reporting.

- Removal of the ambiguities in the Act about whether the Press Council may recruit online news sites to encourage involvement by them in voluntary self-regulation.

- Strengthening of Sect 26 requirement that courts "shall … take into account" Press Council membership in determining "fair and reasonable" publication. And the introduction of a mitigation of damages provision that requires the court to give weight to the membership of the Press Council and adherence to its code to a defendant facing damages.

- Introduction of a "Brexit" provision confirming the continuation of reporting rights/privilege for UK and Northern Ireland institutions after the UK has left the EU.

- Removal of offence of "publication or utterance of blasphemous matter" and related provisions. (Sect 36 -37).

A case for reform

The Irish Times welcomes the broadness of the remit of the review into the Defamation Act (2009). In our submission we will consider not only the provisions of the Act, supporting wholeheartedly the detailed case made by Newsbrands, the representative body of national newspapers, in its submission for specific changes, but also the failure of the Act to contribute to addressing a malign and unreformed defamation regime, and the transformation of the digital space since 2009.

Our submission is not a defence of bad journalism or the misreporting of facts, but an attempt to ensure the survival of a quality press that is an essential pillar of a democratic society. A precarious, economically vulnerable, pillar that is currently genuinely threatened by the scale of legal costs associated with the defamation regime. We offer constructive but radical suggestions for reforms of the Act to support the development of quality journalism, the unbiased reporting of news free from sectoral influences, and to contribute to promoting democratic and informed debate.

We wish, in particular, to make a case for measures to encourage the unregulated social media world to embrace some form of voluntary self-regulation, initially in respect of defamation.

In that context we would also like to join NewsBrands, the Press Council, and the NUJ in affirming that the Press Council/Ombudsman system, creatures of the 2009 Act, have worked well and warrant continued support.

The Irish Times has engaged fully with the PC/PO system and acknowledges wholeheartedly that it has provided an important and welcome new form of redress for many readers upset by their treatment by the press, an effective, cheap, transparent and fast alternative to legal action. Most of those who make complaints to the PC/PO would almost certainly not have embarked on the latter – the system complements rather than supplanting the legal route.

Since 2008 a total of 38 formal complaints were taken against T*he Irish Times* to the ombudsman. Four were upheld, 20 not upheld, while in 14 cases the ombudsman/PC found that sufficient remedial action was taken by the paper. Twenty two complaints about the paper were resolved through the PC conciliation service.

The defamation regime serves neither plaintiff nor defendant. It is hugely expensive and cumbersome to seek redress. It is prone to imposing prohibitive damages on an industry that can ill-afford it. As such it represents a real erosion of freedom of speech and the press. We would point in particular to the *Kinsella* - €10 million award - and *Leech* - €1.25 million award after Supreme Court appeal, and now under welcome appeal to the ECHR – and the reality that such awards bear no comparison to the sums payable in respect of the worst of personal injuries . Such awards feed a deep sense of legal uncertainty and effectively set benchmarks for a huge subterranean out-of-court settlement culture.

The suggestion that judicial advice to juries may restrain them from making outlandish awards is undermined by the Supreme Court's willingness to countenance awards on the scale of the Leech case.

Defamation action is often used by powerful and wealthy figures in Irish society, whose activities are often the focus of significant and legitimate public interest, to try to intimidate

the media into not probing these activities. The high cost of defending legal actions, the possibility of having such high awards given against you, and the risk of defeat that is inherent in almost all court actions, contributes significantly to the ability of those with the wealth to do so, to use the courts and the defamation laws, to bully the media. Given the amounts that can be involved in such situations, it is almost impossible to prevent that bullying having some effect.

The Irish Times believes that a review of both the role of juries in defamation cases and the legislative capping of the scale of awards including a "serious harm" test is needed – an appropriate balancing by the state of the public interest in protecting and vindicating citizens' good names and in protecting the freedom of the press.

Unlike the majority of EU states Ireland, though the 2009 Act has abolished criminal libel, its civil defamation regime's level of awards makes it among the most oppressive to freedom of speech and the media in Europe. Although only two states in the EU, Austria and Malta, yet set caps to damage awards for defamation – €20,000 in most circumstances, and €11,646.87, respectively – we believe there is a strong case to follow suit. Judge-made case law in the UK has set an effective cap of £240,000 on awards.

A NewsBrands survey of newspaper legal costs associated with defamation for 2010-15 estimated the total in excess of a staggering €27.5 million (awards, settlements, and both plaintiff and own legal costs).

The nature of the current system is extraordinarily expensive. In the case of *The Irish Times*, the legal costs for 2012-2016 represent an average 61% of the total cost of claims/potential claims paid. *The Irish Times* has had only 15% of cases reported to the Press Council. For the remaining 85% of claims or threatened claims, the chosen route is to pursue damages. This incurs costs to us as a publisher, but it is also a clear signal that the legal system is making a clear choice in favour of a higher risk and expensive litigation process. In every year since the introduction of the Act, costs in *The Irish Times* have increased annually with 2015 and 2016 being the most expensive.

Inflated awards are also driving "libel tourism" – this State is an increasingly popular venue for forum shopping by plaintiffs who may have little real connection to this country. Concern about this practice has led the Council of Europe to call for a harmonisation across Europe of defamation law practice.

The Act

We do not propose to rehearse at length the arguments made in the NewsBrands' submission whose logic we accept and commend to the review. We would emphasise again, however, that our concerns are primarily about freedom of a responsible press, balancing the right to information and that to a good name, and defending quality journalism, a never-more essential pillar of a democratic society.

In short, however:

Serious harm test – The "serious harm" test introduced in the UK Defamation Act 2013 is reported to be contributing significantly to preventing frivolous libel actions from reaching the courts. The Act provides in section 1 that a "statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant". The introduction of a "serious harm" test would significantly benefit the Irish system. It

would not be onerous for genuine plaintiffs and would provide an important filter, not least in requiring a real connection with the state.

Juries – jury trials, no longer a feature of the vast majority of civil trials, including personal injury trials, feed unpredictability and uncertainty into the defamation legal culture. They are responsible for extraordinarily high damage awards and the costly extending of trial times because of the need to explain the over-complex law to jurors. Wildly escalating legal costs are one of the principle related reasons why newspaper lawyers advise clients not to go to court even with a strong case and even if that means submitting themselves to the lottery of an out of control out-of-court settlement system.

In 2008, an Oxford University study found huge variations in the costs of defamation actions across the EU, from around €600 (constituting both claimants' and defendants' costs) in Cyprus and Bulgaria to in excess of €1,000,000 in Ireland and the UK.

When an out-of-court settlement system, like a giant iceberg's unseen underwater mass, comes to dominate a sphere of the law it is a recipe for a dysfunctionality that is compounded by confidentiality agreements. Plaintiffs and defendants can only guess at where prevailing settlement levels are running. Delays in getting court dates, moreover, exacerbate the problems. Justice delayed is justice denied.

At a minimum, removing from juries the decision on quantum would be a step in the right direction of both moderation and consistency.

Offer to make amends – This is an important and welcome provision in the Act - it enables a defendant who has simply made an honest mistake or is otherwise unable or unwilling to defend a libel claim to put his hands up at an early stage and to admit liability. It does not entitle him to get off scot-free, as he must agree to apologise and to pay the claimant damages and costs. It should facilitate the speedy resolution of claims.but needs clarification. We share the NewsBrands' view that when the parties are unable to agree an appropriate figure for damages, that figure should be decided by a judge sitting alone.

The presumption of falsity – We support the view of the Law Reform Commission (1991) that the presumption of falsity should be abolished and that to be defamatory, a matter should be required to be untrue.

The evolution of digital media platforms

The requirement that the review of the Act should consider "any relevant developments since 2009" is particularly welcome. The media and its legal landscape have changed significantly since that time because of growth in consumption of media on digital platforms. Some of the fundamental assumptions of the Act need to be revisited.

The explosion of social media in particular, with the convergence and overlapping of media platforms has transformed the means by which news is consumed and comment is generated and published.

In the US, Pew reports that some 44 per cent of adults and 61 per cent of millennials get their news from Facebook newspages. In Ireland, a survey by the Reuters Institute for the Study of Journalism (RISJ) in Oxford found that "Half of all … respondents (52%) now say they use social media as a source of news each week. The report shows the influential role played by

Facebook in the distribution of online news with 45% using the network to find, read, watch, share, or comment on the news each week; more than twice that of its nearest rival." Facebook and Google insist, however, that they are not media organisations, and play no interventionist editorial role in fashioning their product, but are merely technological platforms that others are free to use. That means, they insist, that they should have no real moral or legal responsibility for the content of what users post.

Yet a controversy has erupted over the role of fake news on Facebook in the US election. The social media site has responded by beginning to acknowledge that Facebook will have to do something about the problem, albeit insisting that 99 per cent "of what people see is authentic". Its solution: a version of Wikipedia-like vetting for online news – "enabling our community to flag hoaxes and fake news".

An Austrian court has recently delivered an important judgment in ordering Facebook to take down defamatory material.

Google and Facebook have also announced that they intend to curb advertising on fake news sites. Both statements are clear admissions by the organisations that they perform an editorial function on their sites. They should also acknowledge they have an associated responsibility, or what has been called a "duty of care".

In social media sites like Facebook, whatever they may say, an editorial function, or a censorship role to eliminate material like pornography or racist material that violates "community standards", are performed by complex algorithms not humans, sometimes to ludicrous effect – notably the automatic removal of a Pulitzer Prize-winning photo of a nine-year-old girl fleeing napalm bombs during the Vietnam war for violating nudity standards – "system error" .

Mark Zuckerberg, Facebook's boss, acknowledges that the company struggles to find the balance between its mission to be a free-expression utopia for its 1.8 billion users and its responsibility to protect them from all that is defamatory, dangerous (like terrorist propaganda) and untrue. An interventionist editorial function is inevitably central to that.

Nothing could illustrate the challenge more clearly than reports in recent weeks that the company has been developing algorithms to block certain types of content from appearing in news feeds in specific geographic areas, most notably China. – according to the New York Times, Facebook has already blocked roughly 55,000 pieces of content in about 20 countries, including Pakistan, Russia and Turkey, between July 2015 and December 2015.. The new tool will automate the censorship process further to enable Facebook to persuade the Chinese authorities to grant it access to their market.

German chancellor Angela Merkel has joined in the discussion, taking issue with the so-called neutrality of algorithms and calling on major platforms to divulge their formulae, arguing that their lack of transparency endangers debating culture. In the circumstances "hands-off" claims made to justify separate treatment in law from newspaper sites can only be described as disingenuous.

Third-party comment

Newspaper sites have also tried to embrace the potential that the digital revolution has created for third party, user-generated comment (UGC) to "democratise" debate online and give readers a sense of ownership of that debate, hitherto impossible.

This potential is now wrapped in huge legal uncertainty over the liability of publishers for that content because of conflicting imperatives of legislators and the courts in their understanding of publishers' "duty of care". Traditional publishers such as *The Irish Times* carry the legal burden of defamation into the digital world. The new entrants, however, including Facebook, are not provided for in the Act.

The EU *Electronic Commerce Directive (ECD) Regulations 2002* (transposed into Irish Law as *European Communities Directive* 2000/31/*Ec* (Regulations 2003) reflects that duty of care in providing that publishers are not liable - cannot be sued - if UGC content defames someone, or breaks another law, if the comment is not moderated or edited, and if they operate a "report and remove" system and take down offensive posts quickly if they receive complaints.

In 2015 the ECHR (*Delfi AS v. Estonia*) made a dubious distinction in legal liability between news sites and general social media sites in this regard – because the former and not the latter allegedly have a financial interest in content. It has upset the balance of the provision in the ECD by exposing news sites to a tougher and hence inequitable legal regime.

Meanwhile, the EU Commission last year (2015), launching a consultation on the ECD, has suggested in its preliminary findings the need for new measures to tackle illegal internet content, asking … "whether to require intermediaries to exercise greater responsibility and due diligence in the way they manage their networks and systems – a duty of care."

The dissenting minority in *Delfi*, arguing against liability for publishers/intermediaries , makes the point that any such liability undermines freedom of speech:

"The imposition of liability on intermediaries was a major obstacle to freedom of expression for centuries. It was the printer Harding and his wife who were arrested for the printing of the *Drapier's Letters* and not the anonymous author (Jonathan Swift), who continued to preach undisturbed. It was for this reason that exempting intermediaries from liability became a crucial issue in the making of the first lasting document of European constitutionalism, the Belgian Constitution of 1831. This is the proud human rights tradition of Europe that we are called upon to sustain."

That view would have broad support in newspapers, although the idea that they have some "duty of care", and hence some liability, is probably more sustainable.

Some comfort has been provided to newspapers by a more recent case in the ECHR this year - *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*. The ECHR ruled that the Hungarian courts had failed to properly balance the right to protect commercial reputation and the right to freedom of expression when they ruled that a news website could be liable for offensive and vulgar user comments. Unlike the defendants in *Delfi*, those had demonstrated an appropriate and speedy takedown system for libellous comments.

Importantly the ECHR stated that there must be a strong reason for punishing a journalist for assisting in the dissemination of third-party statements as this would seriously hamper the contribution of the press to discussion of matters of public interest. The court found, however, that, despite the different outcomes, *Magyar* did not depart from the principles of *Delfi*. But the judgment does clarify that the *Delfi* judgment was limited in scope to "clearly unlawful" comments. Where comments were merely vulgar and offensive, a notice take-down mechanism was sufficient to balance the interests of the parties.

But the legal landscape in relation to what is called the "hosting" defence is very fluid and legally fraught, and a high risk for traditional publishers.

We are deeply concerned with the current, and it would seem increasing legal uncertainty over our responsibilities as publishers in respect of UGC. A court apology and a significant financial settlement that were made by *The Irish Times* to a Dublin professional early in 2016 well illustrate the unfairness and unpredictability of the UGC/hosting defence reality. Anonymous defamatory comments had been added by readers to an online version of an unexceptional article about the professional. The paper had no editorial oversight or control of the comments before they were uploaded and agreed to take them down after they were complained of, but was liable in law. We are advised that it is unlikely any recourse would have been available against Facebook in similar circumstances

We are fearful that the onerous requirements on publishers may make UGC an increasingly impractical proposition – pre-vetting or "pre-moderation" of all comment, for example, is beyond the resources of newspapers who will respond simply by closing down articles to third party comment.

We do not, however, oppose requirements on news sites to have rapid and transparent post-publication takedown procedures. *The Irish Times* in this regard has long had a Readers' Representative and our online team closely monitors and acts on requests for takedowns of comments that are potentially libellous or in breach of community standards.

Any legal regime which sought to treat newspaper sites and social media sites' "duty of care" obligations differently would be to create inequitable double standards – both ethically and commercially. We do not accept, as we have argued above, that there is a qualitative difference between newspaper sites and the news pages of Facebook – to privilege the latter legally over liability for defamation would be an injustice and provide social media sites with an unfair commercial advantage.

Press Council

Public policy would also be served by encouraging, and providing legal incentives to social media sites to sign up to voluntary self-regulation, specifically the Press Council, and the council 's code of conduct. A first step in this regard would be to tailor the Defamation Act to this end in respect of defamation.

Part of the Defamation Act's purpose was to provide new means of redress for those aggrieved by the press, and so it assisted in the establishment of a system of voluntary self-regulation of which the Press Council is the central pillar. This has worked well, as both the PC and the industry acknowledge, and the Act's provisions in this regard do not need to be changed except to remove the ambiguity about whether proliferating online news sites qualify as "periodicals" and may be members of the PC, so availing of any protections the Act may afford. (see below).

The Act implicitly encourages the press to sign up to PC membership and its code of conduct by rewarding publications that do so with a significant legal defence to charges of defamation. Sect 26, in allowing for the specific defence of "Fair and reasonable publication on a matter of public interest", provides that "For the purposes of this section, the court shall, in determining whether it was fair and reasonable to publish the statement concerned, take into account … in the case of a statement published in a periodical by a

person who, at the time of publication, was a member of the Press Council, the extent to which the person adhered to the code of standards of the Press Council and abided by determinations of the Press Ombudsman and determinations of the Press Council."

The defence has yet to be tested in court but it is a welcome incentive to making the PC system work and is an important tool in the PC's recruitment armoury. Consideration should be given to enhancing the provision to make it a presumption that such a defence will normally prevail (rather than that the court "shall .. take it into account") To do so would reflect the public policy imperative that in accepting the voluntary disciplines of the PC and its code affiliated newspapers are manifesting a serious responsibility to discipline themselves that deserves acknowledgment and reward.

We believe that, in the Act's provisions on guiding mitigation of awards, membership and adherence to the Press Council and its code of conduct and evidence of formal internal readers' representative mechanisms should also be considered. PC membership should be seen as evidence of commitment to high standards, responsibility, and willingness to take measures to avoid possible defamation or breaches of journalistic standards.

The incentivising of participation in voluntary self-regulation can be a means of bringing such disciplines and standards to the currently unregulated online world.

Online membership

Currently the Act provides (Section 44 (4)) that "The owner of any periodical in circulation in the State or part of the State shall be entitled to be a member of the Press Council." And it defines (Part 1 Section 2 – Definitions) "periodical" as meaning "any newspaper, magazine, journal or other publication that is printed, published or issued, or that circulates, in the State at regular or substantially regular intervals and includes any version thereof published on the internet or by other electronic means ..."

The definition does not appear to include in its scope the many stand-alone websites such as social media news sites like Facebook, or the majority of newspaper websites which now publish considerable unique – previously unpublished - content.

In specifying that owners of periodicals "shall be entitled" to membership of the Press Council, the Act is clearly permissive – others may also join. But it also appears clear from other sections of the Act that the protections offered by the Act (Sect 26) extend only to "periodicals" as defined in the Act.

If "periodical" is understood to include online sites, why is it qualified by the reference to including "any version thereof published on the internet or by other electronic means; ...", a definition that would appear to exclude sites publishing unique, original material or unique material published on periodical sites? The definition would also appear not to cover the online sites of broadcasters which are not currently encompassed the Broadcasting Act.

We would ask the review to address this ambiguity and help bring the Act into the online age by helping to extend self-regulation to this arena.

Honest court reporting

In December 2015 the Attorney General called for a review of the defamation laws to ensure better protection of court reporters who err inadvertently. They perform an "important

public service" and one of the "most challenging assignments in journalism", she argued, and made the case that reform of defamation laws was necessary to avoid a "chilling" impact on the level and quality of court reporting which the constitutionally-mandated public administration of justice requires.

Journalists, she argued, should not have to fear that a "simple oversight, omission or error" in reporting court proceedings can expose them to risks of litigation, or claims in damages, with consequent risks to their livelihood. Or indeed, we would add, to both the commercial risk involved in performing this essential task, and the financial viability of the newspapers who employ them.

The Irish Times, while reaffirming our absolute commitment to responsible and professional court reporting, concurs wholeheartedly.

We would draw the attention of the review in particular to the prohibitive, and we would argue unfair, costs faced by this paper – in excess of €200,000 - and the *Examiner* in a case in Ennis in 2011 (*Carmody*).

The reporter covering the case was at a funeral and was replaced at short notice by another freelance who was not struck by the absence of the jury from the court. He faithfully reported legal arguments to the judge without realising or telling the papers that they should not be published. After the trial collapsed the next day on an application from the defence, both papers apologised for the error but were convicted of a technical contempt. The full costs of the trial were awarded against the papers.

The potential cost to newspapers of "honest" error is seriously inhibiting to our constitutionally mandated role of covering courts.

Brexit

As the NewsBrands' submission on the review points out, Section 18 of the Act gives legal protection, through statutory qualified privilege, to reports of press conferences and of public meetings "in the State or in a Member State of the European Union".

If the Defamation Act is not amended Brexit will result in the loss of the protection for reports of press conferences and meetings in Northern Ireland and the rest of the UK, seriously jeopardising both freedom of the press and transparency of public proceedings. We share Newsbrands's opposition to any geographical restriction in the provision.

Blasphemy

The provisions of the Act on blasphemy (Sect 36 and 37) should be repealed. The Act included a new indictable offence of "Publication or utterance of blasphemous matter", which carries a maximum fine of €25,000 and consisting of uttering material "grossly abusive or insulting in relation to matters held sacred by any religion", when the intent and result is "outrage among a substantial number of the adherents of that religion."

Due to a lack of blasphemy prosecutions, the blasphemy provision in the Constitution appeared to be of academic interest only until the 2000 case of *Corway v. Independent Newspapers (2000)*. This concerned an application by the plaintiff to commence a private prosecution for blasphemous libel against the *Sunday Independent* for publishing a cartoon

in the wake of the successful referendum introducing divorce in 1995 showing a priest offering communion to three government ministers, each of whom was rejecting it.

The caption read 'Hello Progress—Bye-bye Father?', a play on the anti-divorce campaigners' slogan 'Hello Divorce—Bye-bye Daddy'. The Supreme Court, however, rejected the application, holding that "[i]n the absence of any legislative definition of the constitutional offence of blasphemy, it is impossible to say of what the offence of blasphemy consists."

Minister Dermot Ahern introduced an amendment to the Defamation Act at committee stage, arguing that pending the abolition of the constitutional provision for blasphemy, he was required to provide such a legislative definition.

We are unconvinced by the then minister's case that there was a constitutional imperative to legislate on the issue, or by the appropriateness of this specific provision. The provision in the Act is oppressive and incompatible with human rights law. It is almost certainly also unusable.

There is not only a strong public consensus for repeal of the constitutional ban on blasphemy - a referendum is promised in the programme for government – but also majority support for the removal of the statutory ban in the Defamation Act. At the Constitutional Convention last year members voted 61–38 against retaining the existing constitutional prohibition; 53–38 in favour of replacing it with a prohibition of "incitement to religious hatred". The convention voted 50–49 against having any statutory prohibition of blasphemy, while If a statutory prohibition were retained, members voted 81–11 in favour of a new provision rather than the 2009 Act.

On behalf of *The Irish Times*:

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