Submission on Review of Defamation Act 2009

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Anbally, Cummer, Co. Galway 28 December 2016

The 2009 Defamation Act - The Department of Justice and Equality is now inviting contributions from members of the public to inform this review. Organisations or individuals wishing to contribute should send a submission by 31 December 2016:

- by email to defamationactreview@justice.ie

Dear Sir/Madame,

I wish to suggest that the 2009 Act be reviewed under the following nine headings, before I respond to the proposed headings as outlined by the Department of Justice:

1. Strict Liability/Burden of Proof
2. Proportionality
3. Capping of awards
4. Exclusion of Quangos
5. Lower protection of persons/entities performing public roles
6. Fair Trial rights
7. Open Justice
8. Register of Defamation payments
9. Equal Justice

Let's look at each of the above 9 headings:

1. Strict Liability

This is not required by the constitution, and is against the public interest. Without effective media scrutiny of public officials, corruption can occur, inappropriate favouritism can go unaddressed, contracts/tenders can be rigged in favour of connected persons etc.

It must be firstly recognised that there is an asymmetry of information between state actors and the media/public. State actors hold key information, a lot of which is exempt under freedom of information laws. If journalists must prove all allegations, then this seriously impedes their "constitutional role" as the fourth estate.

Unfortunately, the constitution does not provide sufficient explicit protection to a free media, with a somewhat antiquated reference to the 'education of public opinion' in Article 40.6. However, Articles 5/6 outline the democratic nature of the state. The public is entitled to have governors that primarily serve the public, and not their private goals. Politicians, quangos and civil servants play an agency role on behalf of the public. If the public are not adequately informed, then such public sector actors [PSAs] can pursue "secret profits", and usurp the thrust placed in them by the public. Thus, the constitution needs to be interpreted in line with evolved concepts of democracy and in the context that the constitution is an attempt to constrain the abuse of governmental power; This necessitates constraining government efforts to use oppressive defamation laws as a pretext for concern for citizen rights to a good name, to curtail dissenting opinion.

Kathleen Eisenhardt posits that if principals and agents have divergent goals, a principal's lack of knowledge of the agent's behaviour means that 'the principal cannot verify that the agent has acted appropriately.'[1] Some people argue that the media should enjoy qualified privilege in communicating issues relating to government affairs.[2]

The greater the barrier which is placed on the media's ability to convey information to the public, the greater the scope for public interest corruption by PSAs, by the pursuance of secret profits. Secret profits may consist of brown envelopes of cash, of favours returned, or simply the pleasure of exercising power, for power's sake and includes preferentially treating friends/acquaintances without any clearly identifiable financial gain.

Occasionally, the press accumulates the proof necessary to publish its knowledge of "secret profiteering" by PSAs. Perhaps, a whistle-blower conveys the relevant proof, or secret recording of transactions/commentary provides sufficient evidence to parry off a defamation suit. However, this likely only happens in one out of a hundred cases of corruption, or even fewer occasions.

The media may have some evidence in 9 of the other 99 cases, but this may not meet the standard of proof beyond the balance of probabilities. Hence, only one tenth of cases of

[1] Kathleen M. Eisenhardt, 'Agency Theory: An Assessment and Review' (1989) 14(1) The Academy of Management Review 58.

[2] See- Carolin Anne Bayer 'Re-thinking the common law of defamation: striking a new balance between freedom of expression and the.. '
https://open.library.ubc.ca/cIRcle/collections/ubctheses/831/items/1.0077572

identifiable corruption will get flagged up, under a strict liability standard, whereas if a "good-faith" standard was applied, perhaps another 9 out of 100 cases could be reported. This would provide a significantly higher deterrent against corruption by PSAs. Thus, the price, to the public, of a strict liability standard, is not just the costs of the corruption in those 9 cases not exposed, it is also the costs of that cohort of the remaining 90 (out of a 100) cases of corruption which would be deterred from occurring under a freer and more robust reporting regime).

The public, rather than media, pays the price of oppressive defamation laws. Whereas, media may have to pay high insurance premiums, for defamation insurance, if not large enough to self-insure; this cost has to be borne by all competitors in the market. The cost acts an entrance barrier to the media market, and helps insulate incumbent media operators from competition.

People need to have governors that serve them; this is the essence of democracy.[3] Laws, and administrative decisions need to serve the public interest. Without a free media capable of playing its oversight role, some PSAs will inevitably pursue corrupt activities which will go undiscovered by the public. Strict liability erodes necessary media oversight.[4] Ireland is one of the few countries in the democratic world that applies such a strict liability standard.

The burden of proof should be placed on the plaintiff and a defendant should be able to successfully plead that they acted in good faith in making the contested statement and this, if reasonably credible, should parry of any claim.[5] In *Kunitsyna v Russia* (para 46), the court in finding an Article 10 violation, said:

> The domestic courts did not have regard to: the presence or absence of good faith on the applicant's part; the aim pursued by her in publishing the article; the existence of a matter of public interest or general concern in the impugned publication; or the relevance of information regarding the claimants' next of kin in the context of that topic.[6]

The Criminal Assets Bureaux legislation, for example, sets the strict liability standard aside. Gardaí above a certain rank can form the opinion that a person has engaged in criminal activity, and confiscate assets from otherwise innocent persons. The responsibility rests on the person, whose assets are seized, to prove their good name (that they were not engaged in criminal activity); the "accused" person is required to prove that the assets seized were purchased/acquired by legitimate means, beyond the balance of probability.

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[3] 'A popular government without popular information or the means of acquiring it, is but a prologue to a farce, or a tragedy, or perhaps both' according to James Madison (former US president).

[4] It was reported in a number of newspapers, post his death, that the now deceased and disgraced BBC presenter Jimmy Saville had threatened a number of his alleged victims with libel lawsuits if they sought to further their allegations against him. It would also appear that the threat of defamation suits hinders reporting of suspicions of sexual abuse in Ireland.

[5] For example, in Switzerland (Which is not the most liberal of free-speech countries) - 'Likewise, the defendant will not incur a penalty if he "*proves his allegations to be truthful,"* or if he had reasonable cause to *"hold them in good faith as being truthful."* ' - *http://kellywarnerlaw.com/switzerland-defamation-laws/*

[6] *Kunitsyna v Russia ECHR (Application no. 9406/05)* 13 December 2016.

So, if Gardaí can act on the opinion that a person is engaged in criminal activity, and a person has no remedy other than to go to court to get back the seized assets, why should plaintiffs be allowed to claim money from journalists if journalists are acting in good faith? Both the Gardaí and the Journalists are each performing a watchdog role, in ensuring that wrongdoers do not go unchallenged, and both jobs are equally important to the public purse. In the recent case of *Magyar Helsinki Bizottság v Hungary* (Application no. 18030/11) 8 November 2016;

> The Court would also note that given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information (see *Delfi AS v. Estonia* [GC], no. 64569/09, § 133, ECHR 2015), the function of bloggers and popular users of the social media may be also assimilated to that of "**public watchdogs"** in so far as the protection afforded by Article 10 is concerned.

Strict liability undermines the ability of all public watchdogs to perform their public interest roles.

A *de minimus* threshold also, needs to be introduced - Just because a statement is defamatory in a slight way, should not automatically attach a punishment and thus an interference in free speech, as such an approach does not proportionately respect the right to free speech under article 10 ECHR.

In *Kunitsyna v Russia* (2016)[7], the court stated (para 42):

'…an attack on a person's reputation **must attain a certain level of seriousness** and in a manner causing prejudice to personal enjoyment of the right to respect for private life…"

– In *Annan v Germany* ECHR (App No. 3690/10), 26/11/2015, the court stated---

> 56. In cases such as the present one the Court considers that the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the person who has made the statement in dispute or under Article 8 of the Convention by the person who was the subject of that statement. **Indeed, as a matter of principle these rights deserve equal respect.**

A UN report on Ireland from 2000 stated;

> The Special Rapporteur encourages the preparation of a new Defamation Bill. He is of the view that the **onus of proof of all elements should be on those claiming** to have been defamed rather than on the defendant and where truth is an issue, the burden of proof should lie with the plaintiff. Furthermore, **sanctions for defamation should not be so large as to exert a chilling effect on the freedom of opinion** and expression and the right to seek, receive and impart information. A range of remedies should also be available, including apology and/or correction. The Special Rapporteur reminds that

[7] *Kunitsyna v Russia (Application no. 9406/05)* 13 December 2016

restrictions on the right to freedom of expression must be limited only to those permissible under article 19 of the International Covenant on Civil and Political Rights.[8]

There are about 7 thresholds relating to the burden of proof, ranging from the most oppressive to the most liberal: (1) Strict liability without proof (2) Strict liability with proof (3) [Reynolds]Fair Comment (allowing for error providing exacting conditions are met (4) Negligence (US, non-public persons) (5) Good faith (Swiss) (6) Gross negligence/reasonable (Australia re MPs) AND (7) Gross negligence plus malice (*New York Times* standard).

2. Proportionality

Free speech conflicts with the right to a good name. However, both are important constitutional rights. I would argue that free speech is a more important right, but let's suppose that they are equally important rights.

The principle of proportionality (accepted in constitutional law [See: *Heaney v Ireland* 1994 or *John Gilligan v Criminal Asset Bureau*, 2005] and under ECHR law [see *Annan* above]) should require that where two rights conflict, both rights need to be accommodated; this means that one right should not stand so proud that it tramples on the other. Each right needs to be attenuated to accommodate the other, to afford "equal respect" (*Annan*).

The 2009 Defamation Act abysmally fails to do so. The strict liability standard fails to attach sufficient importance to the right to free-speech. Paying enormous damages fails to respect free-speech. Allowing aggravated and penal damages fails to respect free-speech.

Section 32 of the 2009 Act deals with aggravated and punitive damages: Aggravated damages can be awarded where a defendant conducts her defence in a manner that aggravates the injury to a plaintiff's reputation. This provision is problematic from a number of aspects. It effectively interferes with a defendant's right to a fair trial, as she cannot vigorously defend herself against the suit. On the face of it, this appears to breach Article 6(1) ECHR.

Further, if the intent to defame is established, punitive damages in addition to special, general or aggravated damages can be awarded. It appears therefore, that the civil offence of defamation carries a potentially greater punishment that many criminal offences.

In her masters thesis of 1987, Marie McGonagle argued that penal damages went beyond what the constitution required to protect a person's good name. Marie McGonagle and Prof Kevin Boyle prepared a report for the Dail urging reform of the Defamation Law in 1988.[9] However, in 2009 Marie McGonagle and Annabel Brody wrote an article entitled

[8] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission resolution 1999/36: Addendum, Report on the mission to Ireland. E/CN.4/2000/63/Add.2 (the UN Special Rapporteur's Report on Ireland), para. 84. [see; https://www.article19.org/data/files/pdfs/analysis/ireland-report-to-lag-on-def.pdf]
[9] Kevin Boyle and Marie McGonagle, 'A Report on Press freedom and Libel '(INN, Dublin,1988)

"Defamation Act 2009- too little too late?"[10] ; a question which could easily be answered in the affirmative, upon its reading.

In *Annan v Germany* ECHR (App No. 3690/10), 26/11/2015, the court stated---

> 55. When examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to ascertain whether the domestic authorities have **struck a fair balance when protecting two values** guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other the right to respect for private life enshrined in Article 8 (see *Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, 14 June 2007; *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011; *Axel Springer AG*, cited above, § 84 and *Delfi AS*, cited above, § 138).

Additional leeway needs to be afforded persons engaged in political speech, as in *Annan*. The fair comment defence in the 2009 Act is too conditional, as regards truth of facts etc., to be an effective protection of public interest commentary.

The UN in General Comment 34[11] states that restrictions on free speech '*must conform to the strict tests of necessity and **proportionality**.'* The application of a strict liability standard is disproportionate as is the level of damages awarded.

Providing privilege to parliamentarians recognises the need to ensure that unproven facts are brought to the attention of parliament and the public. However, not providing journalists some level of privilege (such as that qualified by a good faith standard) disrespects the crucial role played by the media in a democracy. This reflects the mistaken *Montesquieu* concept of separation of powers which supposes that tyranny can be avoided by the division of powers between an executive, legislature and a judiciary. This theory erroneously downplays the role of a (free) media which must (a) not be captured by vested interests and (b) must not be excessively constrained by oppressive defamation or sedition laws. In fact, most modern tyrannies take hold, not by a charge of army tanks, but by silent encroachments upon press freedoms and the intimidation of dissenters.

A more enlightened view should hold that politicians are by design beholden to vested interests (those who elect them, and those who finance them) and that, even discounting any level of capture, politicians cannot by themselves be informed of wrongdoing; if citizens cannot convey their concerns to them at least under qualified privilege, or the media is precluded from doing so similarly, then legislators will remain ignorant of relevant uncertain information, regardless of parliamentary privilege. If science had had to proceed on a similar

[10] Marie McGonagle and Annabel Brody 'Defamation Act 2009 - too little too late?"[10] (Communications Law, 2010)

[11] General comment No. 34, International Covenant on Civil and Political Rights, Human Rights Committee, 102nd session, CCPR/C/GC/34, para. 22

basis, and scientists were precluded from speculating on the wrongness of other scientists' ideas, without clear proof, we'd still be living in a pre-Galileo flat world.

A proportionality analysis, which the constitution requires, must avoid vindicating one right 100%, when it conflicts with another right. A jury, or a court, must consider whether an award has a chilling effect on free-speech, and should balance the level of awards with this chilling effect. Awards must be evaluated only in relation to actual harm to a person's ability to earn a living or to conduct their social life and not on notional and vague concepts of reputational damage; such an award should then be cropped back to reflect the constitutional need to vindicate the conflicting right to free speech (to afford *equal respect*).

Proportionality is not just about deciding which constitutional right should prevail, (such as in the X-case, where the right to life of the mother was prioritised over the unborn), it is about vindicating both rights simultaneously, when this possible (as in *Gilligan*, where the right to property/good name was tempered to vindicate the diffuse public interest in ensuring that criminal behaviour is deterred.), and doing so in a balanced manner such that each right is only partly vindicated. Damages need to be curtailed such that they only remedy any clear and proven injury, in a partial manner. The constitution demands that the exigencies of the common good, in a free and vibrant press, curtails individual compensation. Affording 100% vindication to good name protection, attaches 0% value to free speech (and voids *equal respect*) and undermines the democratic nature of the state.

The legislature, in allowing juries to evaluate damages, currently, without reference to the effects those damages have on the public's right to be informed, is acting disproportionately. It is no defence to say that the press should be extra-vigilant in publishing incorrect facts; the press is not obligated to inform the public, it simply evaluates on a risk-profit basis what information it should share. Extra scrutiny of facts, demanded by onerous defamation laws simply moves the risk-profit curve, such that the public is less informed as a result; it will not produce significantly more vigilance. The happenstance nature of public information, needs to inform the caution that must be exercised in interfering with such a fragile pillar of democracy. *Equal respect* demands recognition of this fragility.

Whereas, it is argued that it is a legislature's role to balance conflicting constitutional rights, it is the role of courts to step-in and restrain a legislature's overreach, when it tramples on protected rights <u>outside of a permissible range of balancing options</u>. And when national courts also fail to act, if then falls to international courts to intervene.

Ireland, <u>at a minimum</u>, needs to introduce a *de minimus* threshold, it must take account of the good faith of publishers, it must reverse the burden of proof (in most cases), it must afford equal respect which requires proportionally balancing free speech protection against respect to good name (This means significantly reigning in damages to achieve this). It also needs to enhance protection for political speech, by removing the multiple conditions of S.26, in order to comply with its international law obligations under the ECHR and the ICCPR.

3. Capping of awards

Damages awarded are totally out of proportion to the possible harm caused in many cases. Firstly, juries need to be abandoned. Jurys are not sufficiently informed of the damage to the diversity of media and the chilling effect that high damage awards cause. There is a focus on the harm to the claimant only, and not on the impact for free speech and democratic accountability. Often, a belief is held that some newspapers have deep pockets, and that the cost is just another cost of doing business.[12] Little attention appears to be given to the cost of defamation insurance for small newspapers and website news outlets and the effect that the rise in such insurance has on media diversity.

Also, the damages allowed exceed those for personal injuries, from which victims cannot recover. Persons recover most of their good name upon declaration of the court, that a statement was unjustifiably defamatory. Currently, a person losing one eye is only paid about €138,000 in damages. This is a serious harm, and more life-altering than most if not all defamation injuries. In the UK case of *Jones v Pollard* (1996)[13], the court indicated that damages should not exceed those for extreme personal injury cases.[14]

I suggest that this should be the maximum payable to any claimant [€138,000].[15]

All awards should be stepped back from this maximum.

Awards in the UK are reportedly capped at Stg£200,000.[16] Generally, the awards in most EU countries are 100 times less than in Ireland.[17] For example, in the *Delfi v Estonia* ECHR case, the contested award was €300. Such a case in Ireland, would appear to possibly attach over €30,000 i.e. 100 times greater. And the legal costs could be another €30,000, making the penalty up to 200 times greater.

Another example is the case of *Salumaki v Finland* ECHR, *where* no Article 10 violation was found, but damages were €2,000 and the legal costs were just €1500.[18]

The Council of Europe assembly expressed concern at high damages awards in a 2007 report.

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[12] See comments of UN rapporteur: 'there is allegedly a common perception that newspapers are powerful and possess considerable financial resources…' https://documents-dds-ny.un.org/doc/UNDOC/GEN/G00/100/52/PDF/G0010052.pdf?OpenElement

[13] *Jones v Pollard* 1996 EWCA Civ 1186; [1997] EMLR 233

[14] See- Hugh Jones & Christopher Benson, *Publishing Law* (Rutledge 5th Edn., 2016), p198.

[15] Who would forego an eye to not be defamed? Paying persons who lose an eye does not harm society, other than the costs of insurance, but paying high defamation awards has a multiplier effect; we pay the costs of the defamation, plus the costs of all the corruption and wrongdoing that fails to get exposed as a result.

[16] This "fact" has been reported in a number of outlets, but I do not have an original source of proof; e.g.: http://archive.senseaboutscience.org/data/files/A_quick_guide_to_libel_laws_in_England_and_Wales.pdf ; the Supreme Court in *Leech* (see below) refers to a UK cap of £275,000.

[17] Comparative Study of Costs of Defamation Proceedings Across Europe, University of Oxford, December 2008 - "Ireland was close to ten times more expensive than Italy, the third most expensive jurisdiction." http://archive.senseaboutscience.org/data/files/A_quick_guide_to_libel_laws_in_England_and_Wales.pdf

[18] See para 61- *Salumäki v Finland* (Application no. 23605/09) 29 April 2015 < >

> 'The Assembly likewise 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.'[19]

Its draft resolution called for awards to be capped:

> 'The Assembly accordingly calls on the member states to: (among a list of other recommendations) **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; …'

While the UK courts, [including N. Ireland courts] have espoused extreme personal injury award limits as constraints on defamation awards, the Irish courts have so far, apparently not sought to attach significance to these parameters.[20] It therefore falls on the legislature to ensure compliance with international standards in a country that stubbornly retains its dualist approach to international law transposition in contravention of the rule of law.

4. Exclusion of Quangos

Ireland, probably uniquely, allows QUANGOS to sue as legal persons, and secondly allows the directors or heads of such QUANGOS to sue, even if the QUANGOS are performing public functions related to governmental oversight functions. This is total overkill, and affords such persons effectively, two routes of remedy, potentially doubling the level of damages that could be awarded.

Entities, such as QUANGOS, which perform public regulatory functions, should not be allowed to issue defamation suits, at all,[21] or at most, they should enjoy a much lower level of protection from defamation. I would argue that the standard of *New York Times v Sullivan* [1964] 376 US 254 should apply; i.e. reckless disregard to the truth, plus malice. Allowing QUANGOS to sue as legal persons, just because they are assigned that status (of legal persons) via legislation, while private associations, which are not registered as companies, (and which may engage in similar activities) do not enjoy the right to sue (as legal persons), effectively affords government agencies a higher level of protection under defamation law; this directly violates the COE 2007 recommendation that calls on governments to, 'remove from their defamation legislation any increased protection for public figures, in accordance with the European Court of Human Rights' case-law,…' [See-Recommendation 17.6].[22]

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[19] Doc. 11305 (25 June 2007) 'Towards decriminalisation of defamation', [Report] Committee on Legal Affairs and Human Rights; Rapporteur: Mr Jaume Bartumeu Cassany. <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11684>.

[20] See - *Leech v Independent* [2014] IESC 79 (See section headed, 'Comparisons with other awards').

[21] See 2000 comments of UN rapporteur – 'Government bodies and public authorities should not be able to bring defamation suits;' https://www.hrw.org/news/2013/09/18/liberia-urgently-reform-libel-laws

[22] Rapporteur Cassany (n 20).

5. Lower protection of persons/entities performing public roles.

Similarly, politicians or persons performing public roles generally, should be subject to robust public commentary. It should be assumed, (1) the persons performing public roles have tough skin, and (2) that, such reputations are more difficult to damage, as the public are not so stupid to believe, just because one person defames such a person, that such commentary is true, where there is a clear public record of contribution to the public good.

Also, because of the high profile of public persons, the opportunities for rebuttal of any defamatory commentary is much greater and will get much more traction in the media. Rebuttal can remedy any purported damage to such reputations much more easily.

In Australia, a Law Reform Commission report stated that:

> '…in *Theophanous*,[23] the High Court, by majority, established that the implied freedom of political communication in the Australian Constitution covers discussion of the conduct, policies or fitness for office of government members, political parties, public bodies, public officers and those seeking public office.'[24]

The conditions outlined in S.26 of the Defamation Act are far to extensive, and fall short of the freedoms outlined in *Theophanous*, freedoms which are also required by the Irish constitution. For example, S.26 refers to, 'the extent to which the statement concerned refers to the performance by the person of his or her public function'; in contrast *Theophanous* applies to all discussion of fitness for office of all public office holders/officials, regardless as to whether such discussion refers to 'her public function'. The extensive list of considerations in S.26 (based on the *Reynolds* defence) conveys to a jury that leeway should only be afforded in the most exceptional circumstances; this totally hampers the "breathing space" which public-interest-free-speech requires. *Theophanous* refers to reasonableness, in the context of recklessness and is thus much less restrictive of public interest speech.

[23] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; see para 53: http://www.austlii.edu.au/au/cases/cth/high_ct/1994/46.html

[24] http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-75.pdf

6. Fair Trial rights

One of the serious flaws in the 2009 defamation act, is the awarding of aggravated or penal damages, where a defendant seeks to defend a claim of defamation against them. It is held that, if a robust defence is lodged, that the defendant has aggravated the damage to a person's reputation. This is particularly unfair, where a statement may actually be true, but the defendant does not have access to the necessary proof to prove the truth of a statement.[25] It coerces defendants to plead guilty, even if they are not, and denies persons a right to an adversarial process of contestation; this is because they are doubly punished, firstly for defamation, and secondly for seeking to defend a claim of defamation where a credible defence may exist. I argue that this violates the right to a fair hearing under Article 6(1) ECHR.

7. Open Justice

It is believed, that about 90% of defamations claims are settled before legal proceedings via the courts are initiated, simply by the threat of a solicitor's letter. It may be the case that some editors are reluctant to admit the level of defamation claims against them, and the damages paid out, in case, such damages encourage others to, 'give it a go'.

Of those that are lodged with the court, probably some 80% of cases are settled, with no record of the terms of the settlements, or the legal costs involved. Also, the system of delivery of Civil Bills or Summons, obscures the level of litigation. Under the system, Civil Bills can be stamped with a Court House, but subsequently never delivered. Legal effect, only engages once the Bill is actually served. So, it is impossible for the Court Service to track active legal actions, as, once a year has passed, post the stamping of a Civil Bill, the Court Service may have no record, as to whether the Bill was ever served or not.

Since 2014, when the Jurisdiction of the Circuit Court was increased to 75,000 euro, much more cases are now taken via the Circuit Court. The Circuit Court is effectively a semi-secret court, as no record is kept of the proceedings which are viewable to the public. Judgements are generally not delivered by the courts in writing. If journalists do not attend, which is likely the norm, then such cases are not recorded on public record. Journalists rarely attend the subsequent legal costs adjudications that relate to such cases, so no record is available of the total punishment that is imposed on those who transgress the defamation laws. This is important, given that often the amounts involved are quite high. For example, damages of 75,000 could be awarded, plus an additional adverse legal bill of 60,000, plus a solicitor-own-client bill of 50,000, could be burdened on a losing defendant in the Circuit Court.[26] No record is publically available of the total punishment, which could be €185,000.

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[25] See- for example, the reversal decision in the Jeffrey Archer case -- http://www.telegraph.co.uk/news/uknews/1334653/The-end-Archer-goes-to-jail.html

[26] See page 92 of 2008 report, 'A Comparative Study of Costs in Defamation Proceedings Across Europe' (Available here < http://pcmlp.socleg.ox.ac.uk/wp-content/uploads/2014/12/defamationreport.pdf >) which estimates legal costs: "A Circuit Court hearing of 1-2 days would cost between €50,000 and €75,000." See also on page 92: 'Question 11. If the claimant won, what would be the total estimated costs liability of the defendant? Answer; For the Circuit Court between €100,000 and €150,000. For a fully fought High Court trial between €300,000 and €600,000'.

So the overall chilling effect, of damages and costs is shielded from public scrutiny, even if such scrutiny was pursued, which generally, it is not. The new Legal Services Regulation Act 2015, further entrenches the secrecy of solicitor-own-client costs disputes, by redacting the name of a client, which prevents linkage to the original defamation suit that gave rise to the related costs dispute, in lawyer-own-client disputes. This violates Article 10 ECHR, and undermines the public's ability to monitor the punishing effects of Ireland's oppressive defamation laws. In *Helsinki v Hungary*[27], the court held that the names of lawyers could not be withheld, as they performed a public role in open courts. Neither should the names of clients be secretized.

8. We need to create a Register of all Defamation Awards and Settlements:

The current system of recording of most, but not all, High Court cases fails to alert the public to the threat posed by defamation law to free speech. Some whistle-blowers, who seek to expose wrongdoing are threatened with defamation suits; some of these are settled by defendants, without any proceedings being issued. Currently, these cases are not brought to public attention. This is undemocratic. Democracy requires that the public be fully informed of the consequences of current laws so that they can properly evaluate whether current laws appropriately balance conflicting rights and societal values.

I propose the following measure:

The Court Service, or the Department of Communications [The Authority], should set up a website to record all defamation threats or legal actions. A summary of all cases, the date of the defamatory comment, the date a letter of threat was issued, the date of commencement of proceedings, the date of any judgement, the date of any settlement, the amount of any payment as settlement of any claim or threatened legal action, and the amount of all legal costs associated with such claims or settlements, all need to be published on the website.

The responsibility should lie on the claimant to furnish the information to the Authority. A law should be passed, such that where a defamation claimant, receives an award, or receives a settlement for a defamation claim, that claimant must forward all the details to the Authority. If the claimant fails to forward the information, within one month, then the defendant should be entitled to a full refund of the all amounts paid to the claimant, along with full immunity against any further action for the defamatory comments or allegedly defamatory comments.

Currently, when a civil bill or plenary summons is issued by a court, under the rules of court, the plaintiff has one year to 'serve' the documents on the defendant. This rule should be reduced to 30 days. Further, the plaintiff should be required to notify the court service if and when the legal action is 'served'. A failure to do so, within 30 days of serving, should nullify the proceedings and preclude and further proceedings, except in exceptional circumstances. The Court Service, should be capable of monitoring all 'live' actions, which as I understand, is currently not the case.

[27] *Magyar Helsinki Bizottság v Hungary* (Application no. 18030/11) 8 November 2016

9. Equal Justice requires Equal Protection of the Law:

Persons who are defamed are provided financial compensation for their 'reputational loss', even if no loss, or emotional harm is proven. However, what is clear, is that those who are threatened with huge financial loss, by defamation suits, that subsequently turn out to be unfounded, do often suffer emotional harm. They need to be compensated as well, at least in some cases. I suggest that persons against whom defamation claims are made, but subsequently unsubstantiated, should be entitled to up to €25,000 in compensation. This would deter some legal actions, and provide some balance to free speech rights. This would not generally be more onerous than the current situation for plaintiffs, when the legal costs caps which I have proposed are also taken into account.

Further, the state or Quangos or Entities performing public functions should not be allowed to bank-roll 'private' defamation suits on behalf of members/employees/directors/managers. If a public office holder engages in a defamation suit, then it should be required to be declared, whether the suit is one as a private person, or as an office holder.

Denis Rancourt, writing on the oppressive nature of Canadian defamation law (which contains many of the features of Irish defamation law), stated,

> 'The common law of maintenance and champerty is a weak protection against funding abuse and puts a heavy onus on the party complaining about covert funding to prove legal impropriety. Even government and public institutions can fund private defamation lawsuits of their employees or of any person, and do, not to mention political lobby groups. Thus, without transparency and without limit, there is a systemic condonation of defamation lawsuits by covert proxy.[28]

The state should not bank-roll a private suit, and where a 'public' suit is taken, all awards should be payable to the state. If a 'hybrid' suit is taken, then the percentage split, between the public/private nature of the suit should be declared, upfront, with any damages or any costs liability apportioned accordingly. The legislation should clarify and make these issues transparent from the outset.

Maintenance and Champerty, by the backdoor, via *no foal no fee* agreements for lawyers should be curtailed. Where persons sue for defamation, the lawyers should not be allowed to claim fees from the defendant above the level that the claimant is capable of paying. Legal-aid should instead be provided for indigent litigants, which is currently prohibited; this evidences the role of defamation law as a tool for the wealthy and privileged classes.[29]

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[28] Dr. Denis Rancourt, 'Canadian defamation law is noncompliant with international law' (1 February 2016) http://ocla.ca/wp-content/uploads/2016/02/DGR-Canadian-Defamation-Law-Violates-ICCPR-for-posting.pdf

[29] The Civil Legal Aid Act, 1995 (S.28(9)) prevents legal-aid for defamation actions; this is clearly in contravention of Article 6(1) ECHR; see STEEL AND MORRIS v UK (Application no. 68416/01) ECHR.

Additional Department Template Response below (my further comments):

Scope of the review (as outlined by Dept. of Justice)

Find here a summary of the main features of the Defamation Act 2009

The following is an indicative list of some specific issues which may be considered under the review:

- Whether any change should be made to the matters which a plaintiff or a defendant is required to prove in a defamation case,

A plaintiff should be required to prove that a statement is not true. [See UN report above].

- Whether any change should be made to the persons currently entitled to bring an action for defamation,

Quangos and County/City Councils should be precluded from taking defamation actions.

- Whether any change should be made to section 12 (which provides that a body corporate may bring an action for defamation, whether or not it would incur financial loss as a result of the statement it claims to be defamatory),

Financial loss should be proven, and QUANGOS should be excluded from right to sue as legal persons.

- The experience regarding the jurisdiction of the Circuit Court in defamation cases,

See problems related to OPEN JUSTICE set out above (Section 7).

- Whether any change should be made to the respective roles of the judge and the jury in High Court defamation cases,

Abandon the use of juries.

- Whether any change should be made to the level or type of damages which may be awarded in defamation cases, or to the factors to be taken into account in making that determination,

Maximum of 138,000 euro, generally, should apply to defamation damages.

Pubic persons should be capped at half of this amount, with a much higher threshold of proof of defamation - the *New York Times v Sullivan* [1964] standard.

- Whether any change should be made to the defences of truth, absolute privilege, qualified privilege, honest opinion, fair and reasonable publication on a matter of public interest, and innocent publication, as defined by the Act,

Absolute Privilege should be provided in all communications to UN authorities to which Ireland is an active participant in or with. The Schedule of the Act, which outlines the courts, the proceeding of which are subject to absolute privilege, needs to be expanded:

It should include, at least all EU/EFTA courts, and former EU/EFTA country courts (to include the UK) and all tribunals/UN Committees to which the Ireland is a participant or potential participant.

Qualified Privilege needs to be expanded to all Public Consultations engaged in in the public interest by approved public bodies or those performing public regulatory roles.

It is ridiculous to expect the public to contribute to the public good, and though acting in good faith, still risk losing their house and/or all savings in the process. The public entity involved, should be responsible for redacting any defamatory comments, when the consultation is published, which should be the norm.

- Whether the Act's provisions are adequate and appropriate in the context of defamatory digital or online communications,

Nothing to say.

- The experience in practice regarding the Act's provisions for an offer of amends, an apology, or lodgement of money in settlement,

An offer, of apology or amends should reduce the amount of damages, which need to be reduced at least ten-fold from current awards. Now, where a defendant offers to make amends, this offer can be made without prejudice to a defence based on truth. This offer can reduce any subsequent award of damages, and if accepted, allows any harm to a person's reputation to be mitigated.

While this provision has diminished the oppressive nature of defamation on free speech, the other limb of perverse incentivisation of mitigation remains in place – the fees awarded to lawyers in taxation hearings remain significantly linked to the damages awarded in a defamation case. This means that where a plaintiff's lawyers negotiate a mitigation of damages to her client's name, the lawyers risk getting lesser fees from the other party at taxation. Further, the advantage of the offer to make amends must also include an offer to pay "compensation or damages", which may then be assessed by a jury. If a defendant makes a derisory offer, a danger exists that a jury may be motivated to award exemplary damages as an admonishment.

- Whether the range of remedies (including interim, interlocutory and permanent orders) available under the Act is sufficient to provide accessible and effective redress for defamation,

Yes. Too much redress.

- The experience regarding the operation of the Press Council (recognised under section 44 of the Act) and Press Ombudsman,

Nothing to say.

- Whether any further legislative or procedural measures should be taken with a view to encouraging the efficient, inexpensive and prompt resolution of defamation claims, reducing the need for court intervention, or otherwise increasing the accessibility or effectiveness in practice of defamation law for plaintiffs and defendants.

Yes. The government needs to deal with legal costs. Firstly, it should be noted that, in the one instance when the public was consulted on legal costs, in the UK [2014] Leveson enquiry, the public sought reform of the loser pays principle (for legal costs), in both defamation and privacy actions. The public, observed, that the loser pays rule deters access to justice for middle-income persons, and renders the protections of defamation law inaccessible to them.[30] But, some media outlets oppose legal-costs reform due to the fear of additional defamation suits.[31] Hence, fear of defamation quietens robust analysis by media, while fear of more defamation suits stifles media advocacy for legal costs reform, without which, the public cannot hold power wielders to account via the courts.

Costs should be capped at either €25,000 for losing litigants, unless a claim is seriously vexatious, in which case, the cap could be increased to €50,000. For, losing defendants, the recoverable legal costs should be capped at 30% of the damages awarded (hence a maximum of 30% of 138,000 euro). One-way costs shifting, as proposed by Leveson, should be avoided to avoid dumping the need for legal-aid on the media, with chilling effects.[32]

This would help reign in the disproportionate punishments that can be imposed on persons who are held to have defamed someone. This would go some way towards undoing the incentive for lawyers to avoid seeking amends under the Act.

- The above list of issues is not closed. Respondents may make submissions on these and on other aspects of defamation law, and are invited to propose, with reasons, any further issues which they consider should be encompassed by the review.

[30] 'Libel victims to have legal costs protected'- http://www.bbc.com/news/uk-24081193
[31] http://www.telegraph.co.uk/news/uknews/leveson-inquiry/10311161/The-cost-of-libel-reform.html
[32] See page 1506 (para 3.10) of 4th Leveson Report - http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780_iv.pdf

Conclusion:

Defamation is one of the most litigated areas of law in Ireland. The defamation law lures potential litigants with high awards in damages for even the slightest hint of attack on a person's good name. Such is the allure, that some litigants appear to forum shop Ireland as the best country in the world in which to claim for defamation. Being defamed is seen by some as a form of lotto opportunity to cash in on another's rage or slip of the tongue.

While the concept of the watchdog role of media/bloggers is referenced by the courts, the unconstrained generosity of some juries (uninstructed in the consequences that high damages cause to the watchdog role of the media) in awarding damages for defamation reflects on a state that is reticent to do anything to mitigate the negative effects on free speech (to afford *equal respect*). This failure helps to ensure that those in power are excessively insulated against unproven allegations of inappropriate behaviour or corruption.

The common law tort of defamation was developed in the *Star Chamber* in 1609 and reflects an era when state power was wielded with little criticism.[33] The 1961 Defamation Act in Ireland was effectively a codification of the evolved common law doctrine that preceded it. The 2009 Act was presented as a concession to media demands for reform and a rowing-back of some of the excesses of the common law as a constraint on a free media. Unfortunately, however it does not nearly go far enough to ensure a vibrant press that scrutinises the activity of power wielders in Ireland. In fact, it is a good template for dictatorial regimes around the world.

When British MP Plimsoll tried to expose the perils of dangerously constructed ships in the 19th century and sought that parliament would tighten up regulations to reduce the number of persons lost in shipwrecks, he encountered a lot of opposition. He sought to make safer what were referred to as "coffin ships"- many of which took destitute Irish to the US during the famine.[34] Saving lives might seem to have been in the public interest, but when many MP's are owners of many of the ships that might be assigned to the scrap-yard; political pragmatism can overwhelm a much needed reform. In fact, rather than the law being used to protect the vulnerable; it was turned against Plimsoll himself and he had to defend up to 13 libel lawsuits from disgruntled ship owners.[35] It took until the sinking of the Titanic before robust shipping regulations were finally implemented.[36] Memory fades quickly.

Defamation law, (appropriately watered down), needs to be made accessible to middle-class persons, via legal-costs reform, and made less accessible to those who wield political power so that we enjoy a more contestable democracy. In Ireland, where the profits obtainable by media from the exposure of wrongdoing are relatively low due to fewer consumers of that information, we need to be particularly careful of condoning oppressive defamation laws.

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[33] Van Vechten Veeder 'The History and theory of the Law of Defamation' (Columbia Law Review, 1903)
[34] Jim Shaughnessy, 'The Great Famine coffin ships' journey across the Atlantic'; '…"it was said that sharks could be seen following the ships, because so many bodies were thrown overboard." ' http://www.irishcentral.com/roots/genealogy/the-great-famine-coffin-ships-journey-across-the-atlantic
[35] http://www.bristolpost.co.uk/samuel-plimsoll-sailors-friend/story-11230789-detail/story.html
[36] http://www.dailykos.com/story/2010/5/23/869148/- How regulation came to be: The Eastland Disaster.