



Submission by the Press Council of Ireland to the Department of Justice and Equality Review of the Defamation Act 2009

The Press Council of Ireland welcomes the invitation from the Minister for Justice and Equality, Frances Fitzgerald TD, dated 7 November 2016, to make a submission to the Review of the Defamation Act 2009. The current defamation process has been subject to criticism for its costs, its delays and its excessive awards. The Press Council of Ireland sees its primary functions as two-fold, to provide a means of redress for members of the public dissatisfied with something published in the press and to promote the right of people to be informed through the promotion of freedom of expression and, in particular, the right of the press to publish what it considers to be news, without fear or favour, and the right to comment on it.

The complaints handling procedures of the Office of the Press Ombudsman and the Press Council of Ireland offer members of the public access to a means of redress which is independent, free, fast and does not involve settlement awards. The Press Council believes that the review of the Defamation Act should include provision to encourage members of the public to use its complaints handling process as an alternative to defamation proceedings. The Press Council also believes that any measure to reduce the costs involved in defamation proceedings is in the public interest as it increases access to redress to the wider public and reduces the chilling effect of legal costs on the freedom of the press.

The Office of the Press Ombudsman and the Press Council have been operation for nine years. In that period there have been:

3210 complaints received by the Office of the Press Ombudsman

330 formal decisions made by the Press Ombudsman

114 complaints upheld by the Press Ombudsman

In her letter requesting submissions the Minister provides an indicative list of specific issues which those making a review might consider. This submission follows the order of the Minister's indicative points.

1. The experience regarding the jurisdiction of the Circuit Court in defamation cases

As a means of reducing legal costs the Press Council believes consideration should be given to hearing defamation actions in the Circuit Court where plaintiffs have indicated a limit on the damages they are expecting. The Press Council also believes consideration should be given to hearing defamation actions where large amounts of damages are being sought in the Commercial Court division of the High Court (see next response).

2. Whether any changes should be made to the respective roles of the judge and the jury in High Court defamation cases

As the current levels of awards are threatening the financial viability of publishers and potentially contributing to the reduction in the range and diversity of news and commentary in the media the Press Council believes that consideration should be given to limiting the function of juries in defamation actions to determine if a defamation has taken place with the judge determining the level of awards or introducing a system whereby judges inform juries of appropriate levels of awards (similar to the practice for personal injury awards). See 3 below. If some defamation actions were moved to the Commercial Court there would, of course, be no jury involved in these cases.

3. 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.

Section 26 (2)(f) of the Defamation Act 2009 requires the court, in determining whether it was fair and reasonable to publish the subject matter of the defamation action, the extent to which the publication adhered to the Code of Practice of the Press Council. This provision was included in the Act, it is presumed, to encourage participation by publishers in the Press Council's complaints handling processes and to encourage members of the public to considering engaging in Press Council's processes as an alternative to litigation. There is no evidence to date that this section has been effective. The Press Council would welcome any amendment to section 26 which would encourage members of the public to engage in its complaints handling processes and encourage publishers to sign up to the Code of Practice by becoming a member of the Press Council. This is particularly important as more and more journalism is moving from print to digital publication. The Press Council recommends an amendment to the Act to include the requirement that in considering the scale of damages for defamation account must be taken in mitigation, where the defendant is a member of the Press Council, of the record of the publisher's adherence to the Code of Practice of the Press Council and the decisions of the Press Ombudsman.

Account should also be taken of whether the plaintiff sought redress through the Press Council before initiating legal proceedings.

The Press Council would also like consideration be given to imposing a cap on the maximum amount of awards which can be given in defamation actions or alternatively a “book of quantum” outlining appropriate levels of awards based on the degree of defamation that has occurred.

4. 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 in the Act.

The Press Council believes all these considerations are important in allowing for the right of freedom of expression and the right to publish news and commentary in the media. The Council acknowledges that a balance must be maintained between the right to publish and the right to a person’s reputation. The Council expresses its concern that the media’s confidence in publishing robust commentary is being limited by fear of unreasonable threats of defamation action and the anticipation of disproportionate awards when plaintiffs are successful in defamation actions.

5. Whether the Act’s provisions are adequate and appropriate in the context of defamatory digital or online communications

The Press Council has a particular concern regarding the hosting of comments from members of the public in online publications of Press Council members. Most online comments appear prior to consideration by editorial intervention. If alerted to an issue member publications address the issue and accept responsibility at this point. The facility to comment contributes to freedom of expression and encourages public debate. It would assist publishers if the amended Act recognised that responsibility for opinion hosted online starts at the point moderation occurs rather than earlier. If this suggestion is incorporated into the amended Act it might allow the Office of the Press Ombudsman with the agreement of the press industry to establish a means of consideration of complaints about comments hosted by member publications. Currently the Office of the Press Ombudsman is unable to accept complaints about online comments hosted by member publications.

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

A frequent outcome of complaints to the Office of the Press Ombudsman is the publication of a correction, clarification or apology. On some occasions when a complainant does not take up such an offer and the Press Ombudsman has to make

a decision on the complaint, the Press Ombudsman can, in his decision, determine that the publication offered to take action which was sufficient to resolve the complaint. The Press Council would welcome formal recognition in the amended Act of adherence to such action on the part of publications. If a plaintiff were to persist in proceeding with a defamation action where the publisher had already published a correction, clarification or apology, or had offered to take sufficient action to address the complaint to the satisfaction of the Press Ombudsman, account should be taken of this in determining the outcome of the court action.

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

In the last 7 years since the implementation of the Defamation Act 2009 the number of online-only publications has grown considerably. If the Press Council is to remain relevant and to fulfil its remit it is important that it recruits as member publications of the Press Council new online-only publications. The Press Council is concerned that the Defamation Act should reflect such changes in the media landscape by unambiguously recognising the rights of online-only publications to join the Press Council and, in so doing, offering them such protections as are provided by the Act to media outlets in defending defamation suits. This recognition would also serve the public as it would allow any grievances about something published in online-only publications to be addressed if the online-only publisher is a member of the Press Council of Ireland.

Section 44 (4) of the Defamation Act 2009 provides 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.

Part 1, section 2 of the Act defines “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 of published on the internet or by other electronic means

...

It is unclear if the definition of “periodical” in the Act includes in its scope online-only news publications (some of which are currently members of the Press Council) or the online news sites of print newspapers. The definition should be amended to address any possible anomaly in what type of publications can be members of the Press Council.

It is the view of the Press Council that in its nine years of operation the complaints handling process of the Office of the Press Ombudsman has provided many opportunities for members of the public to have their grievances addressed in a free, speedy and fair manner. This has provided access to justice to many people who could not or would not contemplate initiating defamation actions. It has also saved publishers

the very considerable legal costs which they would have incurred in defending defamation actions if complainants to the Office of the Press Ombudsman had not had their grievances addressed. It is manifestly in the public interest for there to be access to justice which is not dependant on the ability to contemplate potentially large legal costs and lengthy delays in protecting reputations. The Press Council believes section 44 of the Act has served well both the public and publishers and hopes that any amendment to the Act contributes to efficient functioning of the Press Council. As an increasing amount of journalism migrates from print and broadcasting to online it is important that the relevance of the Press Council be protected and enhanced. The particular challenges presented by the multinational and worldwide nature of much online publication is widely recognised and needs to be addressed though multinational action, for example though bilateral agreements between countries and through European Union, Council of Europe and international courts. It is acknowledged that this requirement is largely outside of the scope of this review of the Defamation Act.