



Irish Council for
Civil Liberties

An Chomhairle um
Chearta Daonna

**Submission to the
Department of Justice and Equality
on review of
the Defamation Act 2009**

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Written by:
Doireann Ansbro, Senior Research and Policy Officer



Submission on Defamation Act 2009

The Irish Council for Civil Liberties, (ICCL) welcomes the opportunity to make a submission to the Department of Justice and Equality on the review of the Defamation Act 2009.

ICCL attaches fundamental importance to the promotion and protection of the right to freedom of expression and information. These rights are protected in Ireland under the Irish Constitution in article 40.6.1.i (freedom of expression) and article 40.3.1 (right to communicate); article 10 of the European Convention on Human Rights, (ECHR); article 11 of the EU Charter on Fundamental Rights and Freedom and article 19 of the UN International Covenant on Civil and Political Rights¹ (ICCPR).

From our establishment in 1976, ICCL has consistently campaigned for Irish law to respect and protect the right to freedom of expression, including campaigns to repeal censorship of political speech, in defence of artistic expression and to remove the criminalisation of blasphemy. We welcome the Department of Justice and Equality's stated intention to remove the section on blasphemy within the Defamation Act 2009, in line with the outcome of the 2018 referendum on this issue.

The Irish State has a clear duty to create an enabling environment for free expression. The freedom to freely exchange ideas, views and experiences without fear of disproportionate legal responses is fundamental for a flourishing democracy, the protection of human dignity and full participation in public life.

Legal actions for defamatory statements interfere with the right to freedom of expression. Under the Irish constitutional right to a good name and within the framework of the ECHR, this interference can be justified where the interference is proportionate. This means it must meet the tripartite test of being provided for by law, meeting a legitimate aim and responding proportionately to a pressing social need. Proving that it is necessary means proving that any interference with the right to freedom of expression must be as limited as possible to achieve the legitimate aim.

The first two elements are clearly met in this case. The Defamation Act 2009 provides for the interference in law and the legitimate aim is protecting the good name or reputation of others. This aim is provided for as a separate right by the Irish Constitution in article 40.3.2 and within article 10 of ECHR and article 19 of ICCPR as a legitimate aim for interfering with freedom of expression.

The key here is to ensure that the interference is strictly necessary and as limited as possible. ICCL believes that legal actions provided for under the Defamation Act 2009, (the Act) do not represent a proportionate interference with the right to freedom of expression because it does not provide for the most limited form of interference possible to achieve its aim. The Act has a number of flaws that ICCL believes together constitute a disproportionate impact on the right to freedom of expression and have a chilling effect on expression, public debate and the right to participate in public life.

The flaws in the Defamation Act that together pose a threat to the right to freedom of expression and the right to receive and impart information and ideas are summarised as follows and explored in more detail below.

- I. **Legal Aid Exclusion**-The exclusion of defamatory legal actions from the civil legal aid scheme is a disincentive to defend defamatory actions. A person is more likely to withdraw a statement than defend it, creating a chilling effect on speech.
- II. **Defences** - The defences of honest opinion and fair and reasonable comment in the public interest are too limited and, therefore, have an overly restrictive impact on freedom of expression.
- III. **Burden of Proof** - The burden of proof on the defendant to prove an alleged defamatory statement is true should be shifted to the plaintiff to prove the statement is false.
- IV. **Damages** - The uncertainty and unpredictability around the amount of damages that can be awarded is a disincentive to defend defamatory actions and permit disproportionate awards.

These issues together provide a disincentive to bring or, particularly, to defend a claim. This can create a chilling effect on speech by preventing media, citizen journalists and others from expressing their views, disseminating ideas, and calling out statements that might constitute hate speech. People must have the right to categorise racist or hateful speech as such and not risk being threatened with defamatory actions

¹ Ratified by Ireland in 1989



they either don't have the resources to defend or because a proper public interest defence is not available to them.

Disproportionate interferences represent a violation of the right to freedom of expression, which the Irish state is obliged to remedy. ICCL therefore urges the government to ensure that reform of the Act prioritises the promotion and protection of freedom of expression. Limits to this right provided for in statute must be proportionate. In particular, they must be as minimal as possible to allow for the proper balance between the protection of an individual's good name or reputation while allowing public debate to flourish.

I. Legal Aid

Irish law currently excludes defamation actions from legal aid. S.28 of the Civil Legal Aid Act 1995 assigns 'defamation' as a "designated matter" that is excluded from legal aid with a limited exception in 28(9)(b). The exclusion of defamatory legal actions from the civil legal aid scheme is a disincentive to defend defamatory actions. A person is more likely to withdraw a statement rather than defend it without proper legal representation, creating a chilling effect on speech.

When it comes to an individual defending his right to freedom of expression against a claim of defamation, there may be a significant imbalance of power if the person alleging the defamation has deep pockets. The same can be said of wealthy individuals who threaten others with actions for defamation. Without legal aid, action or defence under the Defamation Act is safe only for those who can financially afford to risk legal costs. This threatens the constitutional right of everyone to equality before the law.

It is also contrary to article 6 of the ECHR, which provides that everyone is entitled to "a fair and public hearing" in the "determination of his civil rights and obligations". The European Court of Human Rights held in *Steel and Morris v UK*² that the lack of legal aid in a defamatory case can constitute a breach of article 6 where there is significant 'inequality of arms', meaning where the other side has significantly deeper pockets to bring or defend a claim. To ensure proper compliance with the ECHR, ICCL urges the removal of 'defamatory actions' as an 'designated matter' excluded under the Civil Legal Aid Act.

II. Defences of Honest Opinion and Fair and Reasonable Comment in the public interest³

The defences available to an individual accused of defamation of 'fair and reasonable comment in the public interest' and 'honest opinion' are too limited and provide a second obstacle to defending claims. The withdrawal of important statements, ideas and analysis from the public domain has a significant impact on freedom of expression. ICCL is aware of at least one occasion where a person publicly defined a particular approach to an issue as racist framing. When the person who had authored the approach threatened him with a defamatory action, he withdrew the analysis from the public domain because he was not confident that the defences available to him were strong enough to ensure he would win his case. As such, the law as it stands may have a chilling effect on an individual's ability to call out racism and hate speech.

Honest Opinion on a Matter of Public Interest

S.20 of the Act provides for a defence of honest opinion but requires a defendant to prove that he believed in the "truth of the opinion"⁴. The Irish Constitution and the ECHR protect the right of individuals to hold and express an opinion, as part of the right to freedom of expression. The European Court of Human Rights has stated that a distinction needs to be made between "facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof" ... "as regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention".⁵

The Irish courts have addressed the scope of such a defence to some extent. For example, in *Hunter v Duckworth*⁶, O Caoimh J stated that the defence of fair comment (a common law defence preceding the Act

² Application no. 68416/01, [2005] ECHR 103 (15 February 2005).

³ For a full analysis of the constitutionality or otherwise of the defences within the Defamation Act 2009, see Eoin O'Dell "The Defamation Act, 2009: The Constitution Dimension", presented at Trinity College Dublin, 2009.

⁴ S.20(2)(a).

⁵ *Lingens v Austria* Application no 9815/82, (1986) 8 EHRR 103, [1986] ECHR 7 (8 July 1986) [46].

⁶ [2003] IEHC 81 (31 July 2003).



but the same in essence as honest opinion) should be “construed liberally to afford a proportionate right to freedom of expression of opinion, even when such expressions may give offence”.

While a belief in the underlying facts relating to the opinion may need to be proven, the truth of an opinion itself can't be proven and therefore should not be required. This defence does not appear to conform to article 10 ECHR and should be amended to remove the requirement that the defendant prove the ‘truth’ of the opinion.

Fair and Reasonable Comment in the Public Interest

The defence provided for in s.26 of the Act: “Fair and reasonable comment in the public interest” is overly complex, lacks clarity and provides too high a threshold for a defendant to meet. It also may not meet the standard required by article 10 of the ECHR.

Potential defences to defamatory actions that would comply with article 10 of the ECHR were explored by English and Irish Courts prior to the Defamation Act coming into force. A clear test was laid down in the English case of *Reynolds v Times Newspapers*, now known as the ‘Reynolds defence’, which was ‘defence of publication in the public interest’. In *Hunter v Duckworth*,⁷ the Irish High Court regarded *Reynolds* as a persuasive authority and concluded that article 10 of the ECHR had informed the development of this defence, implying that publication in the public interest is a defence that is compatible with, if not required by the ECHR. If so this defence should not have been abolished by statute, which 15(1) of the Act sets out to do.⁸

By comparison, the equivalent English Defamation Act does abolish the ‘Reynolds Defence’ but arguably it can do so because s.4(1) of that Act provides for an equivalent defence. It therefore, more clearly meets the requirements of article 10, ECHR. S.4(1) provides that:

- (1) It is a defence to an action for defamation for the defendant to show that -
 - (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
 - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

ICCL recommends that the public interest defence in Irish law is simplified along the lines of s.4 of the English Defamation Act 2013. This would mean providing for the defence of publication on a matter of public interest without having to prove that publication was “fair and reasonable in all of the circumstances”⁹.

III. Burden of Proof

Normally in civil cases, it is for the plaintiff to prove his claim. In cases alleging defamation in Ireland, the burden of proof shifts to the defendant to prove that his statement was true. The plaintiff merely has to prove that a defamatory statement of fact has been published referring to him and there is an automatic presumption that this statement is false. The defendant can defend his statement by proving that the statement was true.¹⁰ Significantly, the Law Reform Commission had previously recommended the removal of the presumption of falsity from Irish law.¹¹ This presumption was removed from the applicable law in the United States in 1986.¹² The European Court of Human Rights has found that the presumption of falsity can infringe on the right to freedom of expression, in particular where a statement is made in order to contribute to public debate and where there is already significant imbalance in the equality of arms.¹³

ICCL believes the burden of proof, which is currently on the defendant to prove the alleged defamatory statement is true, should be shifted to the plaintiff to prove the statement is false.

⁷ [2003] IEHC 81 (31 July 2003)

⁸ See further O'Dell “The Defamation Act, 2009: The Constitution Dimension”, presented at Trinity College Dublin, 2009.

⁹ S.26(1)c

¹⁰ s.16(1) of Defamation Act 2009.

¹¹ Law Reform Commission, Report on the Civil Law of Defamation (Dublin 1991), 55-58, [7.28]-[7.36].

¹² *Philadelphia Newspapers v Hepps*, 475 US 767 (1986).

¹³ *Steel and Morris v UK*, Application no. 68416/01, [2005] ECHR 103 (15 February 2005). See also *Wall Street Journal Europe v United Kingdom*, Application no 28577/05 [2009] ECHR 471 (10 February 2009).



IV. Damages

The uncertainty and unpredictability around the amount of damages that can be awarded in a defamation case is a clear disincentive to defend defamatory actions and permits disproportionate awards. ICCL recommends that better guidance is given on appropriate damages which would take into account the factors of fairness and proportionality. We also agree with the many commentators who have suggested that jury decisions should be restricted to a decision on whether a defamation has taken place rather than what precise damages should be awarded.

ICCL supports the submission by the Press Ombudsman which suggests that solicitors should be obliged to inform their clients of the services of the Press Ombudsman and Press Council in resolving disputes. We also support the suggestion that an amendment to S.26 of the Act could be made to include a provision whereby courts would be required to take into account whether the plaintiff had availed of the services of the Press Ombudsman and Press Council when determining damages.

Finally, ICCL supports the submission to this consultation by Tarlach McGonagal, in particular his recommendation to remove corporate bodies from the Defamation Act. Defamation is an injury to a person's right to dignity and respect and should therefore be restricted to natural persons. The risks to equality of arms, already inherent in defamation actions in the absence of legal aid and as a result of the presumption of falsity, are significantly heightened when it comes to corporate plaintiffs or defendants.

ICCL Key Recommendations on Reform of the Defamation Act 2009:

1. Remove defamation from the list of 'designated matters' exempted from legal aid in the Civil Legal Aid Act 1995.
2. Clarify and simplify the available defences to defamation. Create a defence of 'in the public interest' without the additional threshold of 'fair and reasonable in all of the circumstances'.
3. Shift the burden of proof to the plaintiff, in line with other civil actions.
4. Issue clearer guidance on damages to ensure awards are reduced, including by removing this decision from the remit of juries.
5. Remove corporate bodies from the Defamation Act.

Irish Council for Civil Liberties 2020

Unit 11, First Floor, 34 Usher's Quay, The Liberties,
Dublin 8, Ireland D08 CV6X

 +353-1-9121640

 info@iccl.ie

 www.iccl.ie



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