



Memorandum

on the

Defamation Bill 2006 and the Privacy Bill
2006 of the Republic of Ireland

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**Commissioned by the Representative on Freedom of the Media of the
Organisation for Security and Cooperation in Europe**



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SUMMARY OF RECOMMENDATIONS

RECOMMENDATIONS ON THE DEFAMATION BILL

Recommendations on the Statutory Press Council:

Press Councils are complicated and controversial bodies whose influence touches on all aspects of media regulation and which have wide reaching consequences for the right to freedom of expression. We recommend that the Defamation Bill be amended to reflect the impossibility of effectively legislating for a Press Council:

- The statutory provision for the Press Council and Press Ombudsman should be removed from the Defamation Bill.
- If the statutory Press Council is not abolished, there must be clear provisions ensuring its administrative and operational independence. These should include the protection of the security of tenure of both the directors of the statutory Press Council and the Press Ombudsman.

Recommendations on Criminalisation of Defamation:

Criminal sanctions are inappropriate for defamation cases. While this Defamation Bill decriminalises almost all forms of defamation, it creates the offence of “publication of gravely harmful statements.” This runs counter to international legal standards which mandate that criminal sanctions must not be imposed for defamation.

- We urge that a criminal offence of “publication of gravely harmful statements” is not created and that it is incorporated into the tort of defamation.
- There must be absolutely no provision for summary conviction of “minor” crimes of “publication of gravely harmful statements” as currently exists under Section 35(5). There must be no circumstance in which an individual may be summarily convicted of a defamation related criminal offence and be imprisoned based on this conviction.

Recommendations on Defences to Defamation:

Defences are an essential part of any protection of reputation and provide important protections for the right to freedom of expression. The defences contained in the Defamation Bill do not adequately limit the restrictions on the right to freedom of expression and should be amended to reflect the following:

- There should be an absolute defence of truth and the plaintiff should bear the burden of proving falsity.
- Statements of opinion and value judgements should be absolutely protected. The defence of “honest opinion” should be amended to respect this by removing any qualifications on the defence. The defence should reflect the impossibility of assigning truth or falsity to opinions and the irrelevance of whether such opinions are based on facts.
- The defence of “fair and reasonable publication” should be amended so that it is no longer conditional upon a lack of “spite, ill will or other improper motive.”

- The defence of qualified privilege should be amended so that the threshold reflects the common law standard of ‘malice’ rather than a lower standard of ‘spite, ill will or other improper motive’.
- The defence of “innocent publication” should be clarified to absolve Internet Service Providers (ISPs) of all responsibility for what is posted on internet websites that they merely host.

Additional Recommendations to the Defamation Bill:

There are several other sections that, for various reasons, insufficiently restrain government restrictions on the right to freedom of expression:

- There should be no provision for awarding additional aggravated and punitive damages for the manner in which a defendant conducts his or her defence. Such matters should be dealt with by standard court procedures.
- The torts of slander of goods, slander of title, and malicious falsehood should either be incorporated into the tort of defamation or provided for in separate legislation.

RECOMMENDATIONS ON THE PRIVACY BILL

Recommendation on the definition of privacy:

The Privacy Bill requires a clear, workable description of what is meant by the right of privacy. Presently, the drafting only indicates what the limitations are on this right.

- Section 3(1) should be amended to also include the definition of the right to privacy contained in Article 8(1) of the ECHR.

Recommendations on the defences available to the media:

The availability of clear defences with an appropriate scope to protect the freedom of the press is absolutely critical in balancing the right of privacy with the right of freedom of expression. Our recommendations for amending the defences ensure that the correct thresholds are established and only legitimate obligations are placed on the media.

- The requirement of ‘good faith’ in section 5(1)(e)(i) should be deleted.
- The requirement of ‘public importance’ in sections 5(1)(e)(ii) and 6(1)(a) should be replaced by a requirement of ‘public interest’
- The requirement of ‘for the public benefit’ in sections 5(1)(e)(ii) and 6(1)(a) should be deleted.

Recommendations on matters to which the court shall have regard:

This section requires significant clarification and amendment. We consider that a number of illegitimate restrictions are imposed on the media under this Part of the Privacy Bill and we have made recommendations for amendment accordingly.

- Sections 4(3)(a), 4(3)(c) and 4(4) should be deleted.
- “...to his or her friends” should be deleted from section 4(3)(b).

Recommendations on miscellaneous matters in the Privacy Bill:

Our remaining concern lies with section 13, which provides for when hearings can occur other than in public. We consider section 13(1) significantly, and substantially, expands the established bounds of when an action can be heard other than in public. Any departure from the system of open justice must be carefully reasoned through and be wholly justified in terms of its restriction of freedom of expression - closed hearings seriously undermine the right of access to information and the role of the media as the eyes and the ears of the public.

- Section 13(1) should be redrafted to limit the availability of an *in camera* court order or limitations on restrictions on court reporting to a very limited range circumstances – such as where the individual will suffer inordinately from the fact of the trial taking place being reported; or where the disclosure of specific information which is the subject of the trial is under dispute.

1 INTRODUCTION

ARTICLE 19 welcomes the Irish draft Defamation and Privacy Bills and the clear attempt to bring national laws into conformity with international standards, and particularly with the jurisprudence of the European Court of Human Rights. We are particularly pleased to see that the Defamation Bill contains many provisions providing protection for freedom of expression while maintaining respect for the rights and reputation of individuals. The same is true of the Privacy Bill, which attempts to balance rights, particularly through the defences available to the media. The following analysis of the Defamation Bill is based on a published copy of the Defamation Bill available through the Department of Justice, Equality and Law Reform.¹ Our analysis of the Privacy Bill² is based on the Privacy Bill and the Report of the Working Group on Privacy, established by the Irish government in July 2005, whose report was published on 31 March 2006.³

This Memorandum analyses the Defamation and Privacy Bills in the context of international standards governing the right of freedom of expression. ARTICLE 19 supports the Irish government's efforts to draft progressive legislation which, amongst other things, rejuvenates defences to defamation and for violations of privacy in a manner which protects and promotes freedom of expression in Ireland.

In respect of the Defamation Bill, ARTICLE 19 remains concerned over a number of provisions that detract from the positive changes contained in the Bill. With regard to defences to defamation, our concerns focus on the burden of proof for a defendant and on the associated presumption of the falsity of a defamatory statement. We also reiterate earlier comments made in our 2004 *Submission on the Report of the Legal Advisory Group on Defamation*, and, in particular, our recommendation that all forms of criminal punishment for defamatory statements be removed from the Bill.⁴ We strongly urge that the summary conviction for "minor" incidents of "publication of gravely harmful statements" also be removed. International standards for freedom of expression increasingly recognised that even the most egregious defamatory actions should be dealt with under civil rather than criminal laws.

We also wish to make particularly clear our opposition to the statutory provision for a Press Council. State practice around the world has demonstrated that such bodies are controversial at best, and are often unreasonably restrictive of the right to freedom of expression.

In respect of the Privacy Bill, we consider this to be a progressive statutory regime which brings clarity to the notoriously difficult realm of breaches of privacy. Our main concerns lie in the deficiencies in the definition of privacy and the digressions from the recommendations of the report of the Working Group. The statutory scheme would greatly benefit from a clear, descriptive definition of privacy, rather than a definition which outlines the limitations to the right. We are particularly concerned by the decision to impose obligations on the media which transcend the Working Group's recommendations, as well as international standards. This is critically important in striking the right balance between the rights of privacy and freedom of expression.

¹ [http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6REJAY-en/\\$File/DefamationBill06.pdf](http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6REJAY-en/$File/DefamationBill06.pdf).

² [http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6REJL6-en/\\$File/PrivacyBill06.pdf](http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6REJL6-en/$File/PrivacyBill06.pdf).

³ [http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6REJMU-en/\\$File/WkgGrpPrivacy.pdf](http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6REJMU-en/$File/WkgGrpPrivacy.pdf).

⁴ Available at: <http://www.article19.org/pdfs/analysis/ireland-report-to-lag-on-def.pdf>.

Section 2 of this Memorandum summarises the body of international law and practice on freedom of expression upon which our analysis is based. Section 3 of the Memorandum analyses the Defamation Bill in the context of international law and practice, and specifically draws upon one of our standard-setting publications, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (Defining Defamation).⁵ Defining Defamation encompasses international law, evolving State practice (as reflected, *inter alia*, in national laws and judgments of national courts), and the general principles of law recognised by the community of nations. Since their formulation, the Principles have been widely endorsed, notably by the three specialised mandates on freedom of expression, the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression.⁶

Section 4 of this Memorandum analyses the Privacy Bill in light of international law and practice governing freedom of expression, and makes specific reference to the recommendations of the Report of the Working Group on Privacy, established by the government of Ireland in July 2005.

2 INTERNATIONAL STANDARDS

2.1 The Importance of Freedom of Expression

Freedom of expression is a human right of fundamental importance, in particular because of its critical role in underpinning democracy and the realisation of all other human rights. It is protected in all major global and regional human rights instruments, including the *International Covenant on Civil and Political Rights* (ICCPR)⁷ and the *European Convention on Human Rights* (ECHR),⁸ both of which have been ratified by Ireland.⁹ Article 10 of the ECHR states, in part:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The European Court of Human Rights (ECtHR) has often stressed the fundamental status of freedom of expression. In one of its first cases, it stated:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.¹⁰

⁵ ARTICLE 19 (London: 2000).

⁶ Joint Declaration of 30 November 2000. Available at:

<http://www.unhchr.ch/huricane/hurricane.nsf/view01/EF58839B169CC09C12569AB002D02C0?opendocument>

⁷ UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

⁸ Adopted 4 November 1950, in force 3 September 1953.

⁹ Ireland ratified the ICCPR on 8 December 1989 and the ECHR on 25 February 1952.

¹⁰ *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

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It has repeated this and similar statements in many cases since then. The ECtHR has also made it clear that the right to freedom of expression protects offensive and insulting speech. It has become a fundamental tenet of its jurisprudence that the right to freedom of expression,

... is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’¹¹

The guarantee of freedom of expression applies with particular force to the media. The ECtHR has consistently emphasised the “pre-eminent role of the press in a State governed by the rule of law”¹² and stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.¹³

In nearly every case before it concerning the media, the ECtHR has stressed the “essential role [of the press] in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”¹⁴ In the context of defamation cases, the ECtHR has emphasised that the duty of the press goes beyond mere reporting of facts; its duty is to interpret facts and events in order to inform the public and contribute to the discussion of matters of public importance.¹⁵

The Court has similarly emphasised: “Journalistic freedom ... covers possible recourse to a degree of exaggeration, or even provocation.”¹⁶ This means, for example, that the media are free to use hyperbole, satire or colourful imagery to convey a particular message.¹⁷ The choice as to the form of expression is up to the media. The context within which statements are made is relevant as well. In the second *Oberschlick* case, the ECtHR considered that calling a politician an idiot was a legitimate response to earlier, provocative statements by that same politician.¹⁸ Similarly, in the *Lingens* case, the ECtHR stressed that the circumstances in which the impugned statements had been made “must not be overlooked.”¹⁹

The ECtHR attaches particular value to political debate and debate on other matters of public importance. It recognises that robust debate is part and parcel of democracy and that statements made in the conduct of such debate can be restricted only when this is truly necessary: “There is little scope ... for restrictions on political speech or debates on questions

¹¹ *Ibid.* Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

¹² *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

¹³ *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

¹⁴ See, for example, *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 40.

¹⁵ *The Sunday Times v. The United Kingdom*, 26 April 1979, Application No. 6538/74, para. 65.

¹⁶ *Dichand and others v. Austria*, note 14, para. 39.

¹⁷ See *Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, paras 50-54.

¹⁸ *Oberschlick v. Austria (No. 2)*, 1 July 1997, Application No. 20834/92.

¹⁹ *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 43.

of public interest.”²⁰ The ECtHR has also clarified that this enhanced protection applies even where the person who is attacked is not a ‘public figure;’ it is sufficient if the statement is made on a matter of public interest.²¹

2.2 Restrictions on Freedom of Expression

The right to freedom of expression is among those human rights that, under certain limited conditions, may be restricted. However, any limitations must remain within strictly defined parameters in order to preserve the essence of the right. Article 10(2) of the ECHR outlines the narrowly prescribed circumstances under which freedom of expression may, be limited:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, *for the protection of the reputation or rights of others*, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary.²²

This translates into a three part test: restrictions must be (1) prescribed by law; (2) pursue a legitimate aim; and (3) be “necessary in a democratic society” to achieve that aim.²³

Each part of the test has specific legal meaning. The first requirement means that the restriction must not only be based in law, but also that the relevant law meets certain standards of clarity and accessibility. The ECtHR has elaborated on this requirement:

[A] norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.²⁴

This is akin to the “void for vagueness” doctrine established by the U.S. Supreme Court and which is also found in constitutional doctrine in other countries.²⁵ The U.S. Supreme Court has explained why loosely worded or vague laws may not be used to restrict freedom of expression:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute “abut[s] upon sensitive areas of basic First Amendment freedoms,”

²⁰ See, for example, *Dichand and others v. Austria*, note 14, para. 38.

²¹ See, for example, *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93.

²² ECHR, Article 10(2) (emphasis added).

²³ The ICCPR requires a similar test for restrictions on freedom of expression.

²⁴ *The Sunday Times v. United Kingdom*, note 15, para. 49.

²⁵ Canadian courts have, for example, held this to be the case under the Canadian Charter of Rights and Freedoms. See *Re Ontario Film & Video Appreciation Society v. Ontario Board of Censors*, (1983) 41 OR (2d) 583 (Ont. HC), p. 592.

it “operates to inhibit the exercise of [those] freedoms.” Uncertain meanings inevitably lead citizens to “steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” (references omitted)²⁶

The second requirement relates to the legitimate aims listed in Article 10(2). To satisfy this part of the test, a restriction must truly pursue one of the legitimate aims; it is not acceptable to invoke a legitimate aim as an excuse to pursue a political or other unlisted agenda.²⁷

The third requirement, that any restrictions must be “necessary”, is often essential to the assessment of alleged violations of the right to freedom of expression. The word “necessary” means that there must be a “pressing social need” for the restriction.²⁸ The reasons given by the State to justify the limitation must be “relevant and sufficient,” the State should use the least restrictive means available, and the limitation must be proportionate to the legitimate aim pursued.²⁹ The ECtHR has warned that one of the implications of this is that States should not use criminal sanctions to restrict freedom of expression unless this is truly necessary. In *Sener v. Turkey*, the ECtHR stated that this principle applies even in situations involving armed conflict:

[T]he dominant position which a government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries ... Contracting States cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.³⁰

2.2.1 Protection of Reputation as a Restriction on Freedom of Expression

It is well-established that defamation actions constitute a restriction on the right to freedom of expression.³¹ That means that the law governing these actions must strike the right balance between protecting reputations and encouraging free expression and legitimate criticism; it must not restrict freedom of expression further than is “necessary in a democratic society”. The protection of reputation has always been, and continues to be, a highly valued social commodity, as well as an essential aspect of individual dignity. But it must not be prized at a value which unfairly sacrifices the right of freedom of expression. Striking the right balance between reputation and free expression is absolutely critical in any modern democracy. In the 20 years since the ECtHR delivered its first judgment in a defamation case,³² it has built up a rich body of case-law on this crucial topic and a number of general principles can be discerned.

Public figures must tolerate greater criticism than ordinary people

The ECtHR has been very clear on the matter of public figures and defamation: they are required to tolerate more, not less, criticism, in part because of the public interest in open debate about public figures and institutions. In its very first defamation case, the Court emphasised:

²⁶ *Grayned v. City of Rockford*, 408 U.S. 104, pp. 108-9.

²⁷ See Article 18 of the ECHR. See also *Benjamin and Others v. Minister of Information and Broadcasting*, 14 February 2(1), Privy Council Appeal No. 2 of 1999, (Judicial Committee of the Privy Council).

²⁸ See, for example, *Lingens v. Austria*, note 19, paras. 39-40.

²⁹ *Ibid.*

³⁰ *Sener v. Turkey*, 18 July 2000, Application No. 26680/95, paras. 40, 42.

³¹ See, for example, *McVicar v. the United Kingdom*, 7 May 2002, Application No. 46311/99.

³² The Court gave its seminal *Lingens* judgment in 1986 (see note 19).

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The limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.³³

The ECtHR has affirmed this principle in several cases and it has become a fundamental tenet of its case law.³⁴ The principle is not limited to criticism of politicians acting in their public capacity. Matters relating to the private or business interests of politicians can equally be covered. For example, the “fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises.”³⁵

The principle applies to public officials and to public servants as well as to politicians. In the case of *Thoma v. Luxembourg*, the Court stated:

Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals.³⁶

The principle even applies to large public companies and their management. In *Steel and Morris v. the United Kingdom*, a defamation case concerning the McDonalds fast-food corporation, the ECtHR confirmed that “large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies.”³⁷

Statements of fact must be distinguished from statements of opinion

The ECtHR has made it clear that defamation law needs to distinguish between statements of fact and value judgments. This is because the existence of facts can be demonstrated, whereas the truth of a value judgment is not susceptible of proof. In a number of cases before the Court, domestic courts had wrongly treated allegedly defamatory publications as statements of fact and required the defendant to establish the truth of the statement. For example, in *Feldek v. Slovakia*, the Court held that the use by the applicant of the phrase “fascist past” should not be understood as stating the fact that a person had participated in activities propagating particular fascist ideals. It explained that the term was a wide one, capable of encompassing different notions as to its content and significance. One of them could be that a person participated as a member in a fascist organisation; on this basis, the value-judgment that that person had a 'fascist past' could fairly be made.³⁸

Defence of ‘reasonable publication’

In certain circumstances even false, defamatory statements of fact should be protected against liability. A rule of strict liability for all false statements is particularly unfair for the media, which are under a duty to satisfy the public’s right to know where matters of public concern are involved and often cannot wait until they are sure that every fact alleged is true before they

³³ *Lingens v. Austria*, note 19, para. 42.

³⁴ See, for example, *Lopes Gomez da Silva v. Portugal*, 28 September 2000, Application No. 37698/97, para. 30; *Wabl v. Austria*, 21 March 2000, Application No. 24773/94, para. 42; and *Oberschlick v. Austria*, 23 May 1991, Application No. 11662/85, para. 59.

³⁵ *Dichand and others v. Austria*, note 16, para. 51.

³⁶ *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97, para. 47.

³⁷ *Steel and Morris v. the United Kingdom*, Application No. 68416/01, 15 February 2005, para. 94.

³⁸ 12 July 2001, Application No. 29032/95.

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publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. The nature of the news media is such that stories have to be published when they are topical, particularly when they concern matters of public interest. In a case in which ARTICLE 19 intervened, the ECtHR held:

[N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.³⁹

A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably in publishing a statement on a matter of public concern, while allowing plaintiffs to sue those who have not, what might be termed the defence of reasonable publication. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test. The ECtHR has stated that the press should be allowed to publish stories that are in the public interest subject to the proviso that “they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.”⁴⁰ A number of factors need to be taken into account: the nature and degree of the defamation;⁴¹ the extent to which the newspaper could have reasonably regarded its sources as reliable with regard to the allegations;⁴² whether a reasonable amount of research was conducted prior to publication;⁴³ whether the story was presented in a reasonably balanced manner;⁴⁴ and whether the newspaper gave the person defamed the opportunity to defend themselves.⁴⁵ None of these factors are necessarily decisive on their own; in a case involving newspaper articles making allegations against seal hunters, a matter of intense public debate at the time, the journalists’ behaviour was deemed reasonable even though they did not seek the comments of the seal hunters to the allegations.⁴⁶

Burden of proof

The ECtHR has stated that, when journalists report on a matter of public concern, it will sometimes be unfair to require them to prove the truth of their statements.⁴⁷ This is particularly so when they use reliable sources and act in accordance with professional ethics. In the case of *Dalban v. Romania*, the Court stated: “It would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth.”⁴⁸ However, the Court has required that when they make serious allegations, journalists should make a real effort to verify their truth, in accordance with general professional standards.⁴⁹

Sanctions

³⁹ *The Sunday Times v. the United Kingdom (No. 2)*, 24 October 1991, Application No. 13166/87, para. 51.

⁴⁰ *Bladet Tromsø and Stensaas v. Norway*, note 21, para 65.

⁴¹ See *Bladet Tromsø and Stensaas v. Norway*, note 21, para. 66, and *McVicar v. the United Kingdom*, note 31, para. 84.

⁴² *Bladet Tromsø and Stensaas v. Norway*, note 21.

⁴³ *Prager and Oberschlick v. Austria*, 26 April 1995, application no. 15974/90, para. 37.

⁴⁴ *Bergens Tidende and Others v. Norway*, 2 May 2000, Application No. 26131/95, para. 57.

⁴⁵ *Bergens Tidende and Others v. Norway*, note 44, para. 58.

⁴⁶ *Ibid.*

⁴⁷ See, for example, *Colombani v. France*, 25 June 2002, Application No. 51279/99, para. 65.

⁴⁸ 28 September 1999, Application No. 28114/95, para. 49.

⁴⁹ *McVicar v. the United Kingdom*, note 31, paras. 84-86 and *Bladet Tromsø and Stensaas v. Norway*, note 21, para 66.

Unduly harsh sanctions, even for statements found to be defamatory, breach the guarantee of freedom of expression. The ECtHR has stated that “the award of damages and the injunction clearly constitute an interference with the exercise [of the] right to freedom of expression.”⁵⁰ Therefore, any sanction imposed for defamation must bear a “reasonable relationship of proportionality to the injury to reputation suffered” and this should be specified in national defamation laws.⁵¹ In *Steel and Morris v. the United Kingdom*, the ECtHR also expressed its strong disapproval of a national law that did not require the plaintiff in a defamation case to demonstrate actual financial loss, and it emphasised that awards in defamation cases must take the financial position of the defendant into account.⁵²

One aspect of this requirement is that less intrusive remedies, and in particular non-pecuniary remedies such as appropriate rules on the right to reply, should be prioritised over pecuniary remedies.⁵³ Another aspect is that any remedies already provided, for example on a voluntary or self-regulatory basis, should be taken into account in assessing court-awarded damages. To the extent that remedies already provided have mitigated the harm done, this should result in a corresponding lessening of any pecuniary damages.

2.2.2 Protecting Privacy as a Restriction on Freedom of Expression

As with any restriction on the right to freedom of expression, restrictions for the protection of privacy must be necessary and utilise the least restrictive means available. The restriction must balance the competing interests of personal privacy, on the one hand, and the right of the public to be informed about matters of concern and the freedom of the media to satisfy that concern, on the other hand. It is worth pointing out that almost all privacy claims before international courts are made against the press and other media, rather than against individuals asserting free expression rights.⁵⁴

The most recent, and leading, jurisprudence on the balancing of free expression and privacy is the ECtHR decision in *Von Hannover v. Germany*.⁵⁵ Princess Caroline of Monaco initiated the proceedings claiming that her privacy had been violated by the publication of numerous photographs of her by two popular magazines. The ECtHR held that the decisions of the national German courts, which had upheld the magazines’ right to publish the photographs, infringed the claimant’s right to privacy. This case establishes, amongst other things, that privacy protection is not confined to the disclosure of information, or publication of photographs, that is embarrassing to the claimant; the publication of any ‘private’ information may constitute an interference. Moreover, the Court’s decision indicates that a distinction is to be drawn between material that contributes to a matter of public interest, on the one hand, and gossip celebrity pictures on the other. The ECtHR stated:

[A] fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who ... does not exercise official functions. While in the former case the press exercises its vital role of “watchdog” in a democracy by contributing to “impart[ing]

⁵⁰ *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139/91, para. 35.

⁵¹ *Ibid.*, para. 49.

⁵² Note 37, para. 96.

⁵³ See, for example, *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application No. 13010/87 (European Commission of Human Rights).

⁵⁴ Barendt, *Freedom of Speech*, (Oxford University Press, London 2005), p. 244.

⁵⁵ 24 June 2004, Application No. 59320/00.

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information and ideas on matters of public interest”, it does not do so in the latter case. (reference omitted)⁵⁶

The ECtHR adopted a normative (rather than descriptive) approach to the public interest argument: in its view, the public’s right to be informed could only be properly invoked where the publication discloses material in which the public *ought* to take an interest. The Court held that there was no ‘public interest’ in the normative sense in the publication of photographs “the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant’s private life” – celebrity gossip, in other words.⁵⁷ On the other hand, “the public has a right to be informed, which is an essential right in a democratic society that, in certain special circumstances, can even extend to aspects of the private life of public figures, particularly where politicians are concerned.”⁵⁸

The *Von Hannover v. Germany* case confirms that distinct treatment may be justified in relation to celebrities as opposed to public officials and politicians. But status is only one consideration in the balancing of privacy and free expression, albeit an important one. The circumstances are another. Even for celebrities, a genuine public interest may outweigh their privacy interest. The crucial question is whether the story, or the reproduction of the photograph, is in the public interest. In balancing privacy and free expression, the press needs to show that the publication of the story is in the public interest and that it has behaved responsibly.

⁵⁶ *Ibid.*, para. 63.

⁵⁷ *Ibid.*, para. 65.

⁵⁸ *Ibid.*, para. 64.

3 ANALYSIS OF THE DEFAMATION BILL

3.1 Introduction

The primary purpose of the Defamation Bill is to modernise Irish defamation law by introducing new defences and by replacing the torts of slander and libel with the tort of defamation.⁵⁹ The law serves as an affirmative response to domestic and international criticism from NGOs as well as intergovernmental bodies including the UN Human Rights Committee and the UN Special Rapporteur on Freedom of Opinion and Expression.⁶⁰

It is encouraging that the Defamation Bill respects and incorporates many of the suggestions included in the abovementioned reports and largely conforms to international standards regarding freedom of expression. It is unfortunate, however, that some elements of the Defamation Bill do not reflect international standards or a full response to the abovementioned criticism.

This Section elaborates on our concerns with the Defamation Bill. It first discusses our concerns with attempts to introduce a statutory Press Council. It then addresses the introduction of the offence of “publication of gravely harmful statements” and urges that defamation be addressed exclusively through the civil law. We then detail our concerns regarding the Defamation Bill’s defences and their limitations. Although an attempt has clearly been made to ensure that the system of defences provided for in the Bill is robust, we recommend strengthening the defences by shifting the burden of proof regarding the falsity of statements to the plaintiff and by removing certain conditions related to motive and belief with regard to opinions. Finally, this Section addresses several other miscellaneous provisions which could potentially threaten the right to freedom of expression and which we therefore recommend be amended.

3.2 Statutory Press Council

It is proposed in section 43 that the Minister may formally recognise a Press Council which will, among other things, develop and apply a code of conduct for the media, including through an appointed Press Ombudsman. The minimum requirements which a statutory Press Council must meet are outlined in schedule 2 to the Defamation Bill. These requirements set out the council’s primary objectives (clause 2 of schedule 2), that it is independent in the performance of its functions (clause 3), the requirements for directors of the statutory Press Council (clauses 5 and 6), the funding of the council by a levy from the press who are members of the council (clause 7), the establishment of a Press Ombudsmen to hear and investigate complaints against its members (clauses 8 and 9), and the obligation to formulate a code of conduct for its member which addresses each of the issues outlined in clause 10 of schedule 2.

⁵⁹ Department of Justice, Equality, and Law Reform press release, “Government Approves Defamation Bill 2006”. Available at: <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6RDPV9-en>.

⁶⁰ While freedom of expression did not feature *expressis verbis* in the UN Human Rights Committee’s Concluding Observations on Ireland in 2000, nevertheless, in the course of the oral hearing on Ireland, two individual members of the Committee did raise the issue of Ireland’s defamation law and its effect on the exercise of the right to freedom of expression. See *Memo on the UN Human Rights Committee Session on Ireland*, Le Palais Wilson, Geneva, 13-14 July 2000, on file with ARTICLE 19. See also Mr. Abid Hussain, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Addendum, Report on the mission to Ireland”, 10 January 2000, E/CN.4/2000/63/Add.2, para. 84.

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The proposed Press Council appears to represent a hybrid model, whereby statutory backup is given to an existing body. Two comments are relevant in this regard. First, the precise implications of this are not clear from the legislation. For example, what effect would ministerial recognition have on the remedial measures proposed by the Ombudsman? Would they become mandatory? Second, the legislation is highly prescriptive as to the requirements for recognition, including to the point of specifying the number of members and which social sectors they must represent. In this respect, it is vastly different from other hybrid models, such as the Australian approach to broadcast regulation, which focuses more on whether or not the system is effective in protecting the public interest.

ARTICLE 19 emphasises that self-regulation is the preferable option to a statutory Press Council, in line with the requirement that media regulation should use the least restrictive means possible.⁶¹ If there is a less restrictive, accessible means of achieving the same legitimate aim, the more restrictive means employed necessarily fails the test guiding international standards on restrictions of freedom of expression.

Self-regulation is internationally acknowledged as the preferred means of print media regulation. The UN, OAS and OSCE special mandates on freedom of expression have warned of the risk of interference in the work of regulatory bodies and emphasised the crucial importance of their independence,⁶² and recent declarations on freedom of expression from intergovernmental bodies in other parts of the world have stated, explicitly: “Effective self-regulation is the best system for promoting high standards in the media”.⁶³

There is no reason why, in an established and well-functioning democracy, self-regulation should not be possible. Irish legal academic Marie McGonagle notes that France and Greece appear to be the only Western countries that have never considered introducing a self-regulatory Press Council.⁶⁴ McGonagle further argues that statutory regulation is not necessary as the print media are already subject to a host of laws and regulations:

...to adopt a statutory framework for the print media...would be a regressive step and would spell the death knell for the most prized freedom of the press. It would overlook the fact that the printed press, while not subject to a specific sectoral regime, is already subject to a host of statutory laws, including strict laws of defamation. The solution to the problem may lie in the clear preference for self-regulation evidenced in the new media and the trend towards elements of self-regulation and co-regulation in the broadcast media.⁶⁵

We share this concern and recommend that the proposal to establish a statutory press council be abandoned.

⁶¹ See Section 2.2 of this Memorandum.

⁶² 2003 Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression.

⁶³ *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and Peoples' Rights, Banjul, October 2002, Principle IX.

⁶⁴ M McGonagle, *Media Law* (Thomson Round Hall: Dublin 2003), footnote 87, p. 169. See also ARTICLE 19's joint publication with the International Federation of Journalists, *Freedom and Accountability: Safeguarding Free Expression Through Media Self-Regulation*, (London 2005); and ARTICLE 19, *Memorandum on Malaysia's Press Council Bill*, (London 2006), Available at: <http://www.article19.org/pdfs/analysis/malaysia.prs.06.pdf>.

⁶⁵ Note 64, p. 410.

Recommendation:

- Section 43, providing for ministerial recognition of a Press Council, should be removed from the Defamation Bill. If this section is retained, Schedule 2, setting out the requirements for the Press Council should be substantially revised to focus on the ability of the body to give effect to the public interest instead of specific instructions as to how to create it. Ambiguities about the impact of ministerial recognition should be removed.

3.3 Complete Decriminalisation of Defamation

We welcome the abolition of the common law offences of blasphemous, obscene and seditious libel in section 34 of the Defamation Bill. We note with serious concern, however, the creation of a new offence of “publication of gravely harmful statements” in section 35(1), which may be punished by up to five years’ imprisonment. We further find it very worrying that provision is made for the summary conviction of a person who publishes a “gravely harmful statement” if the District Court considers the facts to constitute a “minor offence” fit to be tried summarily (section 35(5)), which may lead to imprisonment of up to 12 months. Neither of these provisions is appropriate in light of international standards governing defamation law.

At the international level, the problems with criminal defamation laws are increasingly being exposed and criticised. The ECtHR has expressed its clear unease with criminal sanctions for defamation. For example, in the 2006 case of *Raichinov v. Bulgaria*, the ECtHR noted that criminal sanctions are appropriate only in certain grave cases, such as speech which incites to violence. But in ordinary cases, the State’s use of criminal sanctions, rather than civil or disciplinary measures, will be a serious consideration as to whether or not the provision will satisfy the proportionality test.⁶⁶ In its ruling, the ECtHR made express reference to earlier decisions expressing the same concern.⁶⁷

Similarly, the UN Human Rights Committee, the body responsible for overseeing the implementation of the ICCPR, has repeatedly expressed its concern about the use of custodial sanctions for defamation.⁶⁸ In addition, the three special mandates for promoting freedom of expression – the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – stated in 2002:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁶⁹

Section 35(1) does not restrict its application to statements which incite to violence; it concerns statements affecting reputation, albeit causing grave injury. The possibility of

⁶⁶ *Raichinov v. Bulgaria*, 20 April 2006, Application No. 47579/99, para. 50.

⁶⁷ *Lehideux and Isorni v. France*, 23 September 1998, Application No. 24662/1994; and *Cumpănă and Mazăre v. Romania* [GC], 17 December 2004, Application No. 33348/96.

⁶⁸ This concern has been expressed in the context of specific country reports. For example in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq and Slovakia (1997) Zimbabwe (1998), Cameroon, Mexico, Morocco and Romania (1999), Azerbaijan, Guatemala and Croatia (2001), and Serbia and Montenegro (2004).

⁶⁹ Joint Declaration of 10 December 2002. Available at: <http://www.cidh.oas.org/Relatoria/English/PressRel02/JointDeclaration.htm>.

imprisonment for five years for defamation is hugely problematical and any imposition of such a sentence would be most unlikely to survive ECtHR scrutiny. We strongly recommend that this provision be removed from the Defamation Bill.

Section 35(5) is similarly problematic. Indeed, it is contradictory to refer to a “minor” offence which is nevertheless “gravely harmful” to someone’s reputation. The possibility of receiving a year’s imprisonment for defamation under a summary procedure is also hugely problematical, although we do note that the consent of the accused is required.

Recommendation:

- The criminal offences provisions in section 35 of the Defamation Bill should be removed and defamation should be left to be dealt with as a purely civil law matter.

3.4 Defences

3.4.1 Defence of Truth

Section 14 provides for a defence of truth for a defamation action, and requires the defendant to establish the truth of the statement in all material respects.

We note that Irish law has retained the common law presumption of falsity, despite this presumption having been abolished in several other jurisdictions and the Irish Law Reform Commission (LRC) similarly calling for its abolition as part of its extensive review of the law of defamation in 1991.⁷⁰ The presumption of falsity is problematic for the protection and promotion of the right of freedom of expression.

The ECtHR, the U.S Supreme Court and the three Special Mandates on freedom of expression have all highlighted the problematic nature of a presumption of falsity. As noted by Professor Barendt, a pre-eminent British legal academic on free speech, it makes sense to refer to the approach in the United States, where the issues have been considered for forty years and where the law is now relatively well settled and its implications known.⁷¹ In the landmark U.S. Supreme Court case *New York Times v. Sullivan*, Brennan J (in the majority judgment) criticised the presumption of falsity for defamation claims:

Allowances of the defence of truth, with the burden of proving it on the defendant does not mean that only false speech will be deterred. Even courts accepting this defence as an adequate standard have recognised the difficulties of adducing legal proof that the alleged libel was true in all its factual particulars. ... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even thought it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which ‘steer far wider of the unlawful zone.’⁷²

⁷⁰ Irish Law Reform Commission, *Report on the Civil Law of Defamation* (LRC 38-1991), paras. 7.28 – 7.35.

⁷¹ Note 54, p. 206.

⁷² *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

In the United States, the presumption of falsity has been removed and public plaintiffs must now prove that the defendant knew or ought to have known that the matter was false, or was reckless as to whether or not it was true.⁷³

The ECtHR has also noted concerns with requiring defendants to prove truth where the publication relates to a matter of public concern, particularly where a journalist is reporting from reliable sources in accordance with professional standards.⁷⁴ In the case of *Dalban v. Romania*, the ECtHR stated: “[I]t would be unacceptable for a journalist to be debarred from expressing critical value judgements unless he or she could prove their truth.”⁷⁵

In a Joint Declaration issued at the end of 2000, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression strongly recommended that “the plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern”.⁷⁶

The Defamation Bill is a perfect opportunity to implement the recommendations of the Irish LRC to bring the law of defamation in Ireland in greater conformity with international standards governing the right of freedom of expression. At the very least, the presumption of falsity should be reversed for statements regarding public officials and generally in matters of public interest.

3.4.2 Fair and Reasonable Publication

In principle, we welcome the addition of a “fair and reasonable publication” defence to Ireland’s law of defamation through section 24 of the Defamation Bill. We recommend, however, that defence be amended to provide a more appropriate balance between freedom of expression and protection of reputation. The relevant parts of section 24 for our purposes are as follows:

Fair and reasonable publication on a matter of public importance.

24.—(1) Subject to subsection (4), it shall be a defence (to be known, and in this section referred to, as “the defence of fair and reasonable publication”) to a defamation action for the defendant to prove that the statement in respect of which the action was brought was published—

(a) in good faith, and

(b) in the course of, or for the purposes of, the discussion of a subject of public importance, the discussion of which was for the public benefit, and in all the circumstances of the case, it was fair and reasonable to publish the statement.

...

(4) The defence of fair and reasonable publication shall fail unless, in relation to the publication of the statement in respect of which the action was brought, the defendant proves that –

(a) at the time of publication he or she believed the statement to be true;

(b) he or she did not act in bad faith or out of spite, ill will or other improper motive,

(c) the statement bore a relation to the purpose of the defence, and

(d) the manner and extent of publication of the statement did not exceed that which was reasonably sufficient in all of the circumstances.

⁷³ *Ibid*; and *Gertz v. Robert Welch Inc.* 418 U.S. 323 (1974).

⁷⁴ See, for example, *Colombani v. France*, 25 June 2002, Application No. 51279/99, para 65.

⁷⁵ *Dalban v. Romania*, 28 September 1999, Application No. 28114/95, para. 49.

⁷⁶ 30 November 2000. Available at:

<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?opendocument>

(i) *Threshold requirements*

The essence of a reasonable publication defence is that defendants should not be held liable for statements they make, even if those statements ultimately prove to be false, where the circumstances otherwise justify publication. Although it is recognised in most jurisdictions that such a defence should be restricted to matters of public interest (understood normatively), the dual threshold of “public importance” and of being “for the public benefit” is unduly restrictive. The notion of public interest is well understood by courts, if difficult of comprehensive definition, and is therefore preferable to the idea of “public importance”. It has proven useful in balancing the legitimate right of the public to receive information and ideas in which they hold a normative “interest” against a variety of competing social interests.

(ii) *Criteria for a statement to qualify*

We are concerned that the conditions on the availability of the defence are, taken together, unreasonable. There are five or six such conditions, depending on how these are understood, some repeated:

1. The statement must be in ‘good faith’ and also not be made ‘in bad faith or out of spite, ill will or other improper motive’.
2. The statement must be ‘for the public benefit’.
3. It must be ‘fair and reasonable’ in all of the circumstances to publish the statement and the manner and extent of publication must not exceed what is ‘reasonably sufficient in all of the circumstances’.
4. The statement must be believed to be true.
5. The statement must bear a relationship to the purpose of the defence.

One cannot but help wonder at the breadth of these conditions. Indeed, the veritable barrage of criteria that attend this defence, along with the fact that some are quite obviously repeated, make one question the intentions behind it. Some are just illegitimate. Requiring the statement also to be “for the public benefit” is almost an invitation to courts to step inside the shoes of journalists and to second-guess the approach they have chosen to take, something which, as noted above, international courts have steadfastly refused to do.⁷⁷ It is particularly unnecessary, given the further requirement that it was ‘fair and reasonable’ to publish the statement.

Others appear to misunderstand the nature of the defence. For example, making the defence contingent upon the intent of the publication does not relate to the aims of the defence, which are to permit otherwise professional publication on matters of public interest. If someone publishes information that he or she has reason to believe is correct and which concerns a matter of public interest, it should not matter whether the initial publication was done out of spite. For instance, one can imagine a circumstance in which someone intends to expose corrupt or improper behaviour out of spite due to having being excluded from the benefits thereof. If done ‘reasonably’, this should be protected, even if the statements ultimately prove to be mistaken (or to contain mistakes).

In many countries, all that is required is that the publication was reasonable in all of the circumstances. This is the case, for example, in Australia.⁷⁸ In others, a good faith approach is

⁷⁷ See, for example, *Jersild v. Denmark*, September 1994, Application No. 15890/89 (European Court of Human Rights).

⁷⁸ See *Lange v. Australian Broadcasting Corporation*, (1997) 71 ALJR 818 (Australian High Court). See also

adopted instead.⁷⁹ Such a accumulation of conditions as is found in the Irish Defamation Bill, however, is unduly restrictive.

3.4.3 Qualified Privilege

The common law qualified privilege defence arises where the speaker has a duty (legal, moral or social) to publish the information and the recipient has a reciprocal duty or interest in receiving it.⁸⁰ It is ‘qualified’ because the privilege is lost if the publication is actuated by malice.

Our main concern with the Defamation Bill’s formulation of the defence of qualified privilege (section 16) is that it extends the grounds for the loss of the defence beyond the common law position of malice, and thus encroaches on the legitimate scope of the freedom of the press. In particular, it would apply only if the journalist acted with no bad faith, spite, ill will or improper motive. The general common law rule has provided an appropriate balance and there is no need to amend it by legislation.

3.4.4 Honest Opinion

The defence of honest opinion in the Defamation Bill attempts to outline an appropriate level of protection for the expression of fair comment through the media. The defence, however, fails to update this area of law and take advantage of the opportunity for comprehensive review to substantially amend the rules.

First, by continuing to require a clear evidentiary basis for opinions, the defence fails to make the fundamental distinction between fact and comment. It seeks to impose a requirement that every comment is directly referable to a clear factual basis upon which it is based. This is at odds with the development of international standards for free expression and is antithetical to the concept of comment that has been articulated in other jurisdictions and by international courts. This principle was succinctly articulated by the ECtHR in the *Lingens* case:

... a careful 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 [to prove truth] is impossible of fulfilment and it infringes freedom of opinion itself⁸¹

The purpose of comment is to contribute to the marketplace of ideas in a society, to stimulate debate and public discourse. This is a highly valuable social commodity and requires a significant degree of protection. By effectively merging these two categories, public debate and discourse will suffer significantly. The trend of ECtHR jurisprudence is to protect opinions even if the factual context is not particularly convincing or if the comment is particularly shocking. For example, in the case of *Dichand and others v. Austria*, the applicants had published an article alleging that a national politician who also practiced as a lawyer had proposed legislation in parliament in order to serve the needs of his private clients. The ECtHR protected the statement notwithstanding its weak evidentiary basis and serious implications for reputation:

National Media Ltd v. Bogoshi, 1998 (4) SA 1196 (Supreme Court of South Africa).

⁷⁹ For example, in France.

⁸⁰ Note 65, McGonagle, p 122.

⁸¹ Note 29, para. 46.

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It is true that the applications, on a slim factual basis, published harsh criticism in strong, polemical language. However, it must be remembered that the right to freedom of expression also protects information or ideas that offend, shock, or disturb.⁸²

Similarly, in a recent decision, the ECtHR explained that value judgements may be based on rumours or stories circulating among the general public; they need not be supported by hard, scientific facts.⁸³ It should also be noted that the ECtHR has frequently stated that “journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation”.⁸⁴

ARTICLE 19 recommends that all opinions be protected against defamation suit.⁸⁵ This is effectively the case in some jurisdictions,⁸⁶ and avoids a situation where the State stands in judgement of subjective views which individuals may hold.

In relation to the second point, namely the threshold of ‘public importance’ instead of ‘public interest’, we reiterate our comments in Section 3.4.2. Placing the threshold higher than this is inconsistent with governing ECtHR jurisprudence and international standards generally.

Recommendations:

- The Defamation Bill should place the burden of proving falsity upon the plaintiff, at least where the defendant pleads the defence of “truth” in relation to a matter of public interest.
- The defence of “fair and reasonable publication” should be amended so that the threshold is whether the statement relates to a matter of public interest and so that it applies whenever it was reasonable in all of the circumstances to make the statement.
- The threshold of the availability of the qualified privilege defence should be amended to comply with the common law threshold of ‘malice’.
- Consideration should be given to providing absolute protection for opinions. Even if this is not accepted, the standard for protection of opinions should not be conditional upon their having an underlying factual basis.
- The defence of “honest opinion” should also be amended to reflect the threshold of a subject of public interest, rather than a subject of public importance.

3.5 Damages

It is increasingly recognised that one of the more serious threats to freedom of expression is the global trend towards massive pecuniary awards in defamation cases. International courts have held that excessive awards, on their own, represent a breach of the right to freedom of expression and many countries have introduced various measures to address this problem. The ARTICLE 19 publication, *Defining Defamation*, devotes considerable attention to the question of remedies for defamation, noting that the overriding goal of defamation remedies

⁸² *Ibid.*, para. 52.

⁸³ Note 12, para. 65.

⁸⁴ *Prager and Oberschlick v. Austria*, 26 April 1995, Application No. 15974/90, para. 38.

⁸⁵ See *Defining Defamation*, note 5, Principle 10.

⁸⁶ For example, in the United States.

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should be to redress the harm done to the reputation of the plaintiff, not to punish the defendant, and calling for the prioritisation of non-pecuniary remedies wherever possible.⁸⁷

We recognise that certain measures have been introduced to limit the level of damages, including provisions relating to the offer to make amends and the power of the Supreme Court to substitute its own damage award. At the same time, we believe more could be done to ensure that damage awards are proportionate to the harm done.

The Irish case of *de Rossa v Independent Newspapers plc*⁸⁸ is particularly relevant here. The award of damages in this case (£300,000) was three times more than the highest libel award ever previously approved by the Supreme Court – and twenty times the annual industrial wage in Ireland at the time – and there has not been a comparable award made since then. Upon an application by Independent Newspapers and the second defendant Independent News and Media, the ECtHR considered the award in this case was “sufficiently unusual” so as to require the ECtHR’s examination of whether there were adequate and effective domestic safeguards against disproportionate damages awards; namely safeguards which assured a reasonable relationship of proportionality between the award and the injury to reputation.⁸⁹ The ECtHR held, on the particular facts of the instant case, that the safeguards were adequate, as the trial judge and the Supreme Court had given sufficient directions to the jury.

The ECtHR also, however, made specific reference to the recommendations from the Irish Law Reform Commission’s (LRC) March 1991 consultation paper on the law of defamation, as well as the March 2003 report of the Legal Advisory Group on Defamation (LAG), highlighting some of the concrete recommendations made, by LAG in particular, to strengthen the appellate review system in respect of damages awards:

- The function of assessing damages in defamation proceedings heard before a jury should remain with the jury.
- Parties to proceedings should be able to make submissions to the court and address the jury concerning damages.
- Judges should be required to give directions to a jury on the matter of damages.
- In making an award of damages, regard should have to be had to a non-exhaustive list of matters including, for example, the nature and gravity of any allegation in the defamatory matter, the extent to which the defamatory matter was circulated and the fact that the defendant made or offered an adequate, sufficient and timely apology, correction or retraction, as the case might be.
- There should be an avoidance of doubt provision to the effect that, in a defamation appeal from the High Court, the Supreme Court could substitute its own assessment of damages for the damages awarded in the High Court.⁹⁰

We support these recommendations and call for their reflection in the Defamation Bill. The ECtHR’s determination that the *De Rossa* case was of sufficient concern to require its review provides a warning that more could be done to guard against excessive damages awards in Ireland.

⁸⁷ Note 5, Principles 13 and 14.

⁸⁸ [1999] 4 I.R. 432.

⁸⁹ *Independent News and Media and Independent Newspapers Ireland Ltd v Ireland*, 16 September 2005, Application No. 55120/00, para. 113.

⁹⁰ *Ibid.*, para. 74.

3.5.1 Limit on Damages

It is widely agreed that the inhibitive nature of massive damage awards creates a chilling effect and leads to a climate of self-censorship which thwarts robust, investigative journalism. The UN Special Rapporteur on Freedom of Opinion and Expression adverted to this problem in the Irish context: “Writers, editors and publishers may become increasingly reluctant to report and publish matters of public interest because of the large costs of defending such actions and the big awards granted in these cases. This creates a restraint on the freedom of expression, access to information and the free exchange of ideas.”⁹¹

The problem of excessive damages for defamation has also been addressed by the ECtHR. In *Ceylan v. Turkey*⁹² and *Tammer v. Estonia*,⁹³ the ECtHR noted that “the nature and severity of the penalty imposed are also factors to be taken into account when assessing the proportionality of the interference [with the right to freedom of expression]”.⁹⁴ More specifically, in the *Tolstoy Miloslavsky* case, the ECtHR noted that, “under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.”⁹⁵ Central to the deliberations in that case was the fact that the sum of damages awarded was three times the size of the highest libel award previously made in England.

Defining Defamation calls for strict limits on the level of pecuniary awards in defamation cases. Such awards should be made only where non-pecuniary remedies are insufficient to redress the harm done. Furthermore:

- (d) The level of compensation which may be awarded for non-material harm to reputation – that is, harm which cannot be quantified in monetary terms – should be subject to a fixed ceiling. This maximum should be applied only in the most serious cases.
- (e) Pecuniary awards which go beyond compensating for harm to reputation should be highly exceptional measures, to be applied only where the plaintiff has proven that the defendant acted with knowledge of the falsity of the statement and with the specific intention of causing harm to the plaintiff.⁹⁶

With regards to pecuniary damages, we urge that, contrary to the provisions of section 11, corporations who sue in defamation should be limited to material harm to reputation. Corporations experience harm in the form of pecuniary losses and should therefore be compensated as to this damage alone. It cannot be considered proportionate to the legitimate aim of protection reputation to grant damages accounting for non-financial loss for corporations.

Recommendation:

- The Defamation Bill should be amended to include strict limitations on punitive damages.

⁹¹ The UN Special Rapporteur’s Report on Ireland, note 60, paras. 73 and 84.

⁹² 8 July 1999, Application No. 23556/94.

⁹³ 6 February 2001, Application No. 41295/98.

⁹⁴ *Ceylan v. Turkey*, note 92, para. 37.

⁹⁵ *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139 of 1991, para. 49.

⁹⁶ Note 5, Principle 15.

3.6 Miscellaneous

3.6.1 Protection of Sources

An issue the Defamation Bill does not touch upon is the right of journalists to protect their confidential sources of information. This principle, most famously enshrined in the *Goodwin*⁹⁷ case, is also of relevance in the context of defamation actions. Principle 6 of *Defining Defamation* deals with this issue in the context of defamation law:

(a) Journalists, and others who obtain information from confidential sources with a view to disseminating it in the public interest, have a right not to disclose the identity of their confidential sources. Under no circumstances should this right be abrogated or limited in the context of a defamation case.

(b) Those covered by this Principle should not suffer any detriment in the context of a defamation case simply for refusing to disclose the identity of a confidential source.

While the first part of this Principle may be expressed in general legislation, it is appropriate for a defamation act to give expression to the latter, namely that no adverse inference should be drawn from the refusal by a defendant in a defamation action to name his/her source(s).

3.6.2 Correction Orders

ARTICLE 19 welcomes the addition of correction orders as an alternative and/or additional avenue of redress to pecuniary damages. Correction orders are a new remedy in Irish defamation law, and provide that the court may direct the defendant to publish a correction of the defamatory statement. This remedy is available when there is a finding that the statement was defamatory and the defendant has no defence available to the action.

We recommend, however, that section 28 be amended so as to explicitly specify that correction orders are only available as a remedy in respect of statements which form the imputation in issue in the proceedings.

3.6.3 Innocent Publication

ARTICLE 19 recognises the positive step of including Internet Service Providers within the defence of “innocent publications”(section 25). This defence is essential to the right to freedom of expression and is important for ISPs as outlined in Principle 2 of *Defining Defamation*:

(b) Bodies whose sole function in relations to a particular statement is limited to providing technical access to the Internet, to transporting data across the Internet or to storing all or part of a website shall not be subject to any liability in relation to that statement unless, in the circumstances, they can be said to have adopted the relevant statement. Such bodies may, however, be required to take appropriate action to prevent further publication of the statement, pursuant either to an interim or to a permanent injunction...

Section 25 applies to ISPs but it should be redrafted to state more clearly that ISPs are only responsible for statements which are the subject of an interim or permanent injunction. Going beyond this, however, ISPs should not be held liable for information posted on websites which they merely host; that is, they should have no direct responsibility for the information posted therein.

⁹⁷ *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90 (European Court of Human Rights).

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Recommendations:

- It should be made clear within the Defamation Bill that journalists are under no obligation to reveal their sources and that no adverse inference in a defamation case should be drawn from the refusal to reveal confidential sources.
- Correction orders are a welcome addition to the Defamation Bill but should be limited to correcting the substantive statement complained of in the action for defamation.
- It should be made clear in the “innocent publications” defence that ISPs are not responsible for the material on websites they operate unless the ISP openly endorses the material or has refused to obey a court order to remove it.

4 ANALYSIS OF THE PRIVACY BILL

4.1 Introduction

The Privacy Bill establishes a statutory tort of violation of privacy, which is actionable without proof of special damage (section 2). Section 3(1) provides that a person's entitlement to privacy is that which is reasonable in all the circumstances having regards to the rights of others and to the public order and the common good.

Section 3(2) outlines when there will be a violation of privacy and section 4 outlines the factors which a court shall have regard to in determining whether there has been a violation. Section 5 outlines the defences to an allegation of a defence and section 6 designates certain disclosures not to be a violation of privacy. Sections 7 to 17 are procedural matters concerning the hearing of a claim of a violation of privacy.

Our analysis addresses the implications of the Privacy Bill for the right of freedom of expression. The provisions which raise concern are sections 3, 4, 5, 6 and 13.

4.2 Definition of Privacy

Section 3(1) of the Privacy Bill states:

For the purposes of this section, the privacy to which an individual is entitled is that which is reasonable in all the circumstances having regard to the rights of others and to the requirements of public order, public morality and the common good.

This definition indicates the limitations without describing the substantive content of the right. We recommend, furthermore, that a descriptive definition of privacy is provided. Such a definition would greatly aid the operative provisions of the Privacy Bill. In the context of the media in particular, it is essential that there is a workable definition of privacy, so that the scope of the concept is clearly understood. If it is unclear what reporting is permissible and what is not, the free flow of information, and the public's right to know, will be significantly inhibited.

Recommendation:

- Section 3(1) should be amended to include a substantive description of privacy.

4.3 Defences

Section 5 of the Privacy Bill outlines five defences to an allegation of infringement of privacy – contained in the Working Group's report as the 'public interest defences'.⁹⁸ We consider there are substantial implications for the right of freedom of expression in the fifth public interest defence, contained in section 5(1)(e):

S. 5(1) It shall be a defence to a privacy action for the defendant to prove that the act in respect of which the action was brought –

...

⁹⁸ Note 3, p. 91.

(e) was an act of newsgathering, provided any disclosure of material obtained as a result of such act was –

- (i) done in good faith;
- (ii) for the purpose of discussing a subject of public importance;
- (iii) for the public benefit; and
- (iv) fair and reasonable in all of the circumstances.

An “act of newsgathering” is defined in s 5(2) as:

An act which is reasonable in all the circumstances and that consists of, or is necessary or incidental to –

- (a) the acquisition or preparation of material for publication in a periodical,
or
- (b) the acquisition or preparation of material for broadcasting.

We are concerned that this defence fails to strike the appropriate balance between privacy and freedom of expression. The defence is too narrow because it imposes an inappropriate requirement of ‘good faith’, and the thresholds in section 5(1)(e)(ii) and 5(1)(e)(iii) are, as has been noted in relation to defamation, too high. It is significant that each of these points of concern is a significant departure from the recommended provision contained in the Working Group’s report.

4.3.1 Requirement of ‘good faith’

We consider this requirement to be inappropriate and unnecessary in the context of reporting on privacy, and thus to constitute an illegitimate restriction on the freedom of expression.

In the media’s communication of information and ideas to the public, the inherent newsworthiness of information is often based in the fact that it is reporting critically on individuals or on government. Furthermore, the media are usually commercial operations which are entitled to gain profit from reporting in a manner which appeals to the public – within ethical restraints and the application of the general law. But a requirement of acting in ‘good faith’ transcends these obligations and imposes a restriction which is antithetical to the nature of the media’s role.

We note that the Working Group does not recommend imposing an obligation of ‘good faith’ on the media.⁹⁹

4.3.2 Threshold of ‘public importance’

The threshold of ‘public importance’ is qualitatively different from the threshold of ‘public interest’. Our particular concern is that ‘public importance’ may be interpreted as providing a narrower defence against privacy claims. The Working Group recommended the utilisation of the term ‘public interest’, in line with standards at international law.¹⁰⁰

The term ‘public importance’ is not congruent with the jurisprudence relating to the balancing of privacy and freedom of expression by the ECtHR. Consistently, the ECtHR refers to the duty of the media to “impart information and ideas on all matters of public interest”.¹⁰¹ In the

⁹⁹ *Ibid.*, Appendix 1, Head 6: Defences, para. 1(d).

¹⁰⁰ Note 3, p 104.

¹⁰¹ See, for examples among many authorities, note 55, para. 58; *Observer and Guardian v. United Kingdom*, 26 November 1991, Application No. 13585/98; and *Bladet Tromsø and Stensaas v. Norway*, note 21.

Von Hannover case, for example, the ECtHR held that a distinction needs to be made between reporting facts relating to public figures who hold political office and reporting details of the private life of an individual who does not exercise official functions.¹⁰² The implication is that the work of a public official is inherently a matter of public interest, even if it does not reach to being of importance. The Working Group's report also utilises the terminology of 'public interest' to discuss how to achieve the correct balance between privacy and freedom of expression.

4.3.3 Threshold of 'for the public benefit'

We consider that, as noted above, this requirement fails to meet international standards governing the balance between privacy and freedom of expression. Specifically, we consider that this requirement is subsumed by the 'public interest' test, rather than being a separate criterion in the balancing of privacy and freedom of expression. For this reason, we recommend that the requirement of 'for the public benefit' is removed from the public interest defence contained in section 5(1)(e).

4.3.4 'Fair Comment' defence

Section 6(1)(a) provides for a 'fair comment' defence:

6. – Disclosure by a person of any information, documentation or other material concerning an individual is not a violation of privacy where –

- (a) the disclosure was done in good faith and was –
 - (i) for the purpose of discussing a subject of public importance,
 - (ii) for the public benefit, and
 - (iii) fair and reasonable in all the circumstances

We repeat our concerns outlined above. This section should be amended to remove the requirement of 'for the public benefit' and the requirement of 'discussing a subject of public importance' should be amended to state 'discussing a subject of public interest'.

Recommendations:

- The requirement of 'good faith' in section 5(1)(e)(i) should be removed.
- The requirement of 'public importance' in sections 5(1)(e)(ii) and 6(1)(a) should be replaced by a requirement of 'public interest'.
- The requirement of 'for the public benefit' in sections 5(1)(e)(ii) and 6(1)(a) should be removed.

4.4 Matters to which a court should have regard

Section 4 of the Privacy Bill provides a list of matters to which a court shall have regard in determining whether there has been a violation of privacy. We consider sections 4(3) and 4(4) to be particularly problematic for the balance between privacy and freedom of expression.

¹⁰² Note 55, para. 63.

4.4.1 Where information was contained in a register or similar document accessible by the public

Section 4(3)(a) states that an allegation of violation of privacy shall not be defeated by reason only that the disclosed information was, at the time of the disclosure, contained in a register or other similar document to which members of the public or a section of the public had access.

We note at the outset that this provision is not a recommendation of the Working Group. We further note that the rationale for this provision is unclear. If information was already publicly available, why should it not be a defence to an allegation of violation of privacy? This has been held by the ECtHR to be a defence in other contexts.¹⁰³ The media should be entitled to rely upon publicly available information contained in a register to which the public has access. To provide otherwise creates uncertainty for journalists – when will they be allowed to rely upon publicly available information and when will this constitute a violation of privacy? Uncertainty, in turn, exerts a ‘chilling effect’ on the media as they steer well clear of the prohibited zone to avoid censure.

4.4.2 Where the plaintiff had already disclosed the information to his or her family or friends

Section 4(3)(b) states that an allegation of violation of privacy shall not be defeated by reason only that the plaintiff had disclosed the information to members of his or her family or to his or her friends. We recognise that section 4(3)(b) may seek to give effect to the right to maintain a sphere of private life, as affirmed in the *Von Hannover* case and other ECtHR jurisprudence. At the same time, the ability to discuss freely among friends and family is itself part of one’s private zone and to seek to restrict this is problematical.

4.4.3 Event or occurrence in a public place

Section 4(4) states that the claim of a plaintiff in a privacy action brought in respect of a disclosure shall not be defeated by reason only of the defendant proving that the disclosure related to an event or occurrence that happened in a public place or a place that, at the time of the disclosure, was visible to members of the public.

This provision tends towards a general application of a right of privacy in a public place. This is at odds with the ECtHR jurisprudence on this issue. The effect of this jurisprudence, as well as the jurisprudence of some countries, is to create a limited scope of privacy for public figures in public places when that person is clearly engaging in private acts which it would be unreasonable to disclose. This might be the case, for example, in a restaurant. This is substantially narrower than section 4(4), which is unlimited in regard to the persons to whom it applies or the nature of the activity concerned. We consider that the legitimate portions of section 4(4) could easily and more appropriately fall within the subsections of section 4(1), rendering section 4(4) superfluous.

Recommendation:

- Sections 4(3)(a), 4(3)(b) and 4(4) should be removed or reconsidered, in line with the above.

¹⁰³ See the judgment of the European Court of Human Rights in *Observer and Guardian v. the United Kingdom*, 26 November 1991, Application No. 13585/88, para. 69.

4.5 Miscellaneous issues

4.5.1 Hearings Other Than In Public

Section 13 of the Privacy Bill states in broad terms that the court may make an order to protect the privacy of an individual. It is easiest to set out section 13(1) in full:

- (1) Upon the application of any individual, a court before which any action founded on tort is brought may, for the purpose of protecting the privacy of the individual, order that -
- (a) the action or any part of the action, including any interim or interlocutory application, shall be heard otherwise than in public,
 - (b) all persons (other than the parties to the proceedings and persons of such a class as the court may specify) should not be present during the action or any part of the action, including any interim or interlocutory application,
 - (c) the identity of the individual shall not be disclosed other than to such person, or person belonging to such class of persons, as may be specified in the order concerned, or
 - (d) there shall be no publication or broadcast of any material likely to lead to the identification of the person.

Section 13(2) states that section 13(1) shall not affect any other power of the court to order the hearing of an action otherwise than in public or to protect the identity of an individual.

Section 13(1) significantly, and substantially, expands the established bounds of when an action can be heard other than in public. Open justice is a fundamental principle of a democratic society and is entrenched in Article 34 of the Irish Constitution. The Supreme Court of Ireland has emphasized the centrality of open justice to the administration of justice in several key judgments, including statements such as:

[T]he public nature of the administration of justice and the right of the wider public to be informed by the media of what is taking place are matters of the greatest importance.¹⁰⁴

Any departure from the system of open justice must be carefully considered and fully thought through. Section 45(1) of the *Courts (Supplemental Provisions) Act 1961* sets out four key situations in which the public, but not necessarily the media, *may* be excluded from the courts: (1) applications of an urgent nature for *habeas corpus*, bail, prohibition or injunction; (2) matrimonial causes and matters; (3) lunacy and minor matters; and (4) proceedings involving the disclosure of a secret manufacturing process. Even within these established categories, the adoption of blanket exemptions is controversial.¹⁰⁵

Given the centrality of the presumption of open justice, we are seriously concerned by the broad brush approach adopted in section 13(1) towards closing the doors to the public for the protection of privacy. We consider that very careful thought should be given as to whether or not the existing regime for closure of court hearings is not sufficient, as it has been deemed to be in many countries.

¹⁰⁴ *Irish Times Ltd v Judge Murphy* [1998] I.R. 359, at 383 (per Hamilton C.J.).

¹⁰⁵ See, for example, *McGonagle*, note 64, p 243.

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At a minimum, these provisions should be much more narrowly drafted to properly balance the right of privacy with the right of freedom of expression. Closed hearings seriously undermine the right of access to information and the role of the media as the eyes and the ears of the public. Section 13(1) should incorporate a high threshold to be satisfied for the protection of privacy – situations where it is undeniable that the individual in question will suffer inordinately if information regarding their trial is reported in the media; or, as the Working Group noted in its report, situations in which the very fact of seeking relief in open court will negate the purpose of the remedy in the first place. The Working Group’s report gives the example of where a trial in open court would reveal information of which the plaintiff is seeking to prevent publication and dissemination.¹⁰⁶ We recommend that section 13(1) be redrafted appropriately to narrow the availability of such a court order to such exceptional circumstances.

Recommendation:

- Consideration should be given to whether or not the existing regime for closure of courts is not sufficient to protect privacy. At a minimum, Section 13(1) should be redrafted to limit the availability of a court order for an in camera hearing or limitations on restrictions on court reporting to a very limited range circumstances – such as where the individual will suffer inordinately from the fact of the trial taking place being reported; or where the disclosure of specific information which is the subject of the trial is under dispute.

¹⁰⁶ Note 3, p 96.