17 Kildare Street,
Dublin 2.
14th July 2023

Ms Helen McEntee TD,
Minister for Justice and Equality,
Dept of Justice and Equality,
51 St. Stephen's Green,
Dublin 2.

Dear Minister McEntee,

This note concerns your Department's recent publication of Draft General Scheme of the Defamation (Amendment) Bill, which followed the Department's publication of the Report of the Review of the Defamation Act 2009 (the "Review").

ISME welcomes in particular the intention to:

- Abolish juries in High Court defamation actions (although we do not consider them to be the primary problem).
- Address the issue of 'libel tourism' which has been reputationally damaging for Ireland.
- Reform the defence of 'fair and reasonable publication' on a matter of public interest to make it simpler and clearer.
- Retain the right to sue for defamation by bodies corporate.
- Reform defence for live broadcasting.
- Introduce a harm test for "transient retail defamation."
- Counter strategic lawsuits against public participation (SLAPPS).

However, the Review fell short in many respects of addressing the current deficiencies of the Act, specifically whether the proposed amendments will render the revised Act compliant with Article 10 of the European Convention on Human Rights, and with Article 40.6.1.(i) of the Constitution. This is the case because the proposed bill does not address:

1. The capping of damages.
2. Full applicability of anti-SLAPP protections, to include specific protection for complaints made to the LSRA.
3. The need to introduce moral hazard into defamation actions.
4. The need to introduce a serious damage test.
5. The need to reform the defence of truth.
6. The need to protect comedic and satiric comment.

Regarding the capping of damages, the Review suggests that Supreme Court guidance included in a judgment in 2022 against a prominent regulatory and supervisory body in Ireland provides suitable guidance regarding the range of damages in defamation cases. Those recommendations are set out below.

Moderate defamation:	Awards of €0 to €50,000
Medium defamation:	Awards of €50,000 to €125,000.
Serious defamation:	Awards of €125,000 to €199,000
Top of scale defamation:	Awards over €200,000 but rarely over €300,000.

ISME rejects this guidance as ill-considered, inappropriate and unjust, not merely because we consider the awards to be too high, but also by comparison with what the judiciary consider to be appropriate awards in personal injuries actions. In the table below, the Supreme Court guidance on defamation awards is compared with examples from the Judicial Council's personal injuries guidelines. We believe the comparisons stand on their own merits without further comment.

Moderate defamation	€0 to €50,000	Loss of one kidney with no damage to the other.	€36,000-€55,000
Medium defamation	€50,000 to €125,000.	Severe knee injury; development of osteoarthritis, gross ligamentus damage, lengthy treatment, considerable pain and loss of function, arthroplasty or arthrodesis has taken place or is inevitable.	€75,000-€110,000
Serious defamation	€125,000 to €199,000	Total loss of reproductive organs.	€150,000-€250,000
Top of scale defamation	€200,000 but rarely over €300,000.	Below knee amputation of both legs or feet.	€200,000-€300,000

The absence of a cap on damages (and indeed the absence of a requirement for proof of harm or damage) means there is no proportionality between awards (or settlements) made and damage caused by a defamatory statement. Such an absence of proportionality has been found by the ECHR to amount to a breach of Article 10 (the right to freedom of expression) of the European Convention on Human Rights in Tolstoy v United Kingdom.[1]

If the Supreme Court guidance is inappropriate, what should damages awards be? ISME believes European comparisons provide sensible guidance.

- In Austria, the Civil Code[2] allows only for strictly compensatory damages. There are no caps to this. The Media Law allows only for "immaterial" damages for suffering, capped at €20,000, or €50,000 for slander or particularly harmful defamation.
- In the Czech Republic, awards typically average €9,000 (2014 figure).[3]
- Belgium, typical range €6,000 to €17,000; highest recorded award of €600,000 for a false allegation of doping by a cycling team.
- Finland: awards for non-pecuniary harm usually fall between €800 and €2,000, with higher amounts possible in particularly severe cases of damage to reputation. Significant case-Salumäki v. Finland ([2014] ECHR 459)[4] damages of €2,000 and legal costs of €1,500.
- Portugal: The Supreme Court average award in nine cases was €26,364.
- Spain: The average amount of compensation awarded was €24,580.
- Italy: average awards of €50,000.

Some of the EU member states cited above have codified criminal defamation statutes. Perversely, we in Ireland would be somewhat better off with a criminal code, as there would be a *de minimis* test imposed by a regulatory authority such as the DPP before a prosecution was entertained.

[1] *Tolstoy Miloslavsky v. the United Kingdom*, ECHR 13 July 1995
[2] http://legaldb.freemedia.at/legal-database/austria/
[3] http://legaldb.freemedia.at/2017/06/09/trends-in-civil-compensation-for-defamation-in-europe/
[4] https://inforrm.org/2014/05/27/case-law-strasbourg-salumaki-v-finland-no-violation-in-defamation-innuendo-case-hugh-tomlinson-qc/

The foregoing is not to suggest that we do not believe higher damages could be awarded to a plaintiff in defamation proceedings. For example, it is conceivable that an allegation regarding the professional competence of a person in a regulated profession such as medicine or law could have catastrophic implications for their ability to earn a living, or maintain their employment. Similarly, a malicious allegation of sexual misconduct or abuse of children could result in the termination of the career of a Garda or a teacher. In such cases there would be *evident damage* incurred. In our view, such evident damage would be remedied by special damages, calculated by reference to a multiple of the plaintiff's annual earnings, an approach which is already enshrined in law in the Unfair Dismissals Act and the Protected Disclosures Act.

We would therefore view an award of damages for defamation that impacted a person's career as a form of evident damage. However, the general damages guidelines suggested in the Supreme Court case cited on page 1 are excessive, totally inappropriate, and inconsistent with the clear direction set under the European Convention on Human Rights. A legislative cap on damages is therefore necessitated.

Head 20 of the draft general scheme is therefore inadequate. It should provide for a legislative cap on general damages (excluding the "evident damage" identified above) within the District Court range. Special damages when appropriate should be calculated based upon an individual's earnings.

Regarding the intention to provide for anti-SLAPP protections, as stated above, we welcome the inclusion of anti-SLAPP provisions in the draft general scheme. We consider anti-SLAPP protections to be essential in any democracy, but especially so in Ireland where we have not practiced protection of our constitutional right to freedom of expression, and we do not defend it as the courts and legislature do in the United States for example.[5]

ISME believes that freedom of expression is not a concept or right confined to journalists: it is a basic right for all citizens, and must be protected as such. Bloggers,[6] whistle-blowers,[7] academics,[8] and members of civil society organisations[9] among others should be able to participate in public debate without the threat of defamation litigation overhanging them.

While we believe that the "matter of public interest" definition includes complaints made to the LSRA about a lawyer, we have no doubt that such an interpretation will be contested by the legal profession. Since the making of a complaint of professional misconduct about a lawyer to the LSRA is in itself "*a statement that tends to injure a person's reputation in the eyes of reasonable members of society*," the mere fact of making a complaint constitutes grounds for a lawyer to counter such complaint with a defamation action. It cannot be the case that a lawyer complained of to the LSRA can make that complaint go away through the simple expedient of raising an action for defamation. This is an absurd state of affairs which was not contemplated by the Oireachtas when enacting the Legal Services Regulation Act 2015. The Oireachtas must expunge it immediately.

Head 23 of the General Scheme must therefore be expanded so that a defamation action taken on foot of a complaint made to the LSRA must be automatically covered by anti-SLAPP protection until otherwise determined by a court. We are aware of cases where defamation threats have followed

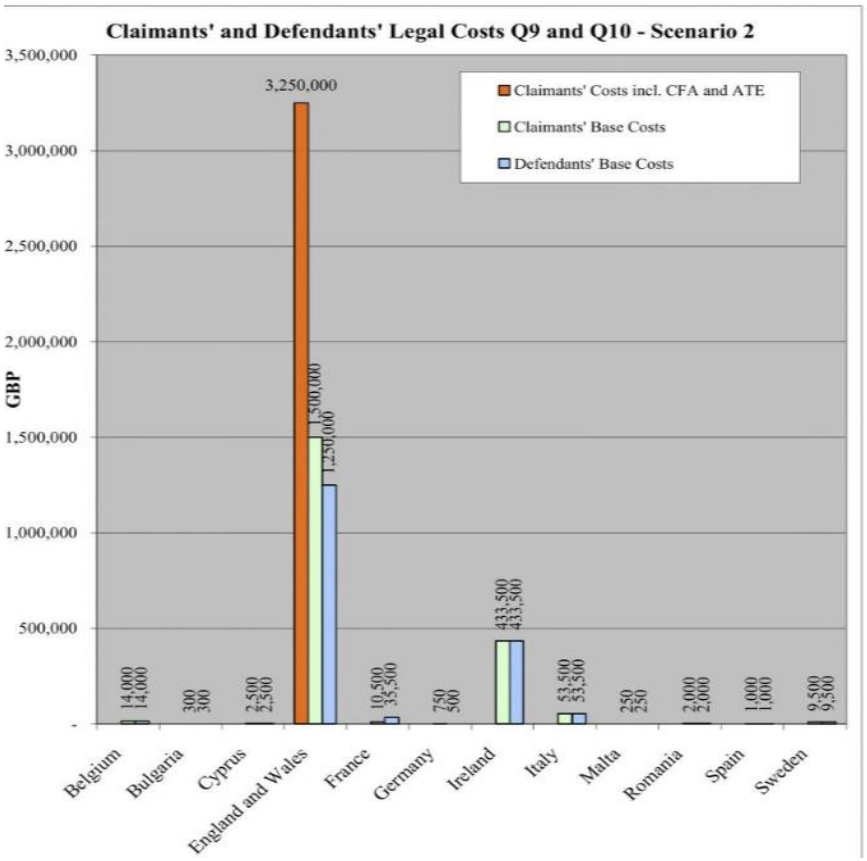
[5] https://ipi.media/ireland-how-the-wealthy-and-powerful-abuse-legal-system-to-silence-reporting/
[6] *Magyar Helsinki Bizottság v. Hungary [GC]*, no. 18030/11, 8 November 2016.
[7] *Guja v. Moldova [GC]*, no. 14277/04, ECHR 2008; *Heinisch v. Germany,* no. 28274/08, ECHR 2011
[8] *Hertel v. Switzerland*, 25 August 1998, Reports of Judgments and Decisions 1998-V
[9] *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009; *Youth Initiative for Human Rights v. Serbia*, no. 48135/06, 25 June 2013

complaints to the LSRA, therefore this concern is not an academic one. Head 24 must grant explicit protection to complaints made to the LSRA, and to protect the groups mentioned above.

Aside from the absence of a "serious damage" test (below) the real issue with defamation proceedings in Ireland is the **absence of moral hazard in court for those bringing claims**. Defamation is not dissimilar to much personal injuries' litigation in this respect, however the situation is far more asymmetric for defendants in defamation proceedings since:

- Legal costs are prohibitive, potentially ruinous, and a successful defendant has almost no chance of recovering their costs.
- The tort lacks objective definition in law, in that a "defamatory statement" is defined subjectively.
- There is no proportionality applied in Ireland in the balancing of the right to freedom of expression and the right to a good name, nor is there proportionality in damages (see above).
- The plaintiff does not have to demonstrate damage or harm.
- A truthful statement provides no reliable defence.
- The burden of proof is reversed.

While a great deal of the narrative around Ireland's defamation law concerns the level of awards, the real power of defamation litigation in this jurisdiction is the power of plaintiffs to inflict enormous legal costs on defendants, costs which will never be recovered, irrespective of outcome.



Ireland is the second most expensive jurisdiction (after England and Wales) in which to take or defend defamation proceedings.[10] Ireland is close to 10 times as expensive as Italy, the third most expensive jurisdiction in the comparative study. Your Department is at present considering the publication of a

[10] Comparative Study of Costs of Defamation Proceedings Across Europe, University of Oxford, December 2008

report into legal costs. ISME wishes to see that report published as soon as possible, after which we wish to see the Department press ahead with implementation of the minority report in the Review of the Administration of Civil Justice.[11]

While the definition of a defamatory statement in the 2009 Act is not substantially out of line with that in other common law jurisdictions, its subjectivity allows plaintiffs to issue proceedings on what could be considered specious, speculative or opportunistic grounds.

Regarding the need for plaintiffs to demonstrate harm or damage, the Departmental Report of the Review of the Defamation Act 2009 erred in speculatively raising "constitutional" issues with the introduction of a serious harm test. The absence of a harm test means that plaintiffs do not even have to reach a *de minimis* threshold of alleged damage before issuing proceedings (see the "proportionality" test above). This is almost certainly a breach of ECHR Article 10 rights.

The requirement for a plaintiff to establish harm or damage is an essential prerequisite of a personal injuries action. No constitutional, legal or evidential issues arise in doing so. Logically, they cannot arise when it comes to defamation.

Head 6 of the General Scheme provides that:

> "*A person may not bring an action for transient retail defamation unless they can demonstrate that they have suffered, or are likely to suffer, serious harm as a result of the alleged defamation.*"

This is a provision that is necessary, and we welcome it. Yet the Review in its consideration of a harm test states: "*Any proposal to introduce a serious harm test would require careful consideration, in light of the constitutional right of access to the courts and the constitutional protection of the right to a good name.*" This overwrought conclusion is directly contradictory of the Department's intention to provide for transient retail defamation, and is illogical and paradoxical.

Head 6 of the General Scheme must also be expanded to include a wider range of commercial settings- at a minimum licensed premises and hotels, where such "transient… defamation" can occur. See Annex I below for a case study demonstrating the need for this.

Head 6 must also be amended to protect a decision by a retailer to refuse admission to a person to a store, or to ask a person to leave a store, where the retailer has a reasonable concern that a person's presence on the premises may be for the purposes of the commission of an offence, or would otherwise create an unsafe working environment for the retailer, their staff or other customers, in circumstances where the exclusion of that person is exclusively on the basis of that reasonable concern. This is essential because we have had a member retailer lose a discrimination (as opposed to defamation) case for excluding from their store a person who claimed to be unable to wear a mask during the Covid 19 pandemic. We consider this inherently unust.

As a general rule, we expect that a business (or person) enforcing a legally mandated check such as an age verification,[12] work permit[13] or a state-mandated health protocol[14] must be presumed to enjoy privilege when doing so, or can avail of the protections available under the SLAPP provisions.

[11] https://assets.gov.ie/100652/b58fe900-812e-43f2-ad8d-409a86e7c871.pdf
[12] https://www.irishstatutebook.ie/eli/2003/act/31/section/13/enacted/en/html#sec13
[13] https://www.hsa.ie/eng/your_industry/quarrying/maintenance_operations/work_permits_and_isolation_of_equipment/
[14] https://enterprise.gov.ie/en/news-and-events/department-news/2020/may/09052020.html

The introduction of a harm test in other common law jurisdictions does not appear to have resulted in the catastrophic effects suggested on page 51 of the Review for inhabitants of those jurisdictions. However, if your Department is in a position to identify any such ill effects in those jurisdictions, it must do so. Otherwise, the General Scheme must be amended to include a serious harm test.

In short, the dice are always loaded in favour of the plaintiff, and thus there is always pressure to settle even the most defensible of cases in Ireland. By way of illustration, we append at Annex I a case study from an ISME member operating a licensed premises who successfully defended a defamation action in the Circuit Court, yet ended up settling out of court with that plaintiff and paying a higher insurance premium.

Regarding the defence of truth, the manner in which this defence is interpreted in the Irish courts effectively renders it inoperable. Nor is ISME proposing the abolition of the presumption of falsity in its entirety. However, there are issues with how the issue is handled in defamation proceedings:

- The use of a defence of truth by the defendant can give rise to aggravated damages.
- There is no corresponding onus on the plaintiff to be truthful or accurate in their pleadings, leaving them free to exaggerate or catastrophise the damage they allege has arisen.
- The courts can and have found in favour of a plaintiff where a defendant has reported or published facts which are not in dispute by the plaintiff.
- While we accept there are difficulties with imposing the burden of truth on a plaintiff, greater difficulties, as well as inherent injustice, arise when this is not required. The reversal of the burden of truth means that our courts do not assess the presence or absence of good faith on behalf of a defendant. Such a finding in Kunitsyna v Russia[15] was found to amount to a breach of Article 10 (Freedom of Expression) of the European Convention on Human Rights.

The General Scheme proposes to extend the right of absolute privilege regarding coverage of courts. This must be expanded to include all EU or EFTA courts, and former EU/EFTA country courts (including the UK) and tribunals or UN Committees where Ireland is or may be a participant, including tribunals established under trade agreements such as CETA.

The General Scheme proposes to extend the right of qualified privilege. This extension does not go far enough. Given the amount of public consultation being carried out by Government Departments, this must include submissions to public consultations by approved governmental bodies. Those bodies must take responsibility for removing potentially defamatory statements before publication of submissions.

We remind your Department of the findings[16] of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, when he visited Ireland in 2000:

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

[15] Kunitsyna v Russia ECHR (Application no. 9406/05) 13 December 2016
[16] https://ap.ohchr.org/documents/dpage_e.aspx?si=E/CN.4/2000/63/Add.2

expression must be limited only to those permissible under article 19 of the International Covenant on Civil and Political Rights.

Despite his visit predating the current Defamation Act by nine years, our laws still fail to vindicate this basic human right.

To summarise on the truth issue: while the 2009 Act nominally protects truthful utterances, raising the defence is highly problematic and risky. We note that while the 2009 Act requires the defendant "*to prove that the statement in respect of which the action was brought is true in all material respects*," the reformed UK statute requires the "*defendant to show that the imputation conveyed by the statement complained of is substantially true.*" The defence of truth therefore requires substantial and material amendment.

Regarding the need to protect satiric and comedic comment, ISME does not represent individuals or businesses which produce or promote such content. However, since satire and comedy are such essential components in the operation of a free society and free press, the absence of an explicit defence of such comment is indicative of a lack of determination to defend freedom of expression. As well as being provided for in the European Convention on Human Rights, "*The right of the citizens to express freely their convictions and opinions*" is enshrined in Art 40.6.1.(i) of the Irish Constitution.

Despite the somewhat hysterical reactions from the legal lobby to your Department's intentions regarding the removal of juries from defamation trials, we remain perplexed as to why the same lobby has little or nothing to say about Ireland's continual failure to vindicate the right to freedom of expression. Both the right to a good name and the right to freedom of expression are enumerated in the same article of the Constitution. The former is vigorously defended, the latter never. Why is this the case?

A general criticism we must raise with the Review is its selective use of the term and principle "access to justice." Access to justice by an impecunious plaintiff, or a plaintiff raising a vexatious claim, is a denial of justice to another. This has been noted on many occasions by Justices of our High Court, without any provision being made by the legislature to address it. We find the Review's suggestions that anti-SLAPP measures, a harm threshold, or amending the presumption of falsity would impede access to justice to be unacceptable in a government issues paper. Too often we see ideas like this floated which are without a legal basis, but which serve as an excuse for doing nothing. Similarly, the suggestions that a legislative cap on damages, abolition of the presumption of falsity, introduction of a harm test, the initiation of defamation cases in the Circuit Court, or the introduction of a court-based summary disposal mechanism present constitutional difficulties is made without legal qualification. ISME was delighted to see the Law reform Commission recently confirm our long-held position that a legislative cap on damages is constitutional, and in fact already exists in several pieces of primary legislation.

Finally, we must acknowledge Ireland's failure to tackle the broader issue identified by the Troika in reforming our legal system.[17] More than a decade after the GFC, we have yet to deliver "*concerted implementation of still outstanding recommendations by the Irish Competition Authority in various areas: sheltered professional service sectors such as the legal and the medical profession, where prices are particularly high and impervious to the economic situation.*" Criticism of Ireland's exorbitant and unjust legal costs and our unlawful defamation regime are an annual event in the EU Commission

[17] https://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp76_en.pdf

Semester Report,[18] the Rule of Law Report,[19] and the OECD Country Survey.[20] Defamation reform is a small but significant element in the wider process of long-delayed legal reform, and it would be unconscionable for your Department to publish anything other than a comprehensive omnibus bill delivering the reforms above at a bare minimum.

I am happy to discuss the foregoing with you at your convenience.

Yours sincerely,

Neil McDonnell
Chief Executive

CC James Browne, Minister of State, Department of Justice
Oonagh McPhillips, Secretary General, Department of Justice
Declan Hughes, Secretary General, DETE
Doncha O'Sullivan, Deputy Secretary General, Department of Justice
Pauline Mulligan, Assistant Secretary General, DETE

[18] https://economy-finance.ec.europa.eu/document/download/61ad0b86-2eea-4e27-a4ed-ddb148ce6186_en?filename=IE_SWD_2023_607_en.pdf (page 54)
[19] https://commission.europa.eu/system/files/2023-07/20_1_52574_coun_chap_ireland_en.pdf (pages 5 & 21)
[20] https://read.oecd-ilibrary.org/economics/oecd-economic-surveys-ireland-2022_46a6ea85-en#page43

ANNEX I: CASE STUDY

An ISME member operating a licenced premises defended a defamation action

The premises admitted a group of people to the bar. One member of the group asked for an alcoholic beverage at the bar. The bartender considered the individual to be under the legal drinking age and asked for ID. The individual did not have any, and the bartender said she could therefore not serve him without ID.

Some time later the same evening, the same bartender was on the floor picking up glasses when she noticed that this individual had an alcoholic drink before him at his table. The bartender approached him and asked him where he got the drink, as he had earlier failed to produce ID. His mother was at the table, and she said she bought it for him.

The bartender said that he had been refused until he produced ID confirming his age, and that the premises could not supply to or allow consumption of alcohol by him until this was done. She took back the drink and returned the price of that drink to the mother. The family were verbally abusive to her for a period, but the situation calmed when the doorman intervened.

The individual eventually went home and got his ID, he returned to the premises and showed it to the bartender. It showed that he was of legal drinking age. In the aftermath, four solicitor's letters arrived as follows:

- From the individual himself.
- From his mother.
- From his mother's first cousin.
- From the first cousin's husband.

The letters alleged that the bartender had abused the individual, and that he was humiliated and embarrassed by this. They further suggested the bartender had called the individual names.
The issue progressed to a Circuit Court hearing. The Judge preferred the evidence of the defendant, finding for the business and awarding costs against the plaintiff. The plaintiff solicitor responded as follows:

- Plaintiff informed the defendant of their intention to appeal the decision to the High Court.
- Plaintiff solicitor subsequently phoned the defendant solicitor advising that they would drop the High Court appeal if the defendant did not pursue plaintiffs for costs, as their clients did not have the money to pay. Additionally, the plaintiff solicitor wanted a €3,000 contribution to their own legal fees.
- Defendant decided to accept the offer, as they had no guarantee of a similar outcome in the High Court.

Having won the case at Circuit Court, the High Court appeal threat resulted in:

- A €3,000 contribution to legal fees of the plaintiff's legal team.
- Failure to secure the legal costs awarded by the Circuit Court judge.
- Incurring of defendant's legal fees of €12,375, total €15,375 (incl plaintiff):
    - Defendant had to pay the €10,000 insurance policy excess.
    - Defendant's insurers paid the balance of €5,375.
    - Defendant's insurance premium rose.