



Submission to the Department of Justice to inform its review of the **Defamation Act 2009**

FLAC, February 2017

About FLAC

FLAC (Free Legal Advice Centres) is a non-governmental, voluntary organisation which exists to promote the fundamental human right of access to justice. As an organisation, FLAC focuses on the use of law as a tool for social change and on the right of equal access to justice for all. We work particularly on the protection of economic, social and cultural rights. FLAC is an affiliate member of the FIDH.

In our work, we identify and make policy proposals on how the law excludes marginalised and disadvantaged people, principally around social welfare law, personal debt & credit law and civil legal aid. We advance the use of law in the public interest and we co-ordinate and support the delivery of basic legal information and advice to the public for free and in confidence. We also engage in strategic litigation.

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Summary of Recommendations

In this submission Free Legal Advice Centres (FLAC) makes the following recommendations:

Recommendation: FLAC recommends in the context of the review of the Defamation Act 2009, that the provision in relation to civil legal aid is brought in line with Article 6 ECHR and Article 47 of the EU Charter of Fundamental Rights, and that the exclusion of defamation from the Civil Legal Aid Act, 1995 be removed.

Recommendation: FLAC recommends that the Department conduct the present review of the Defamation Act, 2009 in tandem with the ongoing review of the Incitement to Hatred Act 1989, to ensure that a complementary approach is taken to regulating hate speech, including the provision of accessible civil remedies to those targeted by such speech.

Preliminary

FLAC welcomes this opportunity to make a submission to the Department of Justice and Equality ('the Department') in relation to the statutory review of the Defamation Act 2009. While it is noted that the review arises from an automatic requirement under section 5 to review its operation five years from its passing, FLAC would also draw attention to a broader obligation on the Department under section 42 of the Irish Human Rights and Equality Act 2014, for convenience referred to here as the public sector duty. A review of legislation undertaken by the Department, should take into account the requirements of the public sector duty.¹ Accordingly, the review of the legislation must consider the need to:

1. Eliminate discrimination;
2. Promote equality of opportunity, and
3. Protect human rights.

While not all legislation will engage all three objectives above to the same degree, it is submitted that these objectives can in fact be furthered in the present review of the Defamation Act, and aspects of the equality and human rights considerations that arise are referred to in more detail below. Over and above the specific points raised in this submission, FLAC would also urge the Department to take this opportunity to expressly acknowledge the operation of the public sector duty in the present review and when reporting on the review set out the methodology adopted to integrate the duty into the review and its impact. Such express reference to the public sector duty and how to implement it in practice would provide leadership and a valuable learning tool to other Government Departments undertaking similar reviews in the future.

Areas for review

The Defamation Act, 2009 was an important codification of the law relating to the protection of reputational rights in Irish law. While the law in relation to defamation has largely evolved as an aspect of wider tort law, in the Irish context it also serves an important role in protecting the constitutional right to a good name, a right that is also encompassed within the right to respect for private life under Article 8 of the European Convention on Human Rights.² However in the context of the present review there are matters ancillary to the 2009 Act itself but which have implications for access to justice and the right to an effective remedy.

In this regard it is observed that actions in defamation are expensive to pursue and the parties bear considerable risk in terms of outcome, which ultimately leads to the perception that it is a remedy at the behest of those with the means to pursue it, but not otherwise.³ In addition

¹ In this context the person to whom the Department is providing services is the public at large, as legislation is addressed to and serves all members of society.

² See for example *Axel Springer AG v Germany*, Judgment (Grand Chamber), 7 February 2012.

³ Proceedings under the Defamation Act 2009 can only be commenced in the Circuit or High Court, but not the District Court. See Courts (Supplemental Provisions) Act 1961.

the legislation, in terms of the type of statement that is considered defamatory, is quite narrow, as it only protects an individual or a corporate entity targeted by the impugned statement, but other forms of more generalised speech, such as for example racist hate speech, that nonetheless has the potential to damage the individual's reputation and standing in society, is not caught within its terms. FLAC considers that these are matters that should be considered in the context of the present review as they undermine the overall effectiveness of the legislation as a means of vindicating human rights and promoting equality of opportunity.

Reflecting the above concerns this submission will address the following two issues:

1. The absence of legal aid for defamation;
2. The duty of the State to combat hate speech and whether the Defamation Act, 2009 and specifically section 10 of the Act protects the right to a good name where a group of persons are targeted by such speech.

(a) Legal Aid

The Civil Legal Aid Act, 1995 identifies a number of "designated matters" in relation to which the provision of legal aid is expressly excluded. One of those excluded areas is defamation.⁴ This exclusion does not allow for an examination of the merits of the application for legal aid, and is an undifferentiated exclusion even where a person's constitutional rights are at stake. While the decision of the Supreme Court in *Magee v Farrell*⁵ has established that there is no absolute right to be provided with legal aid by the State in civil cases where there is no risk to the liberty of the person, the issue of whether this accords with the requirements of the European Convention on Human Rights ('ECHR') was not argued before the Court.⁶

It is apparent that the requirements of the ECHR as regards the provision of civil legal aid are broader than those of the Constitution. Article 6 (1) of the Convention provides:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society,

⁴Section 28 Civil Legal Aid Act 1995. Section 28 (9) (b) provides a very limited exception to this general exclusion in the context of defending a counterclaim for defamation where legal aid has already been granted in respect of the primary proceedings.

⁵*Magee v Farrell & Ors*, [2009] IESC 60.

⁶It is noted that this case led to an application to the European Court of Human Rights, which reached a friendly settlement. The terms of the settlement to which the State agreed required the State to put in place a system of legal aid for next of kin in Inquest hearings where the deceased was in the custody of the State at the time of death. This has since been done. See sections 24 and 25 of the Courts and Civil law (Miscellaneous Provisions) Act 2013.

where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Article 6(1) as set out above, often referred to as the right to a fair trial, has been interpreted as requiring the State to provide legal aid to impecunious litigants, where the right of access to the Courts would otherwise be illusory. As far back as *Airey v Ireland*,⁷ the State was found in breach of its obligations under the ECHR in respect of the provision of legal aid. In that case the issue was the provision of legal aid in family law proceedings before the High Court. The European Court of Human Rights considered a number of factors in relation to the nature of the proceedings and the complexity of the procedure before the Courts and came to the conclusion that:

*"Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case."*⁸

The issue of whether defamation proceedings might come within the category of proceedings where legal aid is necessary was considered in *Steel and Morris v The United Kingdom*⁹ where it was found that defamation proceedings could come within those category of cases where the state may be obliged by the terms of Article 6(1) to provide legal aid. In identifying the factors that are relevant to determining whether the provision of legal aid is necessary the Court stated:

"61. The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively (see Airey, pp. 14-16, § 26; McVicar, §§ 48 and 50; P., C. and S. v. the United Kingdom, no.56547/00, § 91, ECHR 2002-VI; and also Munro, cited above).

62. The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate (see Ashingdane v. the United Kingdom, judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57). It may therefore be acceptable to impose conditions on the grant of legal aid based, inter alia, on the financial situation of the litigant or his or her prospects of success in the proceedings (see Munro, cited above). Moreover, it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial

⁷ *Airey v Ireland*, Judgment, 9 October 1979.

⁸ *Ibid.*, at para. 26

⁹ *Steel and Morris v The United Kingdom*, Judgment, 15 February 2005.

disadvantage vis-à-vis the adversary (see De Haes and Gijssels, p. 238, § 53, and also McVicar, §§ 51 and 62, both cited above)."

Therefore, while there is no absolute right to legal aid in respect of defamation proceedings, and legal aid in this area may be subjected to a merits test, however designed, it is quite clear that a blanket exclusion of such proceedings from the Civil Legal Aid Act, 1995 is unlikely to meet the requirements of Article 6(1) of the ECHR.

Similar concerns arise in relation to compliance with Article 47 of the EU Charter of Fundamental Rights. Article 47 provides:

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

Therefore, while the provision of legal aid has been interpreted as an aspect of fair trial rights under the ECHR, Article 47 of the Charter makes it an express right conferred on the individual, where the person's rights and freedoms under EU law are violated. It is notable that there has been no amendment to the Civil Legal Aid Act, 1995 on foot of the Charter being given treaty status, and again, it is unlikely that the express exclusions set out in the Civil Legal Aid Act, 1995 would be in compliance with the Charter in a case where EU law was engaged. Insofar as defamation is concerned, reputational rights have been interpreted as falling within the scope of the right to respect for private life under Article 8 of the ECHR, and a similar interpretation must be applied to Article 7 of the Charter which contains the identical right.

The absence of legal aid to prosecute or defend such cases will impact on the nature of the cases brought and the overall effectiveness of the legislation. In light of the exclusion under the Civil Legal Aid Act, the protections of the Defamation Act are essentially elitist and distort the fact that the legislation not only regulates the private sphere, but is also intended to vindicate fundamental rights whether protected by the constitution or aspects of the individual's private life under the ECHR.

Recommendation: FLAC recommends in the context of the review of the Defamation Act 2009, that the provision in relation to civil legal aid is brought in line with Article 6 ECHR and Article 47 of the EU Charter of Fundamental Rights, and that the exclusion of defamation from the Civil Legal Aid Act, 1995 be removed.

(b) Group defamation and combating hate speech

Section 10 of the Defamation Act, as presently framed, provides for the possibility of an individual taking defamation proceedings on the basis of a defamatory statement being made against a group or class of persons of which they are a member. The section provides as follows:

“Where a person publishes a defamatory statement concerning a class of persons, a member of that class shall have a cause of action under this Act against that person if—
(a) by reason of the number of persons who are members of that class, or
(b) by virtue of the circumstances in which the statement is published, the statement could reasonably be understood to refer, in particular, to the member concerned.”

There are two observations regarding this formulation. First, although a defamatory statement may be directed to a group, there must be some element of the statement that is targeted at an individual member of that group, before it may ground a cause of action. Secondly, it follows that the number of persons in the class must be so confined that the individuals within the group are identifiable. This would appear to exclude members of a social class or group, howsoever defined, from the potential protection provided by the Act.

This approach in the Act fails to have regard to whether a social group, and the individuals that make up that group, are entitled to the protections of the Constitution or other international human rights standards insofar as the good name of the individuals in the group may be damaged by reference to disparaging statements that are directed to the group to which they belong. An example would be statements that are racist in nature, but where the group concerned are too great in numbers for the statement to be considered to disparage any one member of the group over another. Nonetheless such statements may injure the reputation of the group in general within society, but at present no effective remedy is available to the individuals concerned.¹⁰

While defamation and hate speech have a broader scope in terms of the type of communication that may be targeted and the means of remedying same, the requirements of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), to which Ireland is a party, does place a specific imperative on the State to combat racist hate speech.¹¹ This requirement mainly derives from Article 4 of the Convention which provides:

“States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic

¹⁰It may be observed in passing that this would appear to elevate the rights of individuals who come together as a corporate sole, above individuals who share a common social trait, such as their ethnicity, race or gender.

¹¹While Ireland has entered a reservation/ interpretative declaration in relation to Article 4, this refers to the right to free speech and freedom of assembly, and does not as such exclude the obligations under Article 4.

origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

Another important instrument in this regard is Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.¹² Again this EU decision places a broad obligation on the State to combat hate speech through the criminal law without being prescriptive in relation to the measures adopted. Notably, however, by the terms of Article 3 of the Framework Decision each state is enjoined to “ensure that the conduct referred to in Articles 1 and 2 is punishable by effective, proportionate and dissuasive criminal penalties.” (emphasis added)

Finally attention is drawn to the detailed guidance provided by the European Commission against Racism and Intolerance (ECRI) in its General Recommendation on combating hate speech.¹³ That General Recommendation, drawing on the various human rights standard’s referred to above, the case law of the European Court of Human Rights and the work of other standard setting bodies, sets out a broad range of recommendations to States to assist in combating hate speech. In the present context, where civil remedies for certain types of injurious speech is under review, recommendation 8 merits setting out in full and provides that member States should:

“clarify the scope and applicability of responsibility under civil and administrative law for the use of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those who

¹²Insofar as this is an EU legal measure, the Charter of Fundamental Rights is of relevance and in particular the guarantee of an effective remedy (Article 47); the protection from discrimination (Article 20); the protection of human dignity (Article 1) and the physical and mental integrity of the person (Article 3).

¹³ECRI General Policy Recommendation No.15 on Combating Hate Speech, adopted on 8 December 2015 CRI(2016)15.

are targeted by it while respecting the right to freedom of expression and opinion, and accordingly:

a. determine the particular responsibilities of authors of hate speech, internet service providers, web fora and hosts, online intermediaries, social media platforms, online intermediaries, moderators of blogs and others performing similar roles;

b. ensure the availability of a power, subject to judicial authorisation or approval, to require the deletion of hate speech from web-accessible material and to block sites using hate speech;

c. ensure the availability of a power, subject to judicial authorisation or approval, to require media publishers (including internet providers, online intermediaries and social media platforms) to publish an acknowledgement that something they published constituted hate speech;

d. ensure the availability of a power, subject to judicial authorisation or approval, to enjoin the dissemination of hate speech and to compel the disclosure of the identity of those using it;

e. provide standing for those targeted by hate speech, equality bodies, national human rights institutions and interested non-governmental organisations to bring proceedings that seek to delete hate speech, to require an acknowledgement that it was published or to enjoin its dissemination and to compel the disclosure of the identity of those using it; and

f. provide appropriate training for and facilitate exchange of good practices between judges lawyers and officials who deal with cases involving hate speech;.

These human rights standards and expert body recommendations as set out above, may then be contrasted with the limitations identified above in relation to the Defamation Act 2009. In addition the domestic measure that is designed to deter and punish racist and other forms of hate speech, namely the Prohibition on Incitement to Hatred Act, 1989 has been found to be limited in relation to the forms of behaviour it addresses and has in any event has resulted in very few prosecutions and fewer convictions.¹⁴ It is understood that there has been an ongoing review of this legislation that has remained inconclusive. Taken together, and in the absence of more effective legislation to combat hate speech, the State is unlikely to be in compliance with Article 4 of ICERD, or to be in line with the requirements of EU law and the ECHR.¹⁵

¹⁴ *Combating Racism and Xenophobia through the Criminal Law*, 2008, Walsh and Schweppe, See also *A Life Free from Fear: Legislating for Hate Crime in Ireland: An NGO Perspective*, 2014, Schweppe, Haynes and Carr.

¹⁵ In the case of *Erbakan v. Turkey*, Judgment, 6 July 2006, the European Court of Human Rights stated:

“Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic

Recalling again that there is a duty on the Department, in the context of the present review, to consider the elimination of discrimination, the promotion of equality of opportunity and the protection of human rights, the Department is urged to consider how hate speech, that may damage the reputation and standing of a social group or otherwise incite hatred and discrimination, may be addressed.¹⁶

Recommendation: FLAC recommends that the Department conduct the present review of the Defamation Act, 2009 in tandem with the ongoing review of the Incitement to Hatred Act 1989, to ensure that a complimentary approach is taken to regulating hate speech, including the provision of accessible civil remedies to those targeted by such speech.

societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance...”

¹⁶Consideration of the nine protected groups under domestic equality legislation would appear an appropriate reference point for such a review and indeed an examination of possible amendments to the Equal Status Acts 2000-2015 might also provide an appropriate legislative framework and forum for furthering the State’s obligations to combat hate speech in addition to the ongoing review of the Incitement to Hatred Act, 1989.