17 Kildare Street,
Dublin 2.
1st March 2022

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

Dear Ms McEntee,

Firstly, having lobbied your Department for almost three years on the issue of Defamation Act reform,[1] may I express our gratitude that you intend to bring proposals for an amendment to the Act to Cabinet. In our previous note to the Department, we set out five suggestions for an amended Act:

1. The defamation alleged must be material and demonstrable; i.e. a certain threshold of seriousness must be met before a lawsuit can commence.
2. It must cause serious harm to the plaintiff.
3. It must be damaging; the plaintiff must explicitly set out the quantum of the damage caused; and the plaintiff must pursue their action in a court of appropriate jurisdiction for that quantum.
4. Plaintiffs in defamation actions must be able to give meaningful and reliable undertakings for their costs before they take an action against a defendant; a revised Defamation Act must require this.
5. The Defamation Act must strike a fair balance between the protection of the property rights of one person with the right to a good name of the other, consistent with Art 40. There is no proportionality between the balance of these rights at present, with the right to a good name overwhelming property rights and the right of free expression.

Your proposal to include anti-SLAPP provisions is most welcome, not just for the media, but for associations such as ISME which are regularly threatened with vexatious lawsuits as a result of lobbying activity. In order to be effective, an anti-SLAPP provision needs to be robust, must fully reverse the burden of proof onto the plaintiff, and should include financial penalisation of the plaintiff where a court finds their lawsuit to have been abusive or vexatious.

We also welcome the proposal to include a harm test for “transient defamation.” While the Courts Service does not provide statistics on the origin of defamation lawsuits, we understand anecdotally that most of them do not emanate from the media, but from retail and hospitality businesses. It is patently absurd and unjust that someone who has been asked to open their shopping bag by a security guard should be awarded thousands of euros by our courts for defamation. This proposal is long overdue.

[1] https://www.isme.ie/wp-content/uploads/2019/03/ISME-to-Minister-of-Justice-and-Equality-re-Defamation-Act.pdf

However, we remain very concerned about some key omissions from the reform proposals.

We understand your proposals will not include "fair trial rights." One of the perverse outcomes of the current act is the award of aggravated damages where a defendant mounts a robust defence against the claim lodged against them. (This is also the case in personal injuries litigation.) The practical effect of aggravated damages is to negate the defences of truth and honest opinion. This is most unfair where a statement may in fact be true, but the defendant cannot access the necessary proof to establish the truth of a statement. It forces many defendants to plead guilty, even when they are not. ISME has taken advices on this matter, and there is currently no remedy for the defendant but to counter-sue, a solution that would benefit only the legal profession.

We understand your proposals do not include a general requirement to prove harm. Since defamation is effectively a "reverse onus" tort, which requires the defendant to prove themselves innocent, this omission alone represents a serious undermining of any reform proposal. It allows plaintiffs to sue in cases where there might be no written record, or where the wording complained of is ambiguous. If a "serious harm" test, as requested by ISME in 2019 is not to be introduced, then an amended Defamation Act that is to be consistent with the tests applied by the ECHR will likely require very serious amendment elsewhere in order to provide a fair balance of rights.

There also appears to be no proposal to cap damages. Press reports have referred to "constitutional issues" with capping damages. As your officials must surely be aware by now, this is factually, legally and constitutionally untrue. As ISME has advised Government for years, there is simply no constitutional impediment to the capping of damages. This has recently been affirmed by the Law Reform Commission. In fact, several pieces of primary legislation have capped damages for decades, without constitutional challenge that we are aware of. It is absurd that the courts apply a cap on damages for life-altering catastrophic injuries, but Ireland does not apply a cap to someone who states, without the requirement for any objective test under the law, that their good name has been taken. As we know to society's great cost from personal injuries litigation, the removal of juries has not led to a moderation in damages; quite the opposite.

This goes to the heart of the finding by the European Court of Human Rights in the case of Independent Newspapers (Ireland) Limited v. Ireland, which found that "Unreasonably high damages for defamation claims can have a chilling effect on freedom of expression, and therefore there must be adequate domestic safeguards so as to avoid disproportionate awards being granted." Even if Government does not propose a fixed nominal cap to damages, it can recommend a proportionate or ratio cap, such as the caps in the Unfair Dismissals Act and the Protected Disclosures Act, which tie compensation to the remuneration of the plaintiff. It is perverse and unfair that Ireland award damages for defamation that are many multiples of those available in other countries.[2] The notion that our good names are worth such multiples is entirely bogus and without any objective justification.

[2] Salumaki V Finland

In the absence of a cap, it is unlikely that an amended Defamation Act will survive a first appeal to the European Court of Human Rights. Such an eventuality would render your Department's reform of the Act a failure.

Finally, we believe some administrative adjustments are also required to amend the Defamation Act.

1. As set out in our 2019 letter, the distorting effects of our excessive legal costs regime affects defamation in the same way as it affects personal injuries litigation: dubious cases, instigated by impecunious or indigent plaintiffs are frequently settled by blameless defendants rather than risk the failure to secure costs from a losing plaintiff. This is the weaponisation of an unfair and unjust system. Defamation plaintiffs must undertake to pay costs in the event of loss, or should bond their costs, or their lawyers must do so. The alternative is a civil legal aid regime, which Government might find unpalatable.
2. We believe those exercising public roles or in elected office should not enjoy the same level of protection under an amended Act as private citizens. We should be lawfully entitled to subject such persons to robust public commentary.
3. We need transparency on defamation claims: Most are currently lodged in the Circuit Court, where visibility of claims made is practically non-existent. The Courts Service must record the details of all defamation claims lodged.
4. We need transparency on awards and settlement. Logically, we feel that this should take the form of a public claims register of the type sought in personal injuries, and there is on fact no reason why the same register should not be used for both personal injuries and defamation.

The Defamation Act 2009 has demonstrably oppressed rights of free expression at home and has been an international embarrassment in the ECHR. It is important that we use this opportunity to effectively and fairly modernise this legislation.

Yours sincerely,

Neil McDonnell
Chief Executive

CC Tánaiste Leo Varadkar TD, DETE
Minister of State Robert Troy TD, DETE
Ms Oonagh McPhillips, Secretary General, Department of Justice
Ms Oonagh Buckley, Deputy Secretary General, Department of Justice