17 Kildare Street,
Dublin 2.
3rd May 2024

James Browne TD,
Minister of State for Justice and Equality,
Dept of Justice and Equality,
51 St. Stephen's Green,
Dublin 2.

Dear Minister of State Browne,

I note the remarks by the Taoiseach Simon Harris today, marking World Press Freedom Day, that "*Democracy cannot truly flourish without robust protection for the right of freedom of expression. This will be carefully balanced with safeguarding the individual right to a good name and reputation.*"

May I express our gratitude for the courtesy and attentiveness with which you and your staff welcomed our delegation to the Department of Justice on 11th April. I would like to take this opportunity to summarise our position and our principal defamation reform goals:

1. The introduction of a serious harm test.
2. The introduction of anti-SLAPP measures and the penalisation of SLAPPs, with explicit protection against defamation proceedings in the case of LSRA complaints.
3. The capping of damages.
4. The ending of retail defamation proceedings and analogous proceedings in other fora.
5. Reform of the defence of truth.
6. Immediate and material steps to reduce the cost of all legal proceedings.

1. The introduction of a "serious harm" test is an essential part of meaningful defamation reform. In our view the Defamation Act is unconstitutional without such a test, as it unjustifiably suppresses defendants' property rights. It is equivalent in law to allowing personal injuries litigation without the need to adduce evidence as to injury.

The introduction of a harm test in other jurisdictions has not prevented plaintiffs from instituting defamation proceedings. The onus is now on the other side to prove a harm test would in any way deny the right to protect one's good name. Furthermore, it is absurd to suggest that a harm test is injurious to rights when the bill proposes to introduce a harm test for transient retail defamation.

2. The adoption of the anti-SLAPP Directive by the EU Parliament means that Ireland must introduce robust and meaningful protections for defendants, as well as significant penalties for offending plaintiffs and compensation for defendants. In our view, compensation for defendants must be equivalent to three times the damages sought by the plaintiff, or the maximum jurisdiction of the Court in which the claim is brought, whichever is the greater. This level of award is consistent with existing legislative provisions under the Protected Disclosures Act 2014.[1]

Despite the fact that complaints about lawyers to the Legal Services Regulatory Authority enjoy absolute privilege[2] under the Legal Services Regulatory Act 2015, this has not stopped some lawyers threatening defamation proceedings, and having complaints withdrawn as a result.

[1] https://www.irishstatutebook.ie/eli/2014/act/14/schedule/2/enacted/en/html#sched2
[2] https://www.irishstatutebook.ie/eli/2015/act/65/section/89/enacted/en/html#sec89

Therefore, the anti-SLAPP provisions in the reform bill must be explicitly extended to protect complainants and complaints to the LSRA. In the absence of such explicit protection, it is inevitable that the few protections available to citizens under the LSRA will be eroded by lawyers presenting vexatious defamation proceedings in order to spike complaints against them.

3. Regarding the capping of damages; the Supreme Court has now confirmed (as ISME noted five years ago) that capping damages is constitutional and is a matter for the Oireachtas. As the level of damages recommended by the Supreme Court in Higgins -V- DAA is excessive relative to the guidelines of the Judicial Council for personal injuries, and is almost certainly repugnant to Article 10 rights under the European Convention on Human Rights, the Government must introduce an immediate cap for general damages for serious defamation. We believe that cap should be €75,000.

We accept that on occasion, higher damages than this may be awarded, for instance where a plaintiff has lost their job as a result of a defamatory allegation, or where a business has had their reputation damaged as a result of a defamatory allegation (e.g. in the Dominion Voting Systems v. Fox News case). However, in our view these should be dealt with on a "vouched" basis, similar to special damages in personal injuries cases. Awards of up to twice the vouched loss should be awardable by the courts. This is consistent with legislative provisions under the Unfair Dismissals Act 1977.

4. The proposals to address "transient retail defamation" must be robust, and must not subject the defendant to cost in establishing that such an action is taking place.

In our view, any claim which might be considered to amount to transient retail judgment must not be entertained by a court in the first place, and should be subject to test by the court master in a manner similar to that applied in Rolfe -v- Veale in the UK.[3]

We have noted a concerning increase in the use and abuse of "analogous proceedings" such as complaints under the Equal Status Acts, 2000 – 2015. We therefore seek the extension of anti-SLAPP protections to proceedings brought in the Workplace Relations Commission, and in addition, we believe that plaintiffs under the Equal Status Acts, 2000 – 2015 should be required to lodge a deposit of €500 with the WRC before that agency hears a complaint under this Act.

5. The defence of truth provisions in the reform bill must accommodate the views of the ECHR and the UN. One of the serious flaws in the current act is the awarding of aggravated or penal damages, where a defendant seeks to defend a claim of defamation against them. It is currently held that, if a robust defence is lodged, that the defendant has aggravated the damage to a person's reputation. This is particularly unfair where a statement may actually be true, but the defendant does not have access to the necessary proof to prove the truth of a statement. It coerces defendants to plead guilty, even if they are not, and denies persons a right to an adversarial defence; because they are doubly punished, firstly for defamation, and secondly for seeking to defend a claim of defamation where a credible defence may exist. This arguably violates the right to a fair hearing under Article 6(1) ECHR.

The protection of satiric and comedic comment is essential in a democratic republic. It is also the acid test in determining the State's willingness to defend our constitutional right to freely express opinion. The reform bill must do so.

[3] https://www.dlapiper.com/en/insights/publications/2021/10/important-judgment-on-de-minimis-threshold-in-data-protection-compensation-claims

6. Any reform to the Defamation Act without addressing legal costs will be almost meaningless. As we have previously advised the Department of Justice, the real power in defamation litigation is not the ability to extract damages from defendants, it is the ability to inflict large costs upon them, without any hope of recovery even if the defendant wins. The Government must therefore introduce legislation giving effect to the minority report of the Review of the Administration of Civil Justice[4] within the lifetime of the 33rd Dáil. At our meeting, we also mentioned the following:

- We had a retail security company which turns over €10m annually in Ireland, and has 93 active retail defamation claims on its books with a total potential liability of €3m. These are for "can you please show your receipt for that" type events, which typically settle in the €5k-€8k range, with €25k-€35k in costs.
- We had another business which, having successfully defended defamation proceedings in the Circuit Court connected with the enforcing of licensing laws, had to settle for €27k when the plaintiff threatened to appeal to the High Court.
- The legal instruction to convenience store owners dealing with shoplifters is "no challenge," since the defamation suit which follows will cost more than the stock being stolen. In effect, our legal system condones, protects and encourages the crime of shoplifting.

I would further point out beyond the scope of our discussions that:

- The legal lobby has shown a determination[5][6] to keep divorce proceedings out of the District Court. While their stated intention is to the contrary, it is difficult for us to accept that their primary concerns are for the victims of marriage breakdown.
- We note a recent insolvency case where the legal fees claimed[7] exceeded the value of the liquid assets in the failed company and were reduced by the High Court.
- The State Claims Agency puts the cervical check claims liability[8] in the region of €300m, two thirds of which will be legal fees on ratios established by the Central Bank NCID reports.[9] While the "absolute confidence" standard has been set by the High Court and Supreme Court, it should be noted that clinical liability of this type is not recognised by the WHO[10] or in any other jurisdiction. The number of cervical claims in Ireland is larger than in the UK, despite the population difference. The NCID data is self-explanatory on why cases are litigated rather than settled via PIRB, despite the fact they take longer for plaintiffs, while generating little or nothing in terms of marginal compensation for the plaintiff.
- We agree with the observations made by the CCPC[11] on the failure by the LSRA to advance a timetable for the introduction of a profession of conveyancer. There is no reason the LSRA could not have called for both digitisation AND conveyance reform. It is difficult to disagree with the observations made previously by Isolde Goggin[12] that reforms of the legal profession have prioritised the interest of incumbents. This has been an early test for the LSRA, one which it has failed to pass from the citizens' perspective. The concern remains that the LSRA exists to provide regulation of the profession, by the profession, for the profession.
- By way of final illustration of the situation citizens and small business face before our courts, I mention the case of an ISME member whose case has been partially adjudged in the Supreme Court. I cannot make observations one way or the other about McCool-V-Honeywell[13]

[4] https://assets.gov.ie/100652/b58fe900-812e-43f2-ad8d-409a86e7c871.pdf
[5] https://www.rte.ie/radio/radio1/clips/22383950/
[6] https://www.irishtimes.com/opinion/2024/04/17/were-heading-for-an-unfair-elitist-two-tier-divorce-system/
[7] https://www.businesspost.ie/news/compromise-deal-agreed-on-legal-and-professional-fees-in-mac-interiors-case/
[8] https://www.irishtimes.com/health/2023/07/06/exponential-rise-in-legal-claims-could-make-cervicalcheck-financially-unsustainable-report-warns/
[9] https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/national-claims-information-database/ncid-employers-liability-insurance-report-3.pdf?sfvrsn=bfc1631a_8
[10] https://publications.iarc.fr/625
[11] https://www.rte.ie/news/business/2024/0411/1442882-ccpc-disappointed-at-conveyancing-report-recommendations/
[12] https://www.ccpc.ie/business/news/speeches-and-presentations/law-protect-incumbents-case-legal-services-reform-ireland/
[13] https://ie.vlex.com/vid/mccool-v-honeywell-control-793404657

because, despite 19 years of litigation through the High Court, Court of Appeal and Supreme Court, the substantive matter of whether there is a breach of contract between the parties has not been adjudicated. Mr McCool long ago ran out of funds to pay his lawyers, but the Supreme Court agreed to support his appeal to that court because of its desire to test a prior ruling in "*Battle*" in 1968. In judgments by Justices Charleton,[14] Hogan[15], Woulfe,[16] and Murray,[17] Mr McCool has won the opportunity ***on very narrow grounds***, to continue the action against Honeywell, if he can secure funding to do so.

- Charleton J noted in this case "*If cases are not so controlled, then those which fit into the potential category of ones where unfocused allegations may be met by notices for particulars, interrogatories, repeated and disproportionate discovery motions which seek the production of more than what is reasonably required, and applications resulting, litigation has been known to spiral into a limbo state* ***where justice seriously risk never being heard because the funds to support litigation and the will to fight are already sapped***." [emphasis ISME]
- Mr McCool is 74 years old and has handed over the business to his son and will continue the fight solo if he has the means to do so. Irrespective of the merits of the substantive issue, it is fundamentally unjust that a case can run for decades without conclusion, because we have no control of legal costs, and no equality of arms before our courts.

Yours sincerely,

Neil McDonnell
Chief Executive

CC Simon Harris TD, Taoiseach
Helen McEntee TD, Minister of Justice
Michael McGrath TD, Minister for Finance
Peter Burke TD, Minister for Enterprise, Trade and Employment
Neale Richmond TD, Minister of State, Department of Finance
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

[14] https://www.courts.ie/acc/alfresco/e18a8c48-577b-4d63-a5d4-c430011e1bb4/2024_IESC_5_(Charleton%20J).docx/docx/1#view=fitH
[15] https://www.courts.ie/acc/alfresco/898fe917-819e-4bbc-8ae4-098bba725dd7/2024_IESC_5_(Hogan%20J).docx/docx/1#view=fitH
[16] https://www.courts.ie/acc/alfresco/1f5147c0-d02d-41fe-8d19-668c78ff96bf/2024_IESC_5_(Woulfe%20J).docx/docx/1#view=fitH
[17] https://www.courts.ie/acc/alfresco/81c1a4e8-5089-42d8-a5a8-dedea6e1830e/2024_IESC_5_(Murray%20J).docx/docx/1#view=fitH