

The Bar Council

Conference on Recent Developments in Defamation Law

Distillery Building, 145 Church Street, Dublin 7

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Despite the nay-sayers, I think it is fair to say that the Irish media landscape has been substantially changed by the passage of the 2009 Defamation Act. Part of this change has involved the translation of much case law into statute law: I am not a lawyer, so I wouldn’t presume to go further down that road, except to say that I am sure that this will be of value both to the media and to legal practitioners.

My remarks today have to do more with exploring and explaining the role of the Press Council and the Office of the Press Ombudsman in the new dispensation, and the effect – insofar as it can be ascertained at this early stage – of the recognition of these bodies by the Oireachtas under the terms of this Act.

In doing so I may be giving a passable imitation of a bad fairy at a christening, in that I am speaking to an assembly of lawyers about an initiative, both by government and by the press industry, which, if it works, has the potential to reduce the quantum for the legal profession. However, in an evolving situation such as now exists, I believe that a mutual exchange of information cannot but be of benefit to all participants.

It is hardly a state secret that the issue of press regulation has been one that has surfaced intermittently in Irish public life, or that political or administrative initiatives on the neighbouring island have from time to time given rise to emulation on this side of the Irish Sea. Our defamation legislation itself is a case in point: the 1961 Irish legislation which has now been reformed after half a century had a distinctly cousinly relationship with similar legislation passed some time earlier in Britain.

We were not, however, in lock-step with Britain either in relation to subsequent changes in British defamation law, or in relation to the industry initiatives which, in Britain, generated, first, the Press Council there, and, later, the Press Complaints Commission.

The reasons for this are unclear. It was, however, not until some fifteen years ago that the issue of press regulation surfaced in a substantive form in Ireland. This was in the deliberations, and the Report, of the Commission on the Newspaper Industry, set up in 1995 under the former Chief Justice, Tom Finlay, in the wake of the collapse of the Irish Press Group.

That body recommended the creation of the office of Press Ombudsman, deciding not to recommend the establishment of a Press Council as such because of the relatively small size of our population and of the newspaper market serving it. This was one of the many recommendations of this Commission that were allowed to gather dust, until it was taken down off the shelf a decade later and refurbished as part of on-going discussions between the press industry and the government about matters of common interest. These matters included not only the establishment of a regulatory mechanism for the press, but also reform of the legislation on defamation.

The agreement eventually arrived at – and it was, essentially, a win-win solution – was that at least some of the changes in defamation law sought by the industry would be incorporated in a new Act and, in return, the industry would sponsor an independent Press Council and Press Ombudsman along lines broadly acceptable to government.

To give credit where it's due, the role of a distinguished member of the Bar, Michael McDowell SC, who acted as one of the midwives during a sometimes painful birth process that took more than four years, should be recognized here. Our thanks are due to him and others in helping to bring this process to a successful conclusion.

The subsequent recognition of the Council and the ombudsman by a resolution passed by both Houses of the Oireachtas last year was the final stage in this process.

This resolution gives our new regulatory structures a status which, although not unique, is accorded to few other non-governmental bodies in Irish law. Although there are some similarities with other organizations such as the Red Cross and An Taisce, it is a body that is recognized under statute rather than a body created by statute.

The purpose of the recognition offered under the Act, and bestowed by the Oireachtas under the same Act, is to give the decisions of the Press Council and the Press Ombudsman on complaints about the print media protection against any action for defamation, not simply because it is the Press Council, but because it has satisfied the important and very specific pre-conditions for recognition that are laid down in the second schedule to the Act.

Its core characteristic is that it is an independent body, with its own rules and procedures, and its own Code of Practice, governed by Articles of Association as a company limited by guarantee without shareholders.

It is wholly funded by the press industry, but the membership of the Council has a non-press-industry majority, and both the Council and the Press Ombudsman are, in their operations, completely independent of the industry.

They are also completely independent of government, which does not have any role in the appointment or ratification of the membership of the Council, or of the Press Ombudsman.

From the experience I have garnered since my appointment as Chairman of the Council, I think I can safely say that the model we have adopted here in Ireland is unique. Only two other European Press Councils have a Press Ombudsman as well as a Press Council, and, in each of those, the role of the Press Ombudsman is less significant than it is in Ireland. Where there is a unicameral system, appeals and procedures are generally more limited. Some other Press Councils accept subventions from their governments – Germany and the Netherlands are two that spring to mind – without having to compromise their independence by accepting a government role in appointments. Not all Press Councils have a majority of independent, non-industry members, as we do.

It may be thought that what we have created is, in the words of a former Taoiseach, an Irish solution to an Irish problem. But against that I can offer the evidence that, especially in the countries of central and eastern Europe, and sometimes further afield, our experience, though limited, is frequently called on in countries which are anxious to create structures that can resolve or at least ameliorate the inevitable tensions between government and media in a way that can command public support and respect.

The way our system works is basically quite simple. We generally carry out conciliation and reach conclusions on the basis of documentation alone, although there is also provision for face-to-face mediation. We publish all decisions, whether by the Press Ombudsman or, on appeal, by the Press Council, to the interested parties and on our website. We publish an annual report, of which copies have been made available to you, giving details of our activities.

We actively discourage the involvement of legal practitioners. This is not of course only because of the patent desire of the newspaper industry for a low-cost (free to complainants) mechanism for conflict resolution. We also find that experienced conciliation, such as our staff can engage in, can help to resolve up to a quarter of all cases without the necessity for a formal decision.

What we don't know, as yet, is how and where our procedures, actions and decisions will fit into the new defamation law landscape. Unlike regulatory structures in some other countries, we cannot insist that complainants give an undertaking not to engage in legal action based on the article or articles that are the cause of complaint. If formal legal proceedings have been initiated before we get a complaint, the complaint will not be processed until these legal proceedings are withdrawn or concluded. If formal legal proceedings are initiated during the course of the consideration of a complaint, consideration of that complaint will be suspended until those proceedings, also, have been withdrawn or concluded.

I am aware of anecdotal evidence to suggest that some cases that have been dealt with by our structures have persuaded those involved not to proceed with legal action. Although we do not make any decision in relation to possible monetary compensation, I have learned informally of one case of mistaken identity which, if it had gone to court, would have resulted in – at the very least – a four-figure settlement, that was informally resolved on the basis of a €150 restaurant voucher. I am also aware of one case in respect of which a complainant took legal proceedings despite the apparently satisfactory conclusion of the conciliation process, but I am unaware of the eventual outcome in that case – possibly a small monetary settlement might have been involved.

However – and I know you will be relieved to hear this – there will always be cases in which a complainant, and the courts, may be persuadable that monetary compensation is the most appropriate remedy for the loss of a person's good name. Although the Press Council and the Press Ombudsman are not concerned with monetary compensation in any shape or form, the new legislation does give them a significance- albeit an indirect one - in legal proceedings in two important respects.

One of the most radical changes in the law under the new Act is the provision that a published apology may be considered by the court, not as an admission of liability exposing the publication to considerable legal hazards, but as something that can be taken into account, at the discretion of the Court, in mitigating any financial sanction applicable. Insofar as the conciliation service of the Office of the Press Ombudsman may, on occasion, secure such publication, this provision of the Act obviously enhances the role of the new institution.

Secondly, any publication that is a member publication of the Press Council may, in its pleadings in a defamation case, provide evidence that it is a member publication in good standing of the Council, that it observes the Code of Practice for Newspapers and Magazines, and that it publishes decisions of the Press Ombudsman and/or the Press Council upholding complaints about it in full accordance with the Code and the Council's procedures. This evidence may also be taken into consideration by a Court, at its discretion, when deciding on any possible monetary sanction for defamation.

Interestingly, this can in certain circumstances act to disadvantage publications that are not member publications of the Press Council. This is because, in order to avail of a similar right to plead mitigation, such publications will have to provide satisfactory evidence to the Court that they abide by a Code of Practice and complaints procedures that are at least equivalent to those adopted by the Press Council. Those of you who are familiar with our Code and our procedures will be aware that the bar, in this matter, is being set fairly high.

I am not sure that non-member publications are, as yet, aware of this. We are taking steps to ensure that this information gap is filled as soon as possible, to the advantage of press standards generally in Ireland.

What remains to be seen is what will happen if a complainant who has had a complaint against a newspaper or magazine upheld in our system, and where the publication has had to publish a decision of the Press Ombudsman and/or of the Council itself that it has been in breach of the Code of Practice, takes this trophy to the Circuit Court or the High Court in search of the monetary sanction which our system is, correctly in my view, not empowered to impose.

This is, of course, a matter which is entirely within the competence of the courts, and, for that very obvious reason, is not one on which I would venture to comment.

A final point about the internet. You will be aware that internet publication is, to all intents and purposes, a totally unregulated medium. Although the Defamation Act, in its provisions for press regulation by a recognized body, does not specifically include internet-based publication, there is nothing in our Articles of Association that would preclude membership of the Council by web-based publications, and in recent times one such publication has already applied for, and has been accepted into, membership of the Council. This is a wholly positive development with substantial potential implications for the future.