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Defamation (Amendment) Bill 2024 – Significant Reform on the Horizon

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Introduction

The Defamation (Amendment) Bill 2024 (the “**Bill**”) was published on 2 August 2024 with the possible enactment of the Bill before the end of this year. The road to reform commenced in 2016 and has involved substantial consultation, leading to publication of the Report of the Review of the Defamation Act 2009 in March 2022 and subsequently, the Joint Committee on Justice Report on Pre-Legislative Scrutiny of the General Scheme of the Defamation (Amendment) Bill (September 2023) (the “**Joint Committee Report**”). These reforms will have a significant impact on defamation law in Ireland and will shape the way in which proceedings are both initiated and defended. We set out some of the key proposals below:

1. Abolition of Juries

The Bill proposes to abolish juries in High Court defamation proceedings, meaning all actions would be heard by a judge alone (reflecting the position in the UK since 2013, save for exceptional cases). This change will apply to all defamation proceedings commenced after the Bill is implemented, with the aim of reducing disproportionate and unpredictable damages awards.

This change has been met with some criticism, with proponents of the jury noting the fundamental role played by the jury in the Irish legal system and fears its removal would impact on trust and public participation. It has also been suggested there is little evidence that removing a jury from defamation proceedings will serve to significantly reduce costs or decrease delays. In support of jury abolition, it is noted that juries can add unpredictability and a lack of transparency to case outcomes, cause delays and lead to excessive damages awards. The reasons for and against abolishing juries were set out in the Joint Committee Report and are likely to be debated further as the Bill moves through the Oireachtas.

2. Strategic Lawsuits Against Public Participation (SLAPP)

The Bill introduces protections against abusive Anti-SLAPP proceedings¹ insofar as they relate to defamation proceedings, and in doing so implements certain requirements of the Anti-SLAPP (EU) Directive 2024/1069 (to be transposed by May 2026²). Minister for Justice, Helen McEntee noted that the measures go farther than the minimum requirements of the Directive and that “*further legislative measures are envisaged in due course to transpose it for other types of civil proceedings*”.³

The Bill applies to a wide range of possible behaviours that could give rise to SLAPPs including claims, threats and initiation of multiple proceedings against the individual by the plaintiff (section 34A). The

plaintiffs conduct during the proceedings, including '*bad faith of procedural tactics*' or the generation of costs or delays for the defendant will be considered by the court. Likewise seeking remedies from the defendant of a disproportionate, excessive or unreasonable nature will also be a factor considered by the court when assessing if proceedings amount to SLAPPs.

The Bill provides for accelerated treatment of SLAPP proceedings, including in a security for costs application, an ability for defendants to seek a declaration recognising that the proceedings are a SLAPP either before, during or at the conclusion of the action and strike out mechanisms for unfounded proceedings. In that regard, despite the Joint Committee Report's recommendation that the threshold of showing such a claim was '*manifestly unfounded*' was too high, that threshold has been retained.

3. Serious Harm Test – Body Corporate

The Bill introduces a serious harm threshold for corporate bodies (excluding non-profits) to initiate defamation proceedings. To meet the test, a corporate plaintiff must show that it has or is likely to suffer 'serious harm', and that harm is likely to cause serious financial loss. This new harm test will render an attempt to show reputational harm alone insufficient for most companies. Non-profit corporates will have to demonstrate that serious reputational harm has or is likely to occur.

4. Update to Qualified Privilege Defence - Transient Retail Defamation

The defence of qualified privilege is to be extended to include transient retail defamation, to reflect developments in common law. This will provide a defence to a claim of defamation against retailers, where proof of payment is requested for goods or services received. Retailers may also rely on the new provision to defend a statement that a method of payment is one incapable of being accepted (for example, an apparently forged note or a blocked credit card), provided the statement was not published excessively and the person publishing the statement had a duty or interest in doing so.

5. Innocent Publication – Live Broadcast Defence

The Bill introduces a 'Live Broadcast Defence', which will broaden the defence of innocent publication in line with defences available in other common law jurisdictions such as the UK. The defence applies to broadcasters of radio or television programmes licensed and regulated in the State.

The Bill provides a defence to a defamation action arising from a statement published by a 'relevant person' during a live broadcast, if the defendant can prove that '*reasonable and prudent precautions*' were taken prior to and during the live broadcast to prevent the publication of defamatory statements.

In assessing whether such precautions were taken, the court can consider a wide number of factors such as the level of control the broadcaster could be expected to have over the 'relevant person' (i.e. the person who made the statement) having regard to the location and nature of the live broadcast, and whether or not that person was a contributor to the programme. Notably, the defence may be claimed in respect of statements published by persons whose presence or participation in the programme was not invited by the broadcaster (i.e. bystanders who interject in a live broadcast). Other factors the court may consider include the broadcaster's risk management procedures, including any vetting of contributors.

6. Changes to Offer to Make Amends, Correction Orders and Circuit Court powers

The Bill proposes that defendants, in the context of an offer to make amends or correction order, must publish the correction or apology with the same prominence as the original defamatory statement. This is more onerous than the previous requirement to '*publish that correction and apology in such a manner as is reasonable and practicable in the circumstances*'. The court can have regard to the conduct of both parties, after the offer to make amends has been made, when making a costs order.

The power of the Circuit Court to grant a declaratory order that a statement is defamatory where the defendant has "no defence", a clearly high threshold, will be lowered to allow the relief where the defendant has no defence which is "reasonably likely to succeed".

7. Alternative Dispute Resolution (ADR) processes

The Bill introduces a new requirement for solicitors to inform their clients of the availability and implications of using specified ADR processes where they apply before initiating proceedings, including complaints to the Press Council and Coimisiún na Meán's Right of Reply Scheme (relating to broadcasts). Where the client rejects the process, the solicitor must file a statutory declaration with the Court to evidence that they have complied with this requirement. The court may also invite parties to consider the specified ADR processes and adjourn proceedings or make other orders to facilitate the process and attempt to settle proceedings. An unreasonable refusal by a party to consider or engage in the ADR process can be considered by the court when determining costs.

Conclusion

Overall, the new proposals address a number of issues raised in the Joint Committee Report, many of which will be welcomed. The Bill offers improved methods for recourse concerning offers to make amends, correction orders and increases the onus on parties to avail of specified ADR processes where applicable.

The abolition of the jury in High Court proceedings has been met with some criticism and it remains to be seen whether this change will result in a reduction in delays and lower damages in practice.

Certain proposals within the Joint Committee Report have not materialised such as the proposal to include non-commercial website operation under the innocent publication defence or suggestions to reduce the burden of proof for the defence of fair and reasonable publication. Further, the Bill does not address recommendations concerning the Statute of Limitations and jurisdictional forum shopping.

As the Bill moves through the legislative process, substantive amendments are expected to be tabled but time will tell whether the exclusion of certain Joint Committee recommendations were a missed opportunity. It is hoped the final Bill will deliver on the promise to reduce legal costs and provide more effective and efficient outcomes for defamation actions.

Also contributed to by John Grogan

1. Defamation (Amendment) Bill 2024, Explanatory Memorandum, pg1 & 6,
<https://data.oireachtas.ie/ie/oireachtas/bill/2024/67/eng/memo/b6724d-memo.pdf> - accessed 12 August 2024
2. Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation') OJ L, 2024/1069, 16 April 2024, ELI: <http://data.europa.eu/eli/dir/2024/1069/oj> - This Directive entered into force at EU level on 6 May 2024 and must be transposed into national law by 7 May 2026.
3. Dáil Éireann Debate, Tuesday - 23 July 2024, Question (1456),
<https://www.oireachtas.ie/en/debates/question/2024-07-23/1456/>, accessed 12 August 2024

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