NewsBrands Ireland and Local Ireland

Submission to the Joint Committee on Justice

on the General Scheme of the Defamation (Amendment) Bill

Introduction

NewsBrands Ireland and Local Ireland are pleased to accept the invitation by the Joint Committee on Justice to make a written submission on the General Scheme of the Defamation (Amendment) Bill ("the General Scheme"). We would also be happy to appear before the Committee to discuss our submission and answer questions.

NewsBrands Ireland is the representative body for national newspapers, print and online. Its remit is to promote the vital contribution made by its members' trusted journalism to society and democracy, to convey the commercial power of news brands' audiences to advertisers, and to work towards a fair and balanced legislative framework that supports public service journalism.

Local Ireland is the promotional brand of the Regional Newspapers and Printers Association of Ireland, formerly the Provincial Newspaper Association, founded in 1919, and the oldest newspaper association in Ireland. Regional news publishers in print and online are vital to the communities they serve. No other media can consistently deliver high quality, professional content at such a hyperlocal level.

While we welcome the publication of the General Scheme, reform is long overdue. The Defamation Act 2009 provided for a review of its operation to be completed by January 2015. That statutory review was more than five years late. It is crucial that the reforms, now prioritised by Government, be implemented as quickly as possible and, certainly, within the likely limited legislative timeframe of the current Dáil.

Minister Simon Harris has said that the amendments in the General Scheme "will have a positive overall impact on protection of fundamental rights, access to justice, reduction of courts backlogs and reduction in legal costs." A failure to implement these changes speedily would continue to undermine the work of the independent media in Ireland, which further erodes the proper functioning of democracy in this country.

NewsBrands Ireland and Local Ireland both made detailed submissions on the review of the Defamation Act 2009 in January 2017, in which recommendations for reform were made. Some have been accepted by Government, but many have not. While this is disappointing, that disappointment will be as nothing should even the limited reforms in the General Scheme be rendered moot by further delay.

In commenting on specific items, this submission will adopt the headings in the General Scheme published on 28 March 2023. We will only comment where it seems appropriate or useful to do so.

Executive Summary

As outlined above, the gestation of the General Scheme has been long and occasionally difficult. It is crucial that the birth of even the limited proposed reforms proceeds without delay. The pursuit of perfection should not lead to the loss of the good. Thus, the Amendment Bill must proceed promptly and efficiently to enactment, and we trust that the Committee will play an important role in this process.

Consequently, if there are aspects of the Amendment Bill that the Committee concludes would require more careful and lengthy consideration - and the proposed anti-SLAPP provisions might fall within this category – other proposed reforms should nonetheless be enacted. By way of example, should it become necessary, there is nothing to prevent the abolition of juries, which is the single most important and effective change, by way of a discrete piece of legislation that can be enacted without delay.

As outlined in more detail below, NewsBrands and Local Ireland would urge the following:

1. Juries in defamation cases should be abolished without further delay.
2. A serious harm test should be introduced in all defamation cases.
3. An initial formal offer to resolve proceedings should be open to both parties.
4. Section 17 of the Act of 2009 should remain in its current form.
5. As proposed in Head 15 of the General Scheme, the defence of fair and reasonable publication on a matter of public interest should be simplified.
6. Sub-head (iv) of Head 20 allowing for an intrusion into a claimant's life to be an aggravating factor when determining damages should be deleted.
7. The measures to restrict SLAPPs should not be allowed to delay the introduction of simpler, but no less important, reforms.

Head 3 – Abolition of juries in High Court actions

NewsBrands has been calling for the abolition of jury trials in defamation actions for almost 40 years. They are unpredictable, time consuming and costly. Civil jury decisions lack transparency. A number of jury awards, giving damages greatly in excess of those available in severe personal injury actions, have served to bring the legal system into disrepute. The supposed safeguards against excessive and unpredictable jury awards by appellate courts are both financially onerous and have been criticised by the European Court of Human Rights. Both separately and taken together, these factors have served to damage the constitutional entitlement of freedom of speech and have wrongly undermined one of the pillars of a democratic society, namely a free and independent press.

This is the most important change in the General Scheme. It must be introduced without delay.

Heads 4, 5 and 6 – Serious Harm Test – bodies corporate, public authorities and transient retail defamation.

We welcome both the introduction of a serious harm test in cases involving bodies corporate, public authorities and retailers and the acceptance of the need for such a test. It is a mystery, however, why it is not being introduced in all defamation cases.

The Defamation Act 2013 in the U.K. introduced provisions to prevent both libel tourism and unwarranted, but nonetheless expensive, claims. These are major issues for Irish publications, especially those with an online presence.

If, as is anticipated by several lawyers and as advocated by others, the Republic of Ireland becomes a 'hub' for defamation tourism, the damage to the country's reputation as a liberal democracy and as a place in which technology companies and websites can carry on business relatively freely will be under threat.

Further, as is the case with retail outlets, the Irish media faces, on an almost daily basis, unwarranted and exaggerated claims for defamation. The costs of defending these claims to trial are significant and these costs are often unrecoverable even where the defence succeeds.

A serious harm test for all defamation proceedings would act as a deterrent to vexatious claims and alleviate the risks to Ireland associated with 'libel tourism'. It would be more wide-ranging than, but could operate in parallel with, the Choice of Jurisdiction proposals in Head 10 of the General Scheme.

Section 1 of the U.K's 2013 Act provides:

> ***Serious harm***
>
> *(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.*
>
> *(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.*

These are not onerous requirements for plaintiffs. Quite properly, they insist upon a connection by the plaintiff with the jurisdiction such as would justify putting the parties to the expense of a defamation action there. They serve to filter out unmeritorious actions, where, under the present legal costs' regime, defendants may feel forced economically to settle a claim as the prospects of recouping some or any of its costs from an impecunious plaintiff are slight to none. They rebalance the outer reaches of the defamation spectrum, eliminating the very wealthy plaintiff with little connection to Ireland and the poor plaintiff, who has little financial risk when launching a 'nuisance' claim.

There is no constitutional impediment to the introduction of a serious harm test in all defamation cases. The Government has accepted in the General Scheme that the test can apply equally to individuals and to corporate and public bodies. No logical case can be made for the application of a serious harm test in defamation cases for retailers but not for the media**.**

Further, the wording of section 1 of the 2013 Act, which we would urge the Joint Committee to adopt, not only has the advantage of succinctness and flexibility but would serve to capture many SLAPPs without the difficulties involved in such cases (see below).

We would, therefore, urge the Joint Committee to recommend that the General Scheme be amended to introduce a serious harm test in all defamation cases.

Head 9 – Formal offers

Unlike personal injury actions, formal offers in defamation cases can include matters that go beyond the purely financial. These include, most obviously, apologies, corrections and their proposed wordings. Given this, a defendant in a defamation claim should be entitled to make such an offer, which would later be considered by the court when determining costs, without (as presently set out in the General Scheme) having to do so in response to an offer by the plaintiff. Both sides should be allowed to make the first move in this regard after the issuing of proceedings.

Head 12 – Amendment of section 17 of Act of 2009 (Defence of absolute privilege)

We have considerable concerns about the terms, and potential operation of section 2 of this Head, including, by way of example section 2 (d), which provides:

"*2. [I]n determining whether a report is 'fair and accurate' for the purposes of … section 17, all the circumstances of the case shall be considered, and that:…*

> *(d) it is not sufficient to report correctly part of the proceedings, if by leaving out other parts, a false impression is created.*"

On its face, this provision goes considerably further than the law as presently understood and would impose a much greater burden on the media than currently, when reporting on matters before the courts.

Head 12, as currently constituted, could, by way of example, render defamatory a fair and accurate summary of proceedings because the media did not report upon a later hearing before, and/or the determination of, an appellate court. It would also likely oblige the press to cover every day of a lengthy trial to offset the possibility of inadvertently missing evidence that was contrary to that which had been given earlier in the proceedings.

At a time of enormous financial pressure, when the media already struggles to fulfill its role as the eyes and ears of the public in the courts, such a (presumably unintended) imposition of additional obligations on court reporters could lead to a lack of coverage, especially of local courts, because journalists could only be spared to cover the entirety of a small number of very high-profile proceedings. This could lead to an erosion of the public's faith in the legal system.

Section 17 of the Act of 2009 has worked well. The common law cases that preceded, and underpinned, the defence of absolute privilege have laid down clear criteria for what

constitutes a ‘fair and accurate’ report of court proceedings. The changes proposed in section 2 of Head 12 would serve to introduce greater complexity and difficulties for a defence that has no need for it. In just five sub-sections, several undefined terms are introduced, such as ‘abridged’, ‘correct and just’, ‘the report as a whole’, ‘a substantial inaccuracy’, ‘a false impression’ and ‘assuming a verdict’. There will be questions, for example, as to how the overriding test of ‘fair and accurate’ interacts with that of ‘correct and just’ and whether this newly introduced criteria amends the existing, well-established criteria.

Section 2 should be deleted.

Head 15 – Amendment of sections 22 (Offer of amends) and section 23 (Effect of offer of amends) of Act of 2009

Section 1 of this Head provides that “unless the plaintiff requires otherwise, the correction [and apology] shall be published with equal prominence to the original defamatory statement”.

The members of both NewsBrands Ireland and Local Ireland have no issue with, or objection to, apologies and corrections being appropriately placed or prominent.

However, while the concept of equal prominence is relatively straightforward in the case of the traditional print media, that is not the case for online publications. The concept of equal prominence does not reflect the fluidity of 'prominence' online, where an article may, for example, briefly appear on the home page of a news website and then fall back into the section landing page. There is no fixed in position as would be the case with a print article; rather, there is constant and often rapid change.

In such circumstances, a court might, in trying to achieve ‘equal’ prominence, have to determine if, and how, an online correction or apology should follow an article's trajectory in appearing for a certain time on the homepage and an additional time on the section landing page. This is likely to prove both extremely difficult and ultimately unsatisfactory.

Further, given the rapid, continuing development of online news and the manner in which it is presented and consumed, the concept of equal prominence may not, during the lifetime of the proposed legislation, survive technological advances.

Given this, we would suggest that the legislation adopt the more flexible language of ‘due prominence’. This would allow for direct equivalence in the case of the print media and flexibility for online publications by, for example, separate online apologies and corrections and/or the appending of an apology or correction to the article complained of and/or any archived version of that report.

Head 16 – Amendment of section 26 of the Act of 2009 (fair and reasonable publication on a matter of public interest)

We welcome the simplification of section 26.

Even before the passing of the 2009 Act, considerable concern was expressed that placing the defence of fair and reasonable publication on a detailed statutory basis would hinder both its effectiveness and its future development. Those concerns have been fully borne out in practice. The criteria set out in the sub-sections of section 26 of the 2009 Act have had the effect of "fossilising" the defence so that is does not have the freedom to grow with technological and legal advances or to be flexible enough to meet Ireland's obligations under the European Convention on Human Rights. The changes outlined in Head 16 go a considerable way towards meeting these concerns.

Head 18 – Amendment of sections 28 (Declaratory order), 30 (Correction Order), 33 (Order prohibiting the publication of a defamatory statement) and 34 (Summary disposal of action) of Act of 2009

The proposed amendment to allow for damages to be awarded by the Circuit Court under section 34 (Summary disposal of action) appears to be based upon the recommendation ('Option 4') at page 222 of the Report of the Review of the Defamation Act 2009. The arguments in favour of, and against, Option 4 are set out on pages 220 and 221 of the Report.

In the Report the recommendation was phrased as "Option 4: consider whether to allow for the award of limited damages (e.g. up to €10,000) where summary relief is granted under section 34". The relevant sections of the Report (e.g., 6.3.4. Comparative Perspectives and 6.3.5. Options for Reform) are all predicated on the basis that there would be a limit on the damages that could be awarded where summary relief is granted.

As presently prescribed, however, the General Scheme does not reference, or impose, an upper limit on damages (other than perhaps, by default, the jurisdiction of the Circuit Court of €75,000). This would fly in the face of the recommendation in the Report and the thinking behind it. It would be especially concerning that damages of this magnitude could be awarded in summary proceedings. Any change should be limited to that recommended in the Report i.e. only damages up to €10,000 can be awarded under the amended section 34.

In section 2 of Head 18, the General Scheme recommends that an order prohibiting the publication of a defamatory statement could be made in addition to declaratory relief. We have no objection in principle to this. However, there could well be cases where evidence later comes to light proving the accuracy of a statement previously ruled, on summary disposal, to have been defamatory and where re-publication of a truthful statement would be a breach of a court order. This would obviously be unsatisfactory. Given this, the legislation should provide a mechanism in such circumstances whereby either subsequent publication would not represent a breach of the court order or the media could make an application for permission to publish in light of the new evidence.

Head 20 – Amendment of section 31 of the Act of 2009 (Damages)

We have concerns about the proposal that, under sub-head (iv), a court would, when awarding damages, take into account: "the extent of the intrusion into one's personal, business, professional or social life, or any combination thereof, [including invasion of one's privacy]".

There is a considerable body of case law, much of it involving the media, about when, and in what circumstances, the right to privacy is outweighed by a conflicting right, such as freedom of expression. The balance between these conflicting rights, and the dividing line between what is permissible and what constitutes a breach of privacy, can be difficult to find.

Further, breach of privacy is a compensatable tort, and an aggrieved party can always bring proceedings for both defamation and breach of privacy. The abolition of juries in High Court defamation cases will make that even easier than at present, where currently there can be separate modes of trial for these claims.

In these circumstances, it is unnecessary for an alleged intrusion into a claimant's life to be a, presumably aggravating, factor when awarding damages for defamation. A claimant has an alternative remedy for such a breach for which damages can be awarded in an appropriate case. However, that will only happen after a court has heard the evidence in full, as well the arguments of both sides, has considered the relevant case law and reached a determination. Where a remedy for such wrongdoing already exists, it is wholly inappropriate that an alleged intrusion should be one of, what would become, seventeen criteria to be considered when determining damages in another tort.

Sub-head (iv) should be deleted.

Heads 23 to 31 - New Part 5 of Principal Act: Measures against abusive litigation to restrict public participation (SLAPPs)

Any measures to restrict Strategic Lawsuits Against Public Participation ('SLAPPs') are welcome. SLAPPs have caused major problems in the U.K. and in several European countries, hence the European Commission's proposal for an anti-SLAPP directive.

That said, determining what is a SLAPP rather than a legitimate, if overstated, cause of action can be difficult. This is reflected in the breadth of, and seeming contradictions in, the criteria set out in section 2 of Head 25. No criticism is levelled at these criteria. However, there are real concerns both that the difficulties of definition and the deliberations of the European Commission will lead to a significant delay in finalising the statutory text. As has already been pointed out, reform of the 2009 Act has already been bedevilled by delays.

We are, therefore, concerned that agreed, necessary and urgent reforms – such as the abolition of juries – will be lost because of delays in seeking a remedy for an issue which, while not unknown in Ireland, is less pressing than in other jurisdictions. The good cannot be allowed to become a casualty of the perfect or of efforts to achieve perfection.

Further, if, as urged upon the Joint Committee earlier in this submission, a serious harm test was to be introduced for all defamation cases, many SLAPPs would be caught and disposed of early in proceedings. The serious harm provisions also have the benefit of ease of drafting as well as pre-existing, persuasive caselaw from the U.K.

In short, if the drafting and preparation of the proposed new Part 5 of the Principal Act could lead to delays, which would risk taking the proposed legislation beyond the term of the current Dáil, the anti-SLAPP provisions should be delayed and reconsidered for inclusion in a future Bill, probably after the European Commission has completed its proposals for an anti-SLAPP directive.

2 May 2023

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