

Submission to Department of Justice & Equality on the Review of the Defamation Act 2009, December 2016

Introduction

The Department of Communications, Climate Action and the Environment welcomes this opportunity to make a submission on the review of the Defamation Act 2009 (the Act). While the Act is relevant to the work of many areas within the Department, it is directly relevant to the work of the Broadcasting & Media Division and its stakeholders.

The division conducted a short consultation among its stakeholders to prepare this submission, and the views expressed are reflected below. It should be noted that many of the organisations consulted by the Department have indicated that they will be making individual returns to the Department of Justice and Equality.

In addition to other matters of practical importance, the Department of Communications, Climate Action and Environment wish to highlight the following areas which require attention:

1. Right of Reply Scheme – Statutory Review
2. Jury Trials in Ireland for Defamation actions
3. Liability for user generated comment
4. Defences in Ireland for Defamation

1. Right of Reply Scheme - Statutory Review

Section 49(3) of the Broadcasting Act 2009 ("the Broadcasting Act") required the Broadcasting Authority of Ireland ("The Authority") to prepare a Right of Reply Scheme ("the Scheme"). The Scheme was introduced by the BAI and became effective in 2011. Under Section 49(27) of the Act, the Authority is required to review and report to the Minister on the operation, effectiveness and impact of the Scheme.

The Right of Reply Scheme is a statutory scheme which provides for the correction of incorrect facts or information which have been broadcast about a person, where the assertion of such incorrect facts or information has impugned that person's honour or reputation. The broadcaster, where affording a Right of Reply Statement, broadcasts a correction as a remedy to an individual. A variation of the Right of Reply function has existed in Irish broadcasting legislation since 1960. Prior to the Broadcasting Act this function was integrated with the then Broadcasting Complaints Commission's complaints operations.

However, the specific Right of Reply Scheme in operation at the time of review flows from the Broadcasting Act and is separated from the BAI's complaints process. The current Scheme is underpinned by the statutory provisions outlined in Section 49 of the

Broadcasting Act. It also emanates from Article 28 of the Audio-visual Media Services Directive ("AVMSD") which requires Member States to implement legislation to provide for rectification of incorrect facts.

The Scheme also provides information on how it interacts with the Defamation Act 2009 ("The Act," "The Defamation Act"). Exercise of one's Right of Reply does not preclude a person from pursuing a separate legal action against a broadcaster for defamation. The granting of a Right of Reply does not constitute an admission of liability on the part of the broadcaster. It is not intended to provide for the broadcast of an alternative or contrary position. However, broadcasters who are in a respondent position in defamation litigation may give evidence in mitigation of damage that they granted or offered to grant a Right of Reply to a plaintiff.

The current Scheme is closely aligned with section 49 of the Broadcasting Act and has the following objectives:

- To provide recourse other than, or in addition to, legal proceedings for a person whose honour or reputation has been impugned by the broadcast of incorrect information or facts;
- To ensure that the process for the exercise of a Right of Reply under the Scheme, is transparent, fair and clearly understood both by broadcasters and people seeking to access the Scheme;
- To ensure that the process for the correction of incorrect facts or information, is conducted efficiently and effectively and in line with the timeframe set out in legislation;
- To provide a mechanism for the broadcast of a Right of Reply that is proportionate to the nature of the correction being sought.

In its report to the Minister, the Authority concluded that the operation and effectiveness of the Scheme and the outcomes are broadly positive. While it is notable that no broadcaster referenced any particular experience operating the Scheme, the existence of the Scheme is agreed to be an important democratic safeguard, providing an alternative means for protecting a person "whose honour or reputation has been impugned by an assertion of incorrect facts or information", while maintaining broadcasters' right to freedom of expression.

This Department considers the Scheme to be appropriate in the context of the statutory provisions. Broadcasters are aware of the Scheme and approve its processes. However, very few viewers and listeners use the Scheme, potentially using other mechanisms such as the aforementioned BAI Complaints process or legal proceedings under the Defamation Act 2009 for redress. The Authority concluded that the key area of concern arising from the review is the lack of impact of the Scheme on the general public.

Greater public awareness may assist in the promotion of the Scheme's benefits to

viewers and listeners, particularly as a less costly alternative to defamation proceedings.

The Department of Communications considers that one of the results of this review should be to encourage increased use of the “Right of Reply Scheme”, along with other examples such as the remedies provided by the Office of the Press Ombudsman for its member publications.

2. Jury Trials in Ireland for Defamation actions

Stakeholders have commented that Jury trial awards are high in an international context. They believe that retention of juries in defamation actions is causing issues in their sector, and that defamation cases are best decided by a judge alone, allowing for more reasoned decisions and awards.

The Department notes the point made by its stakeholders that Defamation jury trials have effectively been abolished in the U.K. without complaint by or disadvantage to the parties involved.

The Department recognises the important role in which Juries play in the Irish courts. Two arguments are made in favour of the retention of juries in defamation cases. First, they act as an arbiter of community standards on what is defamatory. Secondly, plaintiffs gain comfort from a vindication of their good names by their peers.

Among the most pressing difficulties presented by stakeholders with defamation action jury trials are:

- The unpredictability of juries;
- The high level of damages that they may award;
- The length of the trial period creating an increased costs in jury trials; and
- The complexity of the law in relation to a jury trial

The level of damages in defamation cases remains a concern to the media sector and to stakeholders. A trial by jury increases legal costs and lengthens the time of each case.

Stakeholders suggested that if juries are to be retained, an opt-in procedure similar to that in the UK, whereby nonjury hearings are the norm in defamation actions could be considered. In effect, there would only be a jury trial in a defamation action where the parties and the judge agree and where it is in the interests of justice.

This Department believes that an opt-in jury system would be compatible with the constitutional protection of one's good name. It would still allow for jury hearings in certain cases but it would address, at least in part, some of the problems and drawbacks with the current procedure.

3. Liability for user generated comment

The absence of clarity in the Act surrounding liability for user generated comment is a major concern for the media sector as a whole.

Third party comments, sometimes also referred to as "user generated content" have become a part of modern media. Interaction with readers is a major part of online communication. There is uncertainty from Stakeholders around the availability of the hosting defence in the e-Commerce Directive to comments placed on their websites. Pre-moderation is considered a difficult task, given the volume & nature of comments.

The Department believes that this review of the Act should seek to provide clarity in relation to liability for user generated comment.

4. Defences in Ireland for Defamation

Offer of Amends and Lodgements: Section 22 of the Defamation Act provides that any person who has published an allegedly defamatory statement may make an offer to make amends before the delivery of the defence.

The recent clarification by the courts that a plaintiff retains the right to opt for a jury assessment following an offer to make amends has the consequence of rendering the Offer of Amends procedure unattractive to Stakeholders as to avail of it leaves a defendant open to all of the costs of a full trial. It is RTÉ's opinion that Section 23(1)(c) should be amended so that it explicitly provides for the assessment of damages by a judge sitting alone.

Typically, a defendant can make a lodgement without an admission of liability. If the plaintiff is successful in his claim, but the damages awarded are not more than the sum lodged, the defendant will be entitled to his costs against the plaintiff from the date of the lodgement. This can act as an incentive to settle the case before trial.

An issue which has been brought to the Department's attention is where an offer of amends has been made and accepted, but the parties do not reach agreement as to the level of damages that should be paid. It appears to be the case that a defendant who has availed of the Offer of Amends procedure which has been accepted by the plaintiff loses the ability to make a lodgement under Section 29 of the 2009 Act, as the legislation explicitly provides that a lodgement is made at the time of the filing of a defence, and no defence can be filed if an Offer of Amends is accepted by a plaintiff.

If this is the case Section 29 should be amended, as suggested by RTÉ so that it explicitly provides that a lodgement can be made by a defendant if an Offer of Amends is accepted and the parties do not reach agreement as to the level of damages that should be paid by the defendant.

Honest Opinion & Fair and Reasonable Publication on a matter of Public Interest:

The strong view expressed by the Department's stakeholders is that the defence of honest opinion, and that of fair and reasonable publication, are virtually unworkable in practice. The view expressed by some is that Section 26 of the Defamation Act does not accord with the principles that good journalistic practices have been adhered to and that the subject matter has been deemed to be of sufficient public importance to warrant publication. The check list contained in Section 26(2) has been compared to an "obstacle course" for defendants in defamation actions.

RTÉ in particular submits that Section 26 as currently drafted does not protect freedom of expression interests. RTÉ noted that a defendant to a defamation action in Ireland has yet to successfully avail of the defence of fair and reasonable publication on a matter of public interest as provided for by section 26.

Serious Harm Requirement:

In the U.K. the Defamation Act 2013 requires that claimants must show they have or will suffer serious harm before bringing a defamation lawsuit. It brought in new statutory defences of truth and honest opinion to replace common law and introduced a defence of "responsible publication on matters of public interest" and removed the presumption in favour of jury trials in defamation cases. The Defamation Act 2013 in the U.K. also introduced provisions to prevent unwarranted, but nonetheless expensive, claims. These are major issues for Irish stakeholders, especially those with an online presence.

Section 1 of the 2013 Act (UK) 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.

Stakeholders recommended that Ireland adopt this in Irish Law. They contest that these are not onerous requirements for plaintiffs.

This system insists upon a connection by the plaintiff with this jurisdiction such as would justify putting the parties to the expense of a defamation action here. This will serve to filter out unmeritorious claims and so-called 'forum shopping'.

Conclusion

The Department of Communications, Climate Action and Environment hopes that this submission is of benefit to the Department of Justice and Equality in its review of the Defamation Act 2009. The Department is available to engage further with the Department of Justice on the issues raised above, and all other aspects of the Defamation Act.

In the event of any queries in relation to this submission, contact can be made in the first instance with Pádraig Mac Aodha (padraig.macaodha@dccae.gov.ie) at 01 6783094.



Dualta Ó Broin

Assistant Principal Officer

Broadcasting & Media Division

01-6782380