

**Draft General Scheme**  
**Defamation (Amendment) Bill**

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## **Head 1 - Short title and commencement**

Provide that

1. The Act may be cited as the Defamation (Amendment) Act 2023.
2. The Act shall come into operation on such day or days as the Minister may appoint, by order or orders, either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes and different provisions.

### **Explanatory Note**

These are standard provisions.

The question of including a collective citation of this Act and the Defamation Act 2009 will be discussed with Parliamentary Counsel.

## **Head 2 – Amendment of section 2 of Act of 2009 (Definitions)**

1. Provide for the amendment of the definition of ‘periodical’ to include
  - (a) an online-only newspaper, magazine, journal or other similar publication that is published on the internet or by other electronic means at regular or substantially regular intervals by a publisher who is established in the State, or where the publication is specifically targeted at the general public, or a section of the general public, in the State; and
  - (b) [online publications by a broadcaster within the meaning of the Broadcasting Act 2009 (as amended); or by a broadcaster established in the State (or, where the publication is specifically targeted at the general public, or a section of the general public, in the State).]
2. Provide for the amendment of the definition of ‘summary relief’, to add the option of the Court making *both* a correction order and an order prohibiting further publication (rather than only one of those orders).
3. Provide that “the Act of 2009” means the Defamation Act 2009.

### **Explanatory Note**

Subhead 1 of this Head is intended to give effect to the following recommendations in the Report of the Review:

*Broaden the remit of the Press Council to clarify that online-only news sites fall within the definition of periodical;*

*Consider extending the remit of the Press Council to cover online publications by broadcasters.*

Subhead 1(b) is subject to consultations with the Department of Tourism, Culture, Arts, Gaeltacht, Sports and Media, and to consultations by the relevant Departments with the stakeholders directly concerned, including the Press Council, Coimisiún na Meán, and broadcasters, to establish their views on this specific question.

### **Head 3 - Abolition of juries in High Court actions**

Provide that –

1. Notwithstanding section 94 of the Courts of Justice Act 1924, [or any other provision made by or under statute, or any rule of law,] a defamation action in the High Court shall not be tried with a jury.
2. Subhead (1) does not apply in relation to an action if the trial thereof began before the commencement of this Head, but does apply to the retrial of such an action if the retrial begins after such commencement.
4. Where, as regards an action in relation to which subhead (1) applies, or a question of fact or an issue arising in such an action -

(a) a notice of trial containing a requirement to have the action, question or issue tried with a jury, or

(b) a notice signifying a desire to have the action, question or issue tried with a jury,

was served or given before the commencement of this Head, the requirement referred to in paragraph (a) of this subhead or, as the case may be, the notice referred to in paragraph (b) of this subhead shall be disregarded.

4. Provide for the following consequential amendments to the Act of 2009:
  - (i) delete subsection (2) of section 13;
  - (ii) amend subsection (3) of section 14 by deleting the words “and shall be determined, in the case of a defamation action brought in the High Court, in the absence of the jury”;
  - (iii) amend subsection (4) of section 26 by deleting the definition of court;
  - (iv) amend subsection (4) of section 30 by deleting the words “or, where the action is tried in the High Court sitting with a jury, the trial judge”;
  - (v) delete subsection (2) of section 31;
  - (vi) amend subsection (4)(k) of section 31 by deleting the words “or, where the action is tried by the High Court sitting with a jury, would propose to make in the event of there being a finding of defamation”;
  - (vii) delete subsection (8) of section 31;
  - (viii) delete subsection (3) of section 32; and
  - (ix) delete subsection (4) of section 34.

## **Explanatory Note**

This Head is intended to give effect to the recommendation in the Report of the Review that juries should be removed from High Court defamation actions.

The background to this recommendation is that there was a general consensus amongst the submissions received, that the role of juries in High Court defamation cases should be reformed. The majority of submissions in relation to the role of juries recommended that High Court defamation cases should be tried by a judge sitting alone without a jury.

## **Head 4 - Serious harm test – bodies corporate**

Provide for the following amendments to section 12 of the 2009 Act:

1. Subject to subheads (2), (3) and (4), and Head 5 (– Serious harm test – public authorities), the provisions of this Act apply to a body corporate as they apply to a natural person, and a body corporate may bring a defamation action under this Act in respect of a statement concerning it, that it claims is defamatory.
2. In the case of a body corporate, other than a body that falls within the scope of subhead (4), a statement is not defamatory unless its publication has caused, or is likely to cause, serious harm to the reputation of the body corporate in the eyes of reasonable members of society.
3. For the purposes of subhead (2), in the case of a body that trades for profit, harm to the reputation of a body is not ‘serious harm’, unless the body can show that it has incurred, or is likely to incur, serious financial loss as a result of the publication of the statement.
4. *[Subheads (2) and (3) do not apply to a micro body corporate (and such a body can bring a defamation action, whether or not it has incurred or is likely to incur financial loss as a result of publication of a statement concerning it which it claims to be defamatory).*
5. *For the purposes of subhead (4), a micro body corporate is defined as a body corporate that employs fewer than 10 people and, in the case of a body that trades for profit, has an annual turnover that does not exceed €2m or, in circumstances where the body corporate has been carrying on business for less than 12 months, an estimated annual turnover that does not exceed €2m; or an annual balance sheet total not exceeding €2m or both.]*

### **Explanatory Note**

This Head is intended to give effect to the following recommendation in the Report of the Review:

*Consider option 2: Provide (as in other common law jurisdictions) that a body corporate may not sue for defamation of its reputation unless it first shows that the statement has caused or is likely to cause serious harm: in the case of a body that trades for profit, this means serious financial loss; consider whether smaller entities (such as SMEs) should be exempted from this requirement).*

## **Head 5 – Serious harm test – public authorities**

Provide that:

1. Subject to subhead (2), the provisions of this Act apply to a public authority as they apply to a natural person, and a public authority may bring a defamation action under this Act in respect of a statement concerning it that it claims is defamatory.
2. A public authority may not bring a defamation action unless it satisfies the court that it is in the public interest to do so.
3. For the purpose of this Head, a public authority includes :
  - a) a Department of State;
  - b) a regional assembly;
  - c) a local authority;
  - d) any other person established by or under an enactment *other than the Companies Act 2014 or a former enactment relating to companies within the meaning of section 5 of that Act*).

### **Explanatory Note**

This Head is intended to give effect to the following recommendation in the Report of the Review:

*Consider whether to provide that a public authority is not entitled to bring a defamation action.*

The background to this recommendation is that a number of submissions to the Review proposed that entities performing government or regulatory functions should not be allowed to sue in defamation.

The amendment would not prevent public authorities from taking defamation actions on behalf of their officers or employees in respect of defamatory statements concerning them in that capacity (even if the public interest test is not satisfied).

The detailed definition of ‘public authority’, in this context, will be the subject of consultation with other Departments.

## **Head 6 – Serious harm test - transient retail defamation**

Provide that:

1. It is not defamatory:
  - (1) for a retailer, or a person acting on their behalf, to:
    - (a) ask a customer to produce a receipt, or other evidence of payment, for merchandise of the retailer that is in the possession of the customer, at the point where the customer is leaving the retailer’s premises;
    - (b) ask a customer to produce a receipt, or other evidence of payment, for food or other merchandise of the retailer that has been consumed, or is being consumed, by the customer, at the point where the customer is leaving the retailer’s premises; or
    - (c) inform a customer that the retailer is unable to accept a payment proffered by the customer, either in cash or by electronic means, where the retailer has a reasonable doubt whether the cash is valid or counterfeit, or (as the case may be) whether the electronic payment is valid;
2. A person may not bring an action for transient retail defamation unless they can demonstrate that they have suffered, or are likely to suffer, serious harm as a result of the alleged defamation.
3. In this Head, ‘transient retail defamation’ means defamation arising from a statement made in non-permanent form, in the course of providing or refusing retail services.
4. In this Head, a retailer includes a restaurant or café.
5. Persons or bodies that represent retail or services sector providers (or a category of providers) may, following consultation with relevant stakeholders, including consumer protection and human rights bodies, draw up or amend a code of practice for the purposes of setting standards of good practice on communication by, and training of, staff (including security staff) who interact with customers to whom this Head applies.

### **Explanatory Note**

This Head is to give effect to the following recommendation of the Report of the Review:

*Consider introducing a ‘serious harm’ test for certain ‘transient defamation’ claims (claims regarding a statement made in non-permanent form, in the course of providing or refusing retail services) to prevent frivolous or vexatious actions.*

This Head will be progressed subject to further particular advice of the AGO on the balancing of the constitutional rights affected.

## **Head 7 - Obligation on solicitors (alternatives to legal proceedings)**

1. Provide that a practising solicitor shall, prior to issuing proceedings on behalf of a client—
  - (a) advise the client, of the role of the Press Council and of Coimisiún na Meán’s right of reply scheme, where applicable,
  - (b) provide the client with information in relation to the redress that can be obtained where a complaint is referred to the Press Council or a right of reply is sought,
  - (c) advise the client of the implications of making a complaint to the Press Council or of seeking a right of reply for any proposed legal proceedings, and
  - (d) advise the client of the implications of resolving the dispute otherwise than by way of the proposed proceedings.
2. If a practising solicitor is acting on behalf of a client who intends to institute proceedings, the originating document by which proceedings are instituted shall be accompanied by a statutory declaration/statement made by the solicitor evidencing (if such be the case) that the solicitor has performed the obligations imposed on him or her under subhead (1) in relation to the client and the proceedings to which the declaration/statement relates.
3. [Provide that the requirement set out in subhead (2) can be met by including the information referred to in that subhead in the statutory declaration which a practising solicitor is required to make under section 14 of the Mediation Act 2017.]

### **Explanatory Note**

This Head is intended to give effect to the following recommendation in the Report of the Review:

*Impose an obligation on solicitors to advise clients of the role of the Press Council/Press Ombudsman, or the BAI right of reply scheme, before issuing proceedings.*

## **Head 8 - Obligation to consider mediation**

Provide that: the parties to a defamation dispute shall consider mediation, as a method of reaching a mutually acceptable agreement to resolve the dispute.

### **Explanatory Note**

This Head is intended to give effect to the following recommendation in the Report of the Review:

*Impose an obligation on parties to a dispute to consider mediation.*

## **Head 9 - Formal offers**

Provide that:

1. The plaintiff in a defamation action may, after the date upon which the plenary summons or civil bill, as appropriate, is served on the defendant, serve a notice in writing of an offer of terms of settlement on the defendant.
2. Where a plaintiff in a defamation action serves a notice in writing of an offer of terms of settlement on the defendant, the defendant may serve a notice in writing on the plaintiff—
  - (a) of an offer of terms of settlement, or
  - (b) stating that he or she is not prepared to pay any sum of money to the plaintiff in settlement of the action.
3. A copy of any formal offer made in accordance with subheads (1) and/or (2), shall, after the expiration of the period specified in subhead (7), be lodged in court by, or on behalf of, the plaintiff or defendant, as the case may be.
4. Where a formal offer is made by the plaintiff and/or defendant, the terms of the offer shall not be communicated to the judge in the trial of a defamation action until after he or she has delivered judgment in the action.
5. The court shall, when considering the making of an order as to the payment of the costs in a defamation action have regard to—
  - (a) the terms of a formal offer, and
  - (b) the reasonableness of the conduct of the parties in making their formal offers.
6. This Head is in addition to and not in substitution for sections 22, 23 and 29 of the Act of 2009 [and sections 168 and 169 of the Legal Services Act ]
7. In this section, the period specified for the purposes of subhead (3) is the period commencing on the date upon which the plenary summons or civil bill, as appropriate, is served on the defendant and ending on the expiration of 14 days after the service of the notice of trial in those proceedings.

### **Explanatory Note**

This Head is intended to give effect to the following recommendation in the Report of the Review:

*It is recommended that, as it already applies in personal injuries cases, provision be made for the making of a tender by the defendant following receipt of a tender by the plaintiff which would be taken into account in determining costs.*

## **Head 10 - Choice of jurisdiction**

Provide that

1. A court does not have jurisdiction to hear and determine an action against a person who is not domiciled in the State, in another Member State or in a state which is for the time being a contracting party to the Lugano Convention, unless the court is satisfied that, of all the places in which the statement complained of has been published, the State is clearly the most appropriate place in which to bring an action in respect of the statement.
2. For the purposes of subhead (1), a person is domiciled in the State or in another Member State, if the person is domiciled there for the purposes of Regulation (EU) No 1215/2012 (Brussels I Recast Regulation); and a person is domiciled in a state which is a contracting party to the Lugano Convention, if the person is domiciled in the state for the purposes of that Convention.
3. For the purposes of this Head ‘the Lugano Convention’ means the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark, signed on behalf of the European Community on 30th October 2007.

### **Explanatory Note**

This Head is intended to give effect to the following recommendation in the Report of the Review:

*To address the perceived risk of international forum-shopping or ‘defamation tourism’ into Ireland: require the court to be satisfied that Ireland is ‘clearly the most appropriate place’ for the action to be brought (as in England and Wales), in cases not falling under the rules of the Brussels I Recast Regulation.*

The background to this Head is that the main rules in Ireland on choice of jurisdiction in cross-border defamation cases are contained in EU Regulation 1215/2012 (Brussels I (Recast) Regulation). This Regulation generally applies to civil and commercial cases that involve more than one country, if the countries concerned are members of the European Union.

Similar rules to the Brussels I Recast Regulation apply as regards Iceland, Norway and Switzerland, under the Lugano Convention.

## **Head 11 – Dismissal/Discontinuance of cases**

1. Provide that, [in accordance with rules of court], where no step has been taken by the plaintiff within 2 years of the initiation of defamation proceedings, the proceedings shall be dismissed/automatically discontinued on notice to the plaintiff for want of prosecution.
2. Provide that subhead (1) shall not apply where, on application by the plaintiff, the court is satisfied that –
  - (a) the interests of justice require that the proceedings should not be dismissed/discontinued,
  - (b) the prejudice that the plaintiff would suffer if the case was dismissed/discontinued would significantly outweigh the prejudice that the defendant would suffer if the case were not dismissed/discontinued,and the court shall, in deciding whether to allow the proceedings continue, have regard to the reason for the failure to take steps to progress the proceedings within the period specified in subhead (1) and the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced.
3. Provide that where the court decides that a case should not be dismissed/discontinued, the court shall specify a time limit within which the plaintiff shall take the necessary action to enable the case to proceed.
4. Provide that this section will come into operation [6 months] after its commencement.

### **Explanatory Note**

This Head is intended to give effect to the following recommendation in the Report of the Review:

*Provide for express statutory jurisdiction for dismissal of claims where no step has been taken by the plaintiff within two years from the bringing of the defamation action, unless there are special circumstances.*

While a comparison between the statistics on defamation proceedings initiated in the courts, and the number recorded as disposed of, would suggest a large backlog of cases, in practice it appears that most of these never actually come to trial.

Stagnant defamation claims result in some defendants having to bear ongoing costs and uncertainty associated with long term proceedings, or claims revived several years after original publication.

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

1. Provide for the amendment of paragraph (i) of subsection (2) of section 17 of the Act of 2009 to extend the scope of the defence of absolute privilege to a fair and accurate report of proceeding publicly heard before, or a decision made public by, any court established under the law of any state or place (i.e., delete the limitation to a court “(i) established by law in the State, or (ii) established under the law of Northern Ireland”).
2. Provide that in determining whether a report is ‘fair and accurate’ for the purposes of paragraphs (i), (j) and (k) of subsection (2) of section 17, all the circumstances of the case shall be considered, and that:
  - (a) an abridged court report shall be privileged provided that it gives a correct and just impression of the proceedings;
  - (b) if the report as a whole is accurate, a slight inaccuracy or omission is not material;
  - (c) if a report contains a substantial inaccuracy it will not be privileged;
  - (d) it is not sufficient to report correctly part of the proceedings, if by leaving out other parts, a false impression is created;
  - (e) a report assuming a verdict before any verdict has been delivered is not privileged.

### **Explanatory Note**

This Head is intended to give effect to the following recommendations in the Report of the Review:

*Extend the territorial scope of absolute privilege under section 17 to cover fair and accurate reports of public proceedings in certain international courts and in the courts of certain specified other States; and*

*Amend the Act as suggested in the Law Reform Commission Report to clarify what is protected under section 17 as a ‘fair and accurate’ report of court proceedings in Ireland.*

### **Head 13 – Amendment of section 18 and Schedule 1 of Act of 2009 (Defence of qualified privilege)**

Provide for –

1. The deletion of paragraph 2 of Part 1 of Schedule 1 to the Act of 2009.
2. The amendment of paragraph 11 of Part 1 of Schedule 1 to the Act, to provide that qualified privilege applies to a fair and accurate report, copy or summary of any notice or advertisement published by or on the authority of any court or any judge or officer of such court (irrespective of the jurisdiction in which the court operates).
3. The amendment of paragraph 11 of Part 1 of Schedule 1, to provide that qualified privilege applies to a fair and accurate report or copy or summary of any notice or other document issued for the information of the public, by or on behalf of any Department of State for which a Minister of the Government is responsible, local authority, or the Commissioner of the Garda Síochána, or by or on behalf of a corresponding department, authority or officer in another State.
4. The amendment of paragraph 1 of Part 2 of Schedule 1 to provide that qualified privilege applies to a fair and accurate report of proceedings, findings or decisions of an association, or committee or governing body of an association (whether incorporated or not, irrespective of what State it is established in), relating to a member of the association, or to a person subject, by contract or otherwise, to control by the association.
5. The amendment of paragraph 2 of Part 2 of Schedule 1, to provide that qualified privilege applies to a fair and accurate report of the proceedings at any public meeting (irrespective of where it is held), being a meeting held for a lawful purpose and for the discussion of any matter of public concern, whether the admission to the meeting is general or restricted.
6. The amendment of paragraph 3 of Part 2 of Schedule 1 to provide that qualified privilege applies to a fair and accurate report of the proceedings of a general meeting of any company or association established by or under statute or incorporated by charter (irrespective of where the meeting takes place).
7. The amendment of paragraph 4 of Part 2 of Schedule 1 to provide that qualified privilege applies to a fair and accurate report of any meeting or sitting of any local authority or the Health Service Executive, and any corresponding body in another state.
8. The inclusion of guidelines in relation to the meaning of ‘fair and accurate’ along the lines of Head 12.2 which provides for such guidelines in the context of absolute privilege.

## **Explanatory Note**

This Head is intended to give effect to the following recommendations in the Report of the Review:

- *Extend the territorial scope of qualified privilege under paragraphs 11 and 12 of Part 1 of Schedule 1 and paragraphs 1, 2, 3 and 4 of Part 2 of Schedule 1, to protect fair and accurate reports of press releases and other documents published by courts, Government Departments, local authorities, and police commissioners, of certain countries other than Ireland, other EU Member States and the United Kingdom; and of proceedings of an association, a public meeting, a company general meeting or a meeting of a local authority or an equivalent body to the Health Service Executive, in certain countries other than Ireland, other EU Member States and the United Kingdom; and*
- *Amend paragraph 1 of Part 2 of Schedule 1 to clarify that it applies to associations (whether incorporated or not) established in the State, a Member State or the UK (or in certain countries to which the territorial scope is extended under the option above).*

#### **Head 14 – Amendment of section 20 of Act of 2009 (Defence of honest opinion)**

Provide for the amendment of paragraph (a) of subsection (2) of section 20 of the 2009 Act to replace the requirement that at the time of publication “the defendant believed in the truth of the opinion or, where the defendant is not the author of the opinion believed that the author believed it to be true” with a requirement that “the defendant genuinely held the opinion or, believed that the author genuinely held the opinion”.

#### **Explanatory Note**

This Head is intended to give effect to the following recommendation in the Report of the Review:

*Remove the requirement on the defendant to prove that the opinion was believed to be true.*

The amendment proposes the replacement of the requirement to prove the truth of an opinion with a requirement that the opinion must genuinely be held. The requirement that the opinion be held ‘genuinely’ is based on the Law Reform Commission Report on the Civil Law of Defamation.

This Head therefore is not intended to remove the core requirement that the opinion must be honestly held by the person who expressed it. Nor will it remove the requirement that the opinion must be based on true facts, or on allegations of fact to which the defence of absolute or qualified privilege would apply. Furthermore, the requirement that the opinion must be on a matter of public interest will still apply.

It will remain open to a plaintiff to argue that an opinion was not honestly held by the defendant.

## **Head 15 – Amendment of sections 22 (Offer to make amends) and 23 (Effect of offer to make amends) of Act of 2009**

1. Provide for the amendment of subsection (6)(b) of section 22 of the Act of 2009, to specify that unless the plaintiff requests otherwise, the correction [and apology] shall be published with equal prominence to the original defamatory statement.
2. Provide for the amendment of subsection (2) of section 23 of the Act of 2009, to specify that it shall be a defence to a defamation action for a person to prove that he or she made an offer to make amends under section 22 and that it was not accepted, unless the plaintiff proves that the defendant knew or had reason to believe at the time of the publication of the statement to which the offer relates that (a) it referred to the plaintiff or was likely to be understood as referring to the plaintiff, and (b) it was false and defamatory of the plaintiff.
3. Provide that where an offer to make amends has been accepted, but agreement cannot be reached as to the damages that should be paid by the person who made the offer, that person may, upon giving notice in writing to the other party, pay a sum of money into court in compensation or damages.
4. Provide that the court shall/may when considering the making of an order as to the payment of costs, have regard to the amount lodged in court, and the reasonableness of the conduct of the parties to the offer to make amends, including the reasonableness of the offer to make a suitable correction of the statement, and the apology offered by the person who made the offer to make amends.
5. Provide for amendments to sections 22 and 23 to set out appropriate time limits applicable to the offer to make amends (including time limits for the making by the defendant of a draft correction and apology and proposal for payment of compensation or damages (if any) and costs; provision of responses by the plaintiff or defendant (as the case may be) to the other party's offers/requests; and the making of a lodgement in court in accordance with subhead (2)).

### **Explanatory Note**

#### *Subhead (1)*

The Report of the Review recommends that section 30 of the Act (Correction order) should be amended “to provide that unless the plaintiff requests otherwise, the correction of a defamatory statement is to be published with equal prominence to the publication of the defamatory statement”. That recommendation is given effect in Head 18.

The Report does not make a similar recommendation in respect of an offer of amends, but this amendment is considered appropriate in order to ensure consistency between a correction order under section 30, and a correction arising from an offer of amends. Subhead (1) therefore provides that the correction and apology must be of equal prominence to the original defamatory statement (unless the plaintiff requests otherwise).

*Subheads (2) – (4)*

Subheads (2) to (4) of this Head are intended to give effect to the following recommendations in the Report of the Review:

*Amend the Act to provide that the plaintiff must prove that the defendant acted recklessly to defeat the offer of amends as a defence;*

*Allow for the making of a lodgement where an offer of amends has been made.*

*Subhead (5)*

While the Report of the Review did not make any recommendation in relation to time limits applicable to the offer to make amends process, the Supreme Court (McMenamin J.), in a judgment (*Higgins v The Irish Aviation Authority*) issued on 7 March 2022, held as follows:

- *“That s.22 and s.23 of the Defamation Act, 2009 require legislative review on the issue of time limits. “*

The appropriate deadlines will be worked out in the course of the drafting of the Bill.

## **Head 16 - Amendment of section 26 of Act of 2009 (Fair and reasonable publication on a matter of public interest)**

Provide for the amendment of section 26 of the 2009 Act to provide that:

1. It shall be a defence to a defamation action for the defendant to prove that—
  - (a) the statement complained of was, or formed part of, a statement on a matter of public interest;
  - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest; and
  - (c) the defendant conducted such enquiries and checks as it is reasonable to expect of a responsible journalist, and made the decision to publish in accordance with the standards of responsible journalism.
2. In determining whether the defendant has proved the matters mentioned in subhead (1), the court shall have regard to all the circumstances of the case.
3. In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court shall make such allowance for editorial judgment as it considers appropriate.
4. Provide that the requirement set out at subhead (1)(c) shall apply with any necessary modifications to persons who are not journalists, who must at minimum show that they acted responsibly in making the publication.
5. [Provide that for the purposes of this Head, ‘defamation action’ does not include a declaratory order.]

### **Explanatory Note**

This Head is intended to give effect to the following recommendation in the Report of the Review:

*Amend section 26 by adopting an approach along the lines applied in UK jurisdictions and in Canada.*

The Report noted that Section 26 was intended to introduce a significant new defamation defence into Irish law. However, this new defence has had very little substantive impact in defamation cases, and it appeared that it had never been successfully pleaded before the courts.

The objectives of the proposed amendment are therefore:

- ensuring that the requirements of the defence are simpler and clearer;
- keeping the essence of the defence, to ensure proper protection of the right to freedom of expression, and recognition of the special role of public interest reporting, consistent with the standards of the European Convention on Human Rights;

- retaining the necessary flexibility for this rapidly-evolving sector; and
- ensuring that the ‘responsible journalism’ standard is clearly presented as the condition for availing of this defence, to ensure fair protection for the right to good name.

The practical requirements under the ‘responsible journalism’ standard are explored in considerable detail in the *Reynolds* caselaw in the UK, and the caselaw of the European Court of Human Rights.

## **Head 17 - Amendment of 27 of Act of 2009 (Innocent publication) in relation to live broadcasts**

Provide for the amendment of section 27 of the Act of 2009, to specify that a broadcaster is not liable for statements made during a live broadcast by a person over whom the broadcaster has no effective control; provided that the broadcaster takes reasonable precautions in advance of the broadcast, and reasonable care during the broadcast, to prevent the making of a defamatory statement, and, where such a statement has been made, to minimise the impact of any such statement.

### **Explanatory Note:**

This amendment is intended to give effect to the following recommendations in the Report of the review:

*Provide for an exemption for statements made in live broadcasts by persons over whom the broadcaster has no effective control provided that the broadcaster takes reasonable precautions in advance of the live broadcast and reasonable care during the broadcast.*

The background to this recommendation is that some submissions to the Review recommended that the defence of innocent publication should be available to live broadcasts. It was argued that the current law excessively limits public debate on matters of public interest. It was noted that the Legal Advisory Working Group on Defamation had recommended that a defence for live broadcasting be introduced, and had stated that in the absence of such a defence, broadcasters who have taken all reasonable measures to avoid defamatory statements being made live on air are exposed for liability for statements by contributors. (Such a defence exists in England and Wales, Scotland and Australia.)

## **Head 17A - Amendment of Section 27 of Act of 2009 (Innocent publication) in relation to website operators**

1. Provide for the amendment of section 27 of the Act of 2009 to specify that, subject to subhead (4), a website operator is not liable for statements posted on the website by a person over whom the website operator has no effective control, provided that the operator had in place, at the time of the posting of the statement the subject of the proceedings, appropriate mechanisms to take reasonable steps to prevent defamatory postings and that such mechanisms could not have prevented the postings in question.
2. Provide that subhead (1) does not apply if
  - (a) it was not possible for the plaintiff to identify the person who posted the statement,
  - (b) the plaintiff gave the operator a notice of complaint in relation to the statement, and
  - (c) the operator failed to respond to the notice of complaint.
3. Provide for the insertion of the following definitions in section 2 of the Act of 2009:

“author” means the person from whom the statement originated/the person who made the original statement;

“editor” means a person with editorial or equivalent responsibility for the content of the statement, or the decision to publish it;

“publisher” means a person whose business is issuing material to the public, or to a section of the public, who issues material containing the statement in the course of that business.
4. Provide for the amendment of section 27(2) of the Act of 2009 to add that a person shall not be considered to be the author, editor or publisher of a statement,
  - (i) if the person’s involvement with the statement is only operating or providing access to a communications system by means of which the person has no effective control over the maker of the statement;
  - (ii) [if the person’s involvement only involves moderating the statement by removing obscene language or correcting typographical errors without altering the substance of the statement;]
  - (iii) where the statement is in electronic form, the person’s involvement with the statement is only –
    - (a) publishing the same statement or providing a means to access the statement in a manner which does not alter the statement, or
    - (b) marking the person’s interest in, approval of or disapproval of the statement in a manner which does not alter the statement,and that involvement does not materially increase the harm caused by the publication of the statement.

5. Provide that subhead 1 is subject to this subhead, and applies to an administrator/moderator of a website or a social media forum who acts otherwise than in the course of a business, profession or occupation.
6. Provide that the Minister may by regulations specify other categories of persons who are not considered to be an author, editor or publisher where he or she considers it appropriate to take account of technological developments (including obsolescence) relation to the dissemination or processing of material or changes in how material is disseminated or processed as a result of such developments.

### **Explanatory Note**

This Head provides for amendments to section 27 of the Act, to give effect to a number of recommendations in the Report of the Review, which recommended as follows:

- *Clarify the requirements for proving online publication*
- *Extend existing defence of ‘innocent publication’ to operators of websites.*

The intention of this Head is to address concerns raised during the review of the Defamation Act regarding non-commercial community websites or social media forums/accounts, for example those established by parents of a local school, local sports club members, or residents’ associations. The concern was that the account owner or administrator - typically a volunteer acting in their spare time - may have no control over the posting of comments by users, but could be legally liable for a defamatory comment posted by a user, even if the administrator/moderator had taken reasonable steps to prevent defamatory comments and removed the comments promptly once aware of them. The wording of this Head will be developed in consultation with the Office of the Attorney General.

The requirement set out in subhead (1), that the defence be subject to the operator/administrator having appropriate mechanisms in place to take reasonable steps to prevent defamatory postings and showing that such mechanisms could not have prevented the postings in question, is intended to ensure compliance with the European Convention on Human Rights as interpreted by the European Court of Human Rights in *Delfi AS v Estonia* (64869/09).

This Head is intended to be in addition to the rules governing the liability of intermediary services providers, as set out in Articles 4, 5, 6 and 8 of the Digital Services Regulation ((EU) 2022/2065), which replace articles 12-15 of the eCommerce Directive (Directive 2000/31/EC).

This Head will require detailed discussion with the Department of Enterprise Trade and Employment and the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, in particular, in the light of implementation in Ireland of the Digital Services Regulation.

**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**

1. Provide for the amendment of sections 28 and 30 of the Act of 2009, to give the court power to make orders under those sections where the defendant ‘*has no defence that is reasonably likely to succeed*’ (consistent with the wording currently used in sections 33 and 34) – rather than ‘*has no defence*’, as currently worded.
2. Provide for the amendment of subsection (6) in section 28, to add the option of the court making *both* of the orders mentioned as alternatives in that subsection (i.e. making a correction order *and* an order prohibiting further publication of the defamatory statement), in addition to a declaratory order.
3. Provide for the repeal of subsection (8) of section 28 (‘No order in relation to damages shall be made upon an application under this section.’)
4. Provide for the amendment of section 33, to replace ‘*if in its [the Court’s] opinion*’ with ‘*if the court is satisfied that*’, (consistent with the wording in sections 28 and 34), in the tests for the court to make an order prohibiting further publication of a statement alleged to be defamatory
5. Provide that for the purpose of subsection (2)(b) of section 30, a correction shall, unless the plaintiff otherwise requests, be published with *equal* prominence to the publication of the defamatory statement (in addition to the current requirement that the statement shall be “communicated to all or substantially all of those persons to whom the defamatory statement was published”).

**Explanatory Note**

This Head is intended to give effect to the following recommendations in the Report of the Review:

*Review the wording of sections 28 (declaratory order), 30 (correction order), 33 (prohibition order) and 34 (summary relief);*

*Amend section 30 of the Act (‘Correction order’) to provide that unless the plaintiff requests otherwise, the correction of a defamatory statement is to be published with equal prominence to the publication of the defamatory statement.*

The background to the first recommendation is that sections 28, 30, 33 and 34 of the Act provide for important types of redress (other than damages), at a point where a court has found that the statement was defamatory, and that the defendant has no defence that is reasonably likely to succeed.

However, several authorities have pointed to confusion caused by an apparent lack of clarity and consistency in the wording of sections 28, 30, 33 and 34 of the Act. They include a presentation made at the Review's symposium on reform of defamation law, two High Court judgments, and several academic texts on Irish defamation law. It has been suggested that this confusion is sufficiently significant to put plaintiffs off availing of these provisions; and such confusion is also likely to increase costs for all concerned.

Essentially, the amendments in *subheads 1-3* propose to ensure more clarity and consistency in the wording, and follow proposals made by the authorities just mentioned.

The proposed change at *subhead 4* would require that, where a defendant is directed by the court to publish a correction of a defamatory statement, the defendant must publish the correction equally prominently to the defamatory statement itself.

At present, section 30(2) requires a court-ordered correction to specify a number of details, and to be published '*in such manner as will ensure that it is communicated to all, or substantially all, of those persons to whom the defamatory statement was published*'.

However, nothing prevents a front-page defamatory news story being 'corrected' by a small paragraph in a less-read page. The proposed change therefore seeks to ensure that a correction would have a more equal impact to the defamatory statement itself.

## **Head 19 - Amendment of section 29 of Act of 2009 (Lodgement of money in settlement of action)**

Provide for the deletion of following words in section 29(1) of the Act: “when filing his or her defence to the action”.

### **Explanatory Note**

This Head is intended to give effect to the following recommendation in the Report of the Review:

*Remove the requirement that a lodgement must be made when the defence is being provided so that the issue could be dealt with in rules of court.*

The background to this recommendation is that section 29(1) of the Act currently provides:

*In an action for damages for defamation the defendant may, upon giving notice in writing to the plaintiff, pay a sum of money into court in satisfaction of the action when filing his or her defence to the action.*

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

Provide for the addition of the following issues that must be taken into account by the court in making an award of general damages:

- (i) the value of money;
- (ii) the source/origin of the statement/identity of the parties;
- (iii) the relationship between and the status of the parties;
- (iv) the extent of the intrusion into one's personal, business, professional or social life, or any combination thereof, [including invasion of one's privacy];
- (v) the effect on the plaintiff;
- (vi) the conduct of the defendant (other than the conduct of the defence).

### **Explanatory Note**

This Head is intended to give effect to the following recommendations in the Report of the Review:

*Amend section 31 to set out in greater detail the issues to be taken into account in determining damages.*

The factors proposed in this Head have been taken from recent judgments of the Supreme Court and Court of Appeal.

## **Head 21 – Amendment of section 32 of Act of 2009 (Aggravated and punitive damages)**

1. Provide for the amendment of section 32 of the Act to clarify that (notwithstanding anything in the common law), the only circumstances in which aggravated damages may be ordered are:
  - (a) where the court finds the defendant liable for damages to the plaintiff in respect of a defamatory statement; and
  - (b) the defendant conducted the defence in a manner that aggravated the injury caused to the plaintiff's reputation by the defamatory statement.
2. Provide that subhead (1) does not prejudice the defendant's right to conduct a robust defence, but that a defendant may not conduct the defence in a manner that aggravates the injury caused by the original defamatory statement.

### **Explanatory Note**

This Head is intended to give effect to the following recommendation in the Report of the Review:

*Clarify the situations where aggravated damages may be awarded.*

In the course of the review, it was suggested that the circumstances in which aggravated damages can be awarded should be clarified. Specifically, it was suggested that it was not clear if the common law in this area was retained. Under the common law, aggravated damages could be awarded if a defendant's conduct following the initial publication (including the manner in which a defence was conducted) had compounded the harm generated by the initial publication.

Since the Report was published, the Supreme Court has issued its judgment (March 2022) in *Higgins v The Irish Aviation Authority*, where the issue of aggravated damages was considered in detail.

This Head reflects the judgment of Mr Justice McMenamin in that case.

## **Head 22 – Factors to be considered by court in awarding costs**

Provide that in awarding costs in respect of proceedings under the 2009 Act, a court may, where it considers it just, have regard to any unreasonable refusal or failure by a party to the proceedings to consider using or, as the case may be, attending alternative dispute resolution procedures: in particular, mediation, the services of the Press Council, or the Coimisiún na Meán right of reply scheme.

### **Explanatory Note**

The Report includes the following recommendation:

- *Include participation by a party in alternative dispute resolution processes among the factors to be taken into account in assessing the redress to be awarded in defamation proceedings.*

This Head gives the courts the power to take into account, in determining liability for costs, a party's participation, or refusal to participate, in alternative dispute resolution mechanisms.

It is broadly based on section 21 of the Mediation Act 2017, which provides:

*In awarding costs in respect of proceedings referred to in section 16, a court may, where it considers it just, have regard to—*

- (a) any unreasonable refusal or failure by a party to the proceedings to consider using mediation, and*
- (b) any unreasonable refusal or failure by a party to the proceedings to attend mediation,*

*following an invitation to do so under section 16(1).*

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

Provide for:

The insertion, after Part 4 in the Principal Act, of a new Part, entitled ‘*Measures against abusive litigation to restrict public participation*’, comprising Heads 24 to 31 below.

### **Explanatory Note:**

**Head 23** provides for the insertion of a new Part into the 2009 Act, to deal with defamation proceedings being used as ‘SLAPPs’.

‘SLAPP’ stands for ‘Strategic Lawsuit Against Public Participation’: the concept originated in North America in the 1990s, but is now widely used. Essentially, it refers to the strategic and abusive use of vexatious litigation, by a powerful entity or individual, to weaken and deter public interest discussion (and in particular, investigative journalism).

This Part is intended to give effect to the following recommendation of the Report of the Review:

*Introduce a new ‘anti-SLAPP’ mechanism, to allow a person to apply to court for summary dismissal of defamation proceedings that he/she believes are a SLAPP.*

The Report noted that research on SLAPPs, both across Europe and internationally, suggests that defamation actions are among a range of different types of civil and criminal actions which may be mis-used as SLAPPs, depending on the jurisdiction concerned.

These Heads also take account of the legislative proposal for an EU anti-SLAPPs Directive (COM (2022) 177), published by the European Commission in April 2022, which is currently in negotiation before the Civil Justice Working Group of the European Council. Ireland strongly supports the proposal, and has opted in to its adoption.

*(The text quoted here is that of the Commission proposal as published, and may evolve, in the course of negotiations between the European co-legislators, until the proposal is adopted.)*

## Head 24 – Definitions (Part 5)

### Provide that:

1. In this Part,

“*act of public participation*” means any statement or publication by a natural or legal person that is expressed or carried out, in the exercise of the right to freedom of expression and information, on a matter of public interest, [and preparatory, supporting or assisting action directly linked thereto];

“*matter of public interest*” means any matter which affects the public to such an extent that the public may legitimately take an interest in it, in areas such as:

- (a) fundamental rights, public health, safety, the environment, or climate;
- (b) activities of a public figure;
- (c) matters under consideration by a legislative, executive or judicial body, or any other official proceedings;
- (d) allegations of corruption, fraud or other criminal offences;
- (e) activities aimed to fight disinformation;

“*proceedings against public participation*” means proceedings brought under another Part of this Act against an act of public participation;

“*feature of concern*”, in relation to proceedings against public participation, means any of the following features:

- (a) the making of *claims* of a disproportionate, excessive or unreasonable nature;
- (b) intimidation, harassment or *threats* made by the plaintiff or his or her representatives against the defendant or associated parties, including prior to the institution of the proceedings;
- (c) the existence of *multiple proceedings* initiated by the plaintiff or associated parties, against the defendant or associated parties, in relation to similar matters;
- (d) the *conduct of the litigation* by the plaintiff in a manner which is disproportionate, excessive or unreasonable, including (but not limited to) the use of aggressive, unreasonably frequent, or intrusive pre-action communication;
- (e) the conduct of the litigation by the plaintiff in a manner which is likely to generate disproportionate, excessive or unreasonable *costs or delays* to the defendant, especially when the balance of financial resources between the parties is significantly in favour of the plaintiff: this includes (but is not limited to) the choice of jurisdiction and the use of requests for disclosure or discovery;
- (f) the seeking by the plaintiff of *remedies* that are disproportionate, excessive or unreasonable.

## **Explanatory Note**

Head 24 includes relevant definitions.

The definitions of “*act of public participation*” and ‘*public interest*’ are central to the concept of a SLAPP, and those proposed here take account of those definitions in Article 3 of the European Commission’s proposal for an anti-SLAPP Directive.

‘*Features of concern*’ refers to a number of features that are identified frequently as hallmarks of typical SLAPPs.

The list here takes account of those identified by Article 3.3 of the European Commission’s proposal for an anti-SLAPP Directive, and by the UK Ministry of Justice in its paper of 20 July 2022 on proposed legislative action against SLAPPs, ‘*Strategic Lawsuits Against Public Participation (SLAPPs): Government Response to the Call for Evidence*’.

## Head 25 - Proceedings under Part 5

### Provide that:

1. Where proceedings are brought under another Part of this Act by a plaintiff, in relation to an act of public participation by a defendant, the defendant may [in accordance with rules of court], apply under this Part to the court for either or both of :
  - (a) early dismissal of the proceedings, under Head 26;
  - (b) on the full hearing of the proceedings, any of the remedies provided under Head 27.
  
2. In deciding any proceedings brought under this Part, the Court shall take into account:
  - (a) the right to freedom of expression and information, and the actual or potential chilling effect of the proceedings on freedom of expression;
  - (b) the right to vindicate one's good name, and the gravity of the defamation claimed;
  - (c) the importance of public participation in the public interest,
  - (d) the right of both parties to seek an effective remedy through litigation,
  - (e) the public interest in deterring abusive litigation, and
  - (f) the extent to which the proceedings against public participation can be managed by the court in an efficient and proportionate manner.

### **Explanatory Note**

**Head 25** provides that where defamation proceedings are brought by a plaintiff, in relation to public participation by a defendant, the defendant may apply under this Part:

- (under Head 26) for the *early dismissal* of the proceedings: this would enable an applicant to put a stop to particularly egregious SLAPP proceedings at an early stage, before extensive costs have been inflicted on the defendant;
- (under Head 27), after a full hearing of the proceedings, for any of the remedies provided for under Head 27 (including dismissal, and a declaratory order that the proceedings constitute a SLAPP),
- or may apply under both (if, for example, there is insufficient evidence in the early stages for the Court to make an early dismissal order).

This Head also takes account of Article 5 of the European Commission's proposal for an anti-SLAPP Directive.

Subhead 2 refers to the important rights that have to be taken into account and balanced by the court, in an application under this Part.

## Head 26 - Early dismissal

### Provide that:

1. Where proceedings are brought under another Part of this Act by a plaintiff, in relation to public participation by a defendant, the defendant may [in accordance with rules of court], apply to the court at any time after the issue of the proceedings for the early [summary] dismissal of the proceedings.
2. On such application by the defendant [‘the applicant’], where the court is satisfied that the proceedings are proceedings against public participation:
  - (a) the court shall dismiss the proceedings without continuing to a full hearing, if it is satisfied that they are manifestly unfounded; it shall be for the plaintiff in the original proceedings to satisfy the Court that they are not manifestly unfounded;
  - (b) subject to (c), the court [shall/may] dismiss the proceedings without continuing to a full hearing, if it is satisfied that they exhibit one or more features of concern; it is for the applicant to satisfy the Court on this point;
  - (c) the court shall not dismiss the proceedings under (b), if the plaintiff satisfies the court that :
    - (i) the plaintiff’s claims are likely to succeed if the case proceeds to full hearing, and
    - (ii) taking account of all the considerations listed in Head 25, the public interest in allowing the proceedings to continue outweighs the public interest in dismissing the case before a full hearing.
3. When an application is made for early dismissal under this Head, the main proceedings shall be stayed until a final decision on the dismissal application has been issued.
4. An appeal lies against the making or refusal of an order under this Head.
5. The court shall, as far as possible, expedite the hearing of an application or an appeal under this Head.
6. (a) If the court dismisses proceedings on foot of an application under this Head, the applicant shall be entitled to their costs on a full indemnity basis, unless the court determines that all or part of such an award of costs is not appropriate in the circumstances.  
  
(b) If the court does not dismiss the proceedings on foot of an application under this Head, the respondent shall not be entitled to their costs of that application, unless the court determines that such an award is appropriate in the circumstances.

7. Nothing in this Part affects the court’s inherent jurisdiction, or its jurisdiction under rules of court, to dismiss an action summarily.

### **Explanatory Note**

*Head 26* sets out the early dismissal procedure. It takes account of several Articles of the European Commission’s proposal for an anti-SLAPP Directive, which are set out below.

The Report of the Review, and subsequently the UK Ministry of Justice in its paper of 20 July 2022 on proposed legislative action against SLAPPs, have taken early dismissal as the crucial element for an effective anti-SLAPP mechanism.

Such a mechanism requires careful balancing, as the dismissal order would be made before there had been a full hearing of the case made by both parties. For this reason Article 9.1 of the European Commission’s proposal for an anti-SLAPP Directive describes the test for early dismissal as that the proceedings are ‘*manifestly unfounded*’, the term used here.

As the Report of the Review noted, Irish courts already have powers, under their inherent jurisdiction or under Rules of Court, to dismiss or strike out at an early stage proceedings that are unfounded, and also proceedings that are ‘vexatious’ (which may include abusive): though the Court will usually underline that it regards that as exceptional, for the reasons just explained.

Under subhead 2, the court:

- (a) *must* dismiss, if it is satisfied that the proceedings are ‘manifestly unfounded’; and
- (b) *may* dismiss, if not satisfied that they are manifestly unfounded, but satisfied that they exhibit ‘features of concern’ typical of abusive proceedings. (it is likely that a court would require a high threshold of abusiveness to take this step).

In scenario (b), the court must also take account of the balancing considerations set out in subhead 2(c). (This follows the balancing model used in the Canadian (Ontario) anti-SLAPP legislation considered in the Report of the Review: the UK Ministry of Justice paper, mentioned above, proposes a similar test.)

Two important supporting elements in this Head are subhead 3, which provides for the main proceedings to be stayed (frozen) while an application for early dismissal is decided, and subhead 6, which provides for a presumption that the applicant for an early dismissal order is entitled to their costs and that the plaintiff in the main proceedings is not. These features address the aim of SLAPP proceedings and seek to disincentivise their use. In both cases however, the Court has a discretion, to ensure that the mechanism will work fairly in practice.

Article 9.1 of the European Commission's proposal for an anti-SLAPP Directive provides that:

*'Member States shall empower courts and tribunals to adopt an early decision to dismiss, in full or in part, court proceedings against public participation as manifestly unfounded. '*

Article 10 of the proposal provides that:

*'Member States shall ensure that if the defendant applies for early dismissal, the main proceedings are stayed until a final decision on that application is taken.'*

Article 11 of the proposal provides that:

*'Member States shall ensure that an application for early dismissal is treated in an accelerated manner, taking into account the circumstances of the case and the right to an effective remedy, and the right to a fair trial.'*

## Head 27 - Strategic lawsuits against public participation

### Provide that:

1. Where proceedings are brought under another Part of this Act by a plaintiff, in relation to public participation by a defendant, the defendant may [in accordance with rules of court], apply to the court on the full hearing of the proceedings for any or all of:
  - a. a declaration that the proceedings constitute a strategic lawsuit against public participation;
  - b. the dismissal of the proceedings; and
  - c. the remedies provided at Heads 28 to 31.
2. A ***strategic lawsuit against public participation*** means proceedings against public participation where the Court is satisfied that:
  - (a) the proceedings are wholly or partly unfounded, and
  - (b) the main purpose of the proceedings is to prevent, restrict or penalise public participation by the defendant.

Indications of such a purpose may include the presence of one or more features of concern in the proceedings up to and including the full hearing of the action, and any other factors indicating that the proceedings have been conducted in an abusive manner.

### **Explanatory Note**

**Head 27** provides that after the full hearing of the proceedings, a defendant may apply for a declaration that the proceedings constitute a SLAPP, the dismissal of the proceedings, and/or the remedies provided for at Heads 28 to 31.

The Head also defines the tests for a Court to apply in order to be satisfied that proceedings constitute a SLAPP. The ‘features of concern’, which may indicate abusive proceedings, are defined at Head 24.

This Head takes account of Article 5.1 of the European Commission’s proposal for an anti-SLAPP Directive, which provides that:

*‘Member States shall ensure that when court proceedings are brought against natural or legal persons on account of their engagement in public participation, those persons can apply for:*

- (a) *security [for costs] in accordance with Article 8;*
- (b) *early dismissal of manifestly unfounded court proceedings in accordance with Chapter III;*
- (c) *remedies against abusive court proceedings in accordance with Chapter IV.’*

## **Head 28 - Security for Costs**

### Provide that:

In proceedings brought under another Part of this Act by a plaintiff against public participation, the Court may, on application by the defendant, require the plaintiff to provide security for costs, if it considers appropriate in view of any features of concern, or of any other factors suggesting that the proceedings have been conducted in an abusive manner.

### **Explanatory Note**

**Head 28** empowers the court to make an order for security for costs, in proceedings that may be a SLAPP. Irish courts already have this power, though it is rarely used (most commonly where the party concerned does not reside or have assets in this jurisdiction, or is a shell company set up only for the purposes of litigation.)

This Head also takes account of Article 8 of the European Commission's proposal for an anti-SLAPP Directive, which provides that:

*'Member States shall ensure that in court proceedings against public participation, the court or tribunal seised has the power to require the claimant to provide security for procedural costs, or for procedural costs and damages, if it considers such security appropriate in view of the presence of elements indicating abusive court proceedings.'*

## Head 29 – Amicus curiae appearance

### Provide that:

1. In proceedings under this Part, the Court may, in its discretion, permit a human rights body, or a non-governmental organisation, with relevant expertise:
  - (a) to appear before the Court as an amicus curiae in the proceedings, [or
  - (b) to provide support to a defendant.]
2. The Minister may prescribe by regulations the human rights bodies, and the categories of non-governmental organisations, referred to in subhead (1). Such regulations may also provide for the controls on, and the transparency of, supports, including any financial supports, referred to in subhead (1).

### **Explanatory Note**

*Head 29* provides that the court may (at its discretion) permit a human rights body, or a non-governmental organisation, with relevant expertise to appear before it, in proceedings under this Part, the court as an *amicus curiae*. It also empowers the Minister to make regulations, for the purposes of this Head.

The Head is modelled on section 10 of the Irish Human Rights and Equality Commission Act 2014.

It also takes account of Article 7 of the European Commission’s proposal for an anti-SLAPP Directive, which provides that:

*‘Member States shall take the necessary measures to ensure that a court or tribunal seised of court proceedings against public participation may accept that non-governmental organisations safeguarding or promoting the rights of persons engaging in public participation may take part in those proceedings, either in support of the defendant or to provide information.’*

## **Head 30 - Damages**

### Provide that:

Where the Court is satisfied, in an application made under Head 26 or Head 27, that the proceedings which are the subject of that application are:

- a) a strategic lawsuit against public participation, or
- b) proceedings against public participation which, in whole or part, are unfounded and have been conducted in an abusive manner,

the applicant shall be entitled to recover full compensation for any harm suffered as a result of the application, or of those proceedings, from the plaintiff in those proceedings.

### **Explanatory Note**

*Head 30* provides that if the court is satisfied that defamation proceedings taken against public participation are a SLAPP, or abusive, the court may award damages to the defendant in those proceedings, for harm suffered as a result of the proceedings.

It also takes account of Article 15 of the European Commission's proposal for an anti-SLAPP Directive on compensation of damages, which provides that:

*'Member States shall take the necessary measures to ensure that a natural or legal person who has suffered harm as a result of an abusive court proceeding against public participation is able to claim and to obtain full compensation for that harm.'*

## **Head 31 - Costs**

Provide that:

In an application made under Head 27,

- a) where the Court is satisfied that the proceedings which are the subject of that application constitute a strategic lawsuit against public participation: the plaintiff shall be ordered to bear all the defendant's costs of the proceedings on a full indemnity basis, unless the Court considers any elements of those costs to be excessive, unreasonable or disproportionate;
- b) where the Court is not satisfied that the proceedings constitute a strategic lawsuit against public participation, but is satisfied that the proceedings are wholly or partly unfounded or have (in whole or part) been conducted in an abusive manner: the Court may, at its discretion, order the plaintiff to bear all or part of the defendant's costs, including on a full indemnity basis where the Court considers that just.

### **Explanatory Note**

This Head provides that where a court is satisfied that defamation proceedings against public participation constitute a SLAPP, the plaintiff in those proceedings shall be ordered to bear all the defendant's costs on a full indemnity basis, unless the court considers any of the costs to be excessive, unreasonable or disproportionate.

It also provides that where the court is not satisfied that such proceedings satisfy the tests for a SLAPP, but is satisfied that the proceedings are wholly or partly unfounded, or have (in whole or in part) been conducted in an abusive manner, the court may order the plaintiff in those proceedings to bear all or part of the defendant's costs.

The Head takes account of Article 14 of the European Commission's proposal for an anti-SLAPP Directive, which provides that:

*'Member States shall take the necessary measures to ensure that a claimant who has brought abusive court proceedings against public participation can be ordered to bear all the costs of the proceedings, including the costs of legal representation incurred by the defendant, unless such costs are excessive.'*

## **Head 32 - Removal, or cesser of distribution, by intermediary of third party statement**

Provide that –

1. Where a court in a defamation action finds that an online statement was defamatory of the plaintiff, the court may order the intermediary service provider to remove the statement.
2. Where a plaintiff takes a defamation action, the court may, on application by the plaintiff, order the intermediary service provider to include on the website/platform a prominent notice that the statement is subject to defamation proceedings, or to block access to the statement, until such time as a decision in the main proceedings has been issued, or the court directs otherwise.
3. An order shall not be granted under subhead (2) unless the court is satisfied that the plaintiff has established on the balance of probabilities that there is a prima facie case that the statement is defamatory [and that the defendant doesn't have a defence that is likely to succeed].
4. In deciding whether or not to make an order under subhead (2), the court shall take into account all the circumstances of the case, including the balancing of the rights to freedom of expression of the defendant and the right to a good name of the plaintiff.
5. For the purposes of this Head an 'intermediary service provider' means the provider of an intermediary service within the meaning of Article 3(g) of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), and includes 'online platform' and 'online search engine' within the meaning of Articles 3(i) and 3(j).

### **Explanatory Note**

This Head will require detailed discussion with, in particular, the Department of Enterprise Trade and Employment and the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, in the light of implementation in Ireland of the Digital Services Regulation ((EU) 2022/2065).

This Head is intended to give effect to the following recommendation in the Report of the Review:

*Make specific statutory provision for the court to order an intermediary to remove a third-party statement or cease its distribution (final order), or to do so while proceedings are ongoing (interlocutory order)*

This recommendation is intended to address submissions to the review which pointed to the need for a more efficient mechanism for obtaining take-down of user-generated content from social media sites.

### **Head 33 - Power to make an identification order ('Norwich Pharmacal' Order)**

Provide that

1. The Circuit Court or the High Court may hear and decide an application by a person, who alleges that another person ('the anonymous publisher') has anonymously published a defamatory statement about him or her by means of an information society service, for an order (sometimes referred to as a 'Norwich Pharmacal' order), directed to the intermediary service provider of that service ('the service provider'), requiring the service provider to disclose such information as it or they have in relation to the identity of the anonymous publisher, so that they may be identified for the purpose of the plaintiff seeking redress for the wrongs complained of.
2. The information referred to in subhead (1) may include (but is not limited to) the anonymous publisher's name, email address, telephone number, date and time of registration and IP addresses associated with each log in and log out, as the court considers necessary.
3. The court may, in its discretion, grant an order under subhead (1), subject to such terms, if any, as it considers appropriate, if the applicant has established to the court on the balance of probabilities that there is a prima facie case that the statement published by the anonymous publisher by means of the service concerned, is defamatory.
4. In deciding whether or not to make an order under this Head, the court shall take all the circumstances of the case into account, including the balancing of the rights of the applicant and those of the anonymous publisher.
5. Before making an order under this Head, the court may, at its discretion, direct (subject to such terms, if any, as it considers appropriate) that the service provider serve a notice, in the form directed by the Court, on the anonymous publisher, in order to allow that person an opportunity to appear and to make representations to the court.
6. Provide that this Head is without prejudice to the inherent jurisdiction of the High Court to grant a 'Norwich Pharmacal' order.
7. For the purposes of this Head:

'intermediary service provider' means the provider of an intermediary service within the meaning of Article 3(g) of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), and includes an 'online platform' and 'online search engine' within the meaning of Articles 3(i) and 3(j);

'anonymous publisher' means the person who is alleged to have published the contested statement anonymously, via an account with the intermediary service provider concerned.

## **Explanatory Note**

This Head is intended to give effect to the following recommendation in the Report of the Review:

*Provide a statutory jurisdiction for the High Court and the Circuit Court to grant a Norwich Pharmacal order (directing an online services provider to disclose the identity of an anonymous poster of defamatory material).*

This Head will also be discussed with the Department of Enterprise Trade and Employment and the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, in particular, in the light of implementation in Ireland of the Digital Services Regulation ((EU) 2022/2065).

The background to this recommendation is that where defamatory material is posted anonymously on hosting platform or on social media, the intermediary services provider concerned will possess identifying material about the anonymous poster who is its account holder, but will not provide such information in the absence of a court order.

The person who considers themselves defamed by that material will have to seek a ‘Norwich Pharmacal’ order from the court to obtain it, but can do so if the court considers that the material is, prima facie, defamatory. The Norwich Pharmacal order is a court-devised remedy, not expressly provided for under court rules or legislation and as such, can only be granted by the High Court: so seeking such an order is expensive.

The Circuit Court has jurisdiction to hear and decide defamation cases (including online defamation), but no jurisdiction to make a Norwich Pharmacal order.

Making a Norwich Pharmacal order available in the Circuit Court should also reduce the costs involved for all parties (and particularly for the plaintiff, who often has to pay the online services provider’s legal costs, as well as their own) and ensure that such orders are more accessible in practice.

This option was among the recommendations made by the Law Reform Commission in its 2016 Report ‘*Harmful Communications and Digital Safety*’ (see section 7.5.1 of this chapter) and is particularly relevant in defamation cases.

### **Head 34 – Notice (online publication)**

Provide that

1. A person who believes that a defamatory statement about him or her has been published by means of an information society service that is a hosting service (including an online platform, online search engine or social media app) may submit a Notice to the intermediary service provider of the hosting service on which the statement was published.
2. The Notice shall include the following information:
  - (a) the name and email address of the person submitting the Notice;
  - (b) details of the statement alleged to be defamatory and a sufficiently substantiated explanation of the reasons why the person alleges that the statement is defamatory;
  - (c) a clear indication of the exact electronic location of the statement, such as the exact URL or URLs, and, where necessary, additional information enabling the identification of the statement;
  - (d) the name and identification details of the author of the statement (if available)
  - (e) a statement, confirming the bona fide belief of the person submitting the notice that the information and allegations contained in the Notice are accurate and complete.
3. The intermediary service provider shall send a confirmation of receipt of the Notice within [5 working days] of receipt of the Notice.
4. The intermediary service provider shall forward the Notice to the author of the statement within [5 working days] of receipt of the Notice and
  - request the author to provide a response within [5 working days] of the date of the Notice;
  - advise the author that the response will be forwarded to the person who issued the Notice (but that the author's anonymity will be maintained, in the case of an anonymous author);
  - advise the author that failure to respond within that time limit will result access to the statement being restricted (by removing the content or disabling access to it, as appropriate);
  - advise the author that where a statement has been restricted, he she can request the removal of the restriction; and
  - that restricting access to a statement or removing any such restriction does not suggest/imply that the statement is or is not defamatory.
5. Where the intermediary service provider is unable to forward the Notice to the author of the statement, it shall, within [5 working days] of receipt of the Notice, restrict access to the statement (by removing the content or disabling access to it, as appropriate), and notify accordingly the person who submitted the Notice.
6. Where the intermediary service provider receives a response from the author, it shall forward the response to the person who submitted the Notice within a period

of [5 working days] (subject to maintaining the anonymity of an anonymous author, where applicable).

7. Where the intermediary service provider does not receive a response from the author, it shall inform the person who submitted the Notice, and shall, within [5 working days] of the deadline referred to in subhead (3), restrict access to the statement (by removing the content or disabling access to it as appropriate), and notify accordingly the person who submitted the Notice.
8. The restricting of access to a statement in accordance with subhead (6) does not imply/suggest that a statement was defamatory, in the absence of a court decision to that effect.
9. Where access to a statement is restricted in accordance with subhead (6), the intermediary service provider shall remove the restriction if the author of the statement requests it.
10. Where a restriction on access to a statement is removed in accordance with subhead (8), the intermediary service provider shall inform the person who issued the Notice within [5 working days] of the removal of any such restriction.
11. The removal of a restriction in accordance with subhead (8) does not imply/suggest that a statement is not defamatory.
12. Notices referred to in this Head shall be considered to give rise to actual knowledge or awareness, for the purposes of Article 6 of the Digital Services Regulation, where they allow a diligent provider of hosting services to determine that a statement is illegal/defamatory, and that the defendant has no defence, without a detailed legal examination.
13. Provide that
  - (c) the Minister may, following consultations with the Minister for Enterprise, Trade and Employment and the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media, make regulations to specify the form of document required for the purposes of a Notice;
  - (d) regulations made under this subhead may contain such incidental, supplemental and consequential provisions as appear to be necessary or expedient for the purposes of the regulations;
  - (e) every regulation made under this subhead shall be laid before each House of the Oireachtas as soon as may be after it is made;
  - (f) either House of the Oireachtas may, by resolution passed within 21 sitting days after the day on which a regulation is laid before it, annul the regulation;

(g) the annulment of the regulation takes effect immediately after passing of the resolution concerned but does not affect the validity of the Form before the passing of the resolution

14. For the purposes of this Head,

‘Digital Services Regulation’ means Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (‘Digital Services Act’);

‘hosting service’ means a hosting service within the meaning of Article 3(g)(iii) of the Digital Services Regulation;

‘information society service’ means an information society service within the meaning of Article 3(a) of the Digital Services Regulation;

‘intermediary service provider’ means the provider of an intermediary service within the meaning of Article 3(g) of the Digital Services Regulation;

‘online platform’ means an online platform within the meaning of Article 3(i) of the Digital Services Regulation;

‘online search engine’ means an online search engine within the meaning of Article 3(j) of the Digital Services Regulation.

### **Explanatory Note**

This Head is intended to give effect to the following recommendation in the Report of the Review:

*Introduce a prescribed Notice of Complaint process, with time limits, such as that envisaged by Australia and Ontario, which incentivise parties to make contact at an early stage, use the intermediary role of internet platforms in connecting complainants and online publishers, and promote the possibility of swift resolution of defamation disputes without recourse to litigation.*

It is intended to set out in greater detail the mechanism provided for in Article 16 of the Digital Services Regulation ((EU) 2022/2065).

This Head will require detailed discussion with the Department of Enterprise Trade and Employment and the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, in particular, in the light of implementation in Ireland of the Digital Services Regulation.