
LAW REFORM COMMISSION

REPORT

**PRIVILEGE FOR REPORTS
OF COURT PROCEEDINGS
UNDER THE *DEFAMATION
ACT 2009***

(LRC 121 – 2019)



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

Report

Privilege for Reports of Court Proceedings under the *Defamation Act 2009*

(LRC 121 – 2019)

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OVERVIEW AND EXECUTIVE SUMMARY

1. This Report, which follows the publication of the Commission's *Issues Paper on Privilege for Reports of Court Proceedings under the Defamation Act 2009*,¹ arises from a request made by the then Attorney General on 18th December 2015 under section 4(2)(c) of the *Law Reform Commission Act 1975*, which requested the Commission:

"to examine the appropriateness of enshrining in our laws a provision that no report of court proceedings should be actionable in defamation in the absence of proof of malice, and further to institute such proceedings the proposed plaintiff should first have to seek leave of the court and demonstrate on affidavit the *mala fides* alleged."
2. The Attorney General's request under the 1975 Act followed remarks she had made on the retirement of the President of the High Court, Mr Justice Kearns, on 17th December 2015. The Attorney General had noted the need to examine this area in order to avoid any "chilling" impact on the level and quality of court reporting which, she said, the people of Ireland "expect and enjoy." The Attorney General stated that, by ensuring that the public was made aware of the work of the courts, those reporting court proceedings were serving an important public interest by informing the people of the work of the courts in the administration of justice under Article 34 of the Constitution. She added that they should not have to fear that a "simple oversight, omission or error" in reporting court proceedings would expose them to the risks of being sued in a defamation action.²
3. The request required the Commission to examine the current absolute privilege under section 17 of the *Defamation Act 2009* (the 2009 Act) in respect of a "fair and accurate" report of court proceedings. As discussed in the Report below, the absolute privilege in section 17 of the 2009 Act provides a high level of protection to journalists (in effect, immunity from being sued) who provide the quality of court reporting to which the Attorney General referred in her remarks in 2015. The Commission therefore proceeded on the clear assumption that the absolute privilege in section 17 of the 2009 Act should be retained. The Attorney General's request thus required the Commission to examine whether it should separately be provided that, in respect of a report of court proceedings, no claim under the 2009 Act should be brought in the absence of proof of malice, and that any such action would also require prior leave of

¹ *Issues Paper on Privilege for Reports of Court Proceedings under the Defamation Act 2009* (LRC IP 16-2018).

² See Carolan, "Attorney General calls for review of defamation laws", *The Irish Times*, 18 December 2015.

the court. A defence that is based on absence of malice is referred to as a qualified privilege and, as regards such a defence related to a report of court proceedings, the request therefore obviously envisaged that such a new qualified privilege defence would be in respect of a report that did not meet the “fair and accurate” test in section 17 of the 2009 Act.

4. During the consultation process that followed publication of the Issues Paper, the Commission received many submissions from individuals and bodies with an interest in this area, and we greatly appreciate those contributions, which assisted our analysis and the conclusions and recommendations arrived at in this Report.
5. The Department of Justice and Equality is, at the time of writing (July 2019), engaged in a general review of the 2009 Act, as required by section 5 of the 2009 Act, and the Commission understands that the narrow subject-matter of this Report will not affect the generality of that statutory review.
6. In **Chapter 1** of the Report, the Commission notes that, while the issues examined in this Report involve a narrow aspect of the law of defamation, it is important to examine them against the background of the constitutional and international human rights standards that apply in this area of the law. Notably, this involves the interaction between the right to a good name, recognised in Article 40.3 of the Constitution and in Article 8 of the Council of Europe Convention on Human Rights and Fundamental Freedoms (the ECHR), and the right to freedom of expression recognised in Article 40.6.1° of the Constitution and in Article 10 of the ECHR. Article 34.1 of the Constitution, which provides that court proceedings are, in general, to be held in public, is also relevant to this Report. This is because, as the Attorney General noted in her remarks in 2015, reports of such proceedings in the media are, in practice, the means by which most people are informed about the workings of the courts.
7. The Commission also discusses the context in the 2009 Act in which the privilege defence for “fair and accurate” reports of court proceedings occurs. The Commission notes that the general concept of accuracy in court reporting also appears in a number of provisions of the 2009 Act, including in connection with the role of the Press Council, which was established by the newspaper and magazine industry in 2008 and was given statutory recognition in 2010 for the purposes of the 2009 Act. The term “fair and accurate” is also used in the *Data Protection Act 2018* in connection with facilitating structured access to court documents for *bona fide* representatives of the media. The test therefore underpins the role of the media in ensuring that the general public is informed of proceedings in court under Article 34.1 of the Constitution.
8. The Commission then discusses the case law on the meaning of a “fair and accurate” report within the meaning of the 2009 Act. The Commission also discusses how the Press Council has applied the concept of accuracy in court reporting for its members

through its Code of Practice, and the corresponding role carried out by the Broadcasting Authority of Ireland through the statutory codes it has published.

9. The case law indicates that, to meet the “fair and accurate” standard, it is not necessary that a report of court proceedings provides a word-for-word account, and a well-grounded summary, even with slight inaccuracies, that provides an overall account, will be acceptable; but that significant inaccuracies that give a false impression, or prejudice a verdict before a verdict has been given will fail the “fair and accurate” standard.
10. The Commission considers that the case law, and the published material from the Press Council and the Broadcasting Authority of Ireland, provide extremely useful guidance as to what is required in terms of accuracy in court reporting. The Commission also notes, however, that the guidance from the case law, or from the Press Council or the Broadcasting Authority of Ireland, may not be accessible to or accessed by non-professional journalists who publish court reports, including bloggers and persons who are sometimes described as citizen journalists.
11. **Chapter 1** therefore concludes with the Commission recommending that the 2009 Act should be amended to provide that, in determining whether a report of court proceedings is “fair and accurate”, all of the circumstances of the case are to be considered, including the following non-exhaustive list of 5 principles or criteria derived from the case law. The non-exhaustive 5 principles or criteria are: (a) an abridged court report will 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; and (e) a report assuming a verdict, before any verdict has been delivered, is not privileged.
12. These principles or criteria clearly indicate that a report of court proceedings would meet the “fair and accurate” test in the 2009 Act even where, to echo the remarks of the Attorney General in 2015, it includes a simple oversight, omission or error. Inserting them into the 2009 Act would therefore support the view that a person making such a report of court proceedings would not be exposed to the risk of being sued in a defamation action. This would also assist in underpinning the high quality of court reporting to which the Attorney General also referred, and therefore continue to serve the important public interest of informing the people of the work of the courts in their administration of justice under Article 34 of the Constitution.
13. In **Chapter 2** of the Report, the Commission begins by discussing the scope of persons who may claim the privilege defences for a “fair and accurate” report under the 2009 Act. The case law has long established that the privilege is not confined to reports of

court proceedings by professional journalists but also applies to reports by others, such as bloggers and citizen journalists. The Issues Paper sought views as to whether a distinction should be drawn between, on the one hand, reports by professional journalists and, on the other hand, reports by others using, for example, social media or blogs. Views were also sought as to whether the absolute privilege should apply only where those making reports are subject to the oversight of a standards-setting body akin to the Press Council or the Broadcasting Authority of Ireland.

14. The submissions received supported retaining the current position. The Commission reviewed the case law and relevant constitutional and international standards concerning freedom of expression that are engaged on this issue. This review strongly supported the current position, and the Commission therefore recommends that the scope of persons who may claim the absolute privilege defence for a “fair and accurate” report should be retained, and that it should therefore continue to apply to professional journalists and also to reports by others, such as bloggers and those described as citizen journalists.
15. The Commission then turns in **Chapter 2** to discuss: how court reporting is affected by the enactment of the *Data Protection Act 2018* (the 2018 Act); 3 Practice Directions of 2019 that address the need to protect original court files; and a Practice Direction of 2018 that restricts live social media postings from courtrooms during ongoing trials.
16. Detailed Rules of Court have been made under the 2018 Act, in force since August 2018, which provide a structured basis under which court officials may, in order to ensure the accuracy of court reports, provide specific information to *bona fide* members of the Press or broadcast media. Separately, the need to have an appropriate structure in place to control access to original court documents, whether by media representatives or others, has been underpinned by 3 Practice Directions of the courts published in April 2019. These provide that the original files maintained in the offices of the High Court, the Court of Appeal and the Supreme Court are not to be made available to any person attending at any of those offices, including the parties to the proceedings and the solicitors on record. These Practice Directions do not, of course, affect the ability of the Press and other media to access information in accordance with the Rules made under the 2018 Act.
17. The Commission also examines the 2018 Practice Direction of the courts that imposes a general ban on live social media postings from courtrooms during ongoing trials. The ban does not apply to postings made by a lawyer with a direct interest in the trial, or by a *bona fide* member of the press or media organisation, or by a professional legal commentator whose professional standing is established to the court’s satisfaction and who is using such device for the purpose of reporting proceedings before the court. Similar restrictions have been in place in England and Wales since

2011 and in Northern Ireland since 2016. The Commission acknowledges the need to ensure that ongoing trials are not adversely affected by prejudicial social media commentary. The Commission also notes that, while the term “*bona fide* member of the press” is well understood, the term “professional legal commentator whose professional standing is established to the court’s satisfaction” is less clear. While that term may echo the recognition in case law that certain bloggers and other social media commentators are exercising a right to communicate comparable to *bona fide* members of the press, it is not entirely clear how this element of the Practice Direction is to be applied in individual cases.

18. The Commission supports the comments made by the Chief Justice at the time the Practice Direction was published that it would be subject to review as to its impact and effectiveness. The Commission therefore concludes that the opportunity could be taken to clarify that this aspect of the Practice Direction aligns with the case law on the role of certain bloggers and other social media commentators. Beyond that, the Commission does not make any recommendation on the extent to which the 2018 Practice Direction may need to be reviewed. This is because of the complexity involved in any further regulation of social media and online and broadcast communications. In this context, the Department of Communications, Climate Action and Environment is, at the time of writing (July 2019), preparing legislation with a view to establishing an Online Safety Commissioner and to implementing the 2018 European Union (EU) Revised Audiovisual Media Services Directive (AVMSD).
19. In **Chapter 3** of the Report, the Commission addresses whether a new qualified privilege defence, which would apply to a report of court proceedings that falls below the “fair and accurate” standard, should be enacted. The Commission approaches this on the clear assumption that the absolute privilege in section 17 of the 2009 Act is retained and that, as recommended in Chapter 1, a non-exhaustive list of criteria as to what constitutes a fair and accurate report should be incorporated into the 2009 Act. The Commission considers the arguments for and against such a new qualified privilege defence, and ultimately concludes that the arguments against its introduction far outweigh the arguments in favour.
20. In particular, the Commission considers that such a new privilege defence would run clear risks of a reduction in the standard and quality of reporting of court proceedings. This would adversely affect the appropriate balance that defamation law seeks to achieve between the two key rights engaged, namely, the right to a good name and the right of free speech and expression, the importance of which the Commission emphasises throughout this Report. For this reason, among others, the Commission does not consider that such a new qualified privilege defence should be introduced.

21. In **Chapter 4** of the Report, the Commission considers, bearing in mind the recommendation made in Chapter 3, whether a potential plaintiff should be required to obtain leave to bring proceedings in a defamation case related to a report of court proceedings. While such a requirement would be constitutionally permissible if drafted in accordance with requirements of proportionality, the Commission considers that it would be undesirable because it would restrict the right of access to the courts and a potential plaintiff's ability to defend his or her good name under Article 40.3. Moreover, the Commission considers that such a leave requirement would arguably be superfluous, because section 8 of the 2009 Act already requires that a plaintiff or defendant in a defamation action must swear an affidavit verifying any allegations of fact, and that this already provides sufficient protection against unfounded claims.
22. **Appendix A** contains a summary of the recommendations made in the Report.
23. **Appendix B** contains a *Draft Defamation (Amendment) Bill* to give effect to the reforms recommended in Chapter 1.

CHAPTER 1 OVERVIEW OF DEFAMATION LAW AND GUIDANCE ON PRIVILEGE FOR REPORTS OF COURT PROCEEDINGS

1. Overview of the *Defamation Act 2009*, including the rights engaged

(a) Constitutional and ECHR context of the 2009 Act

[1.1] The request of the Attorney General under the *Law Reform Commission Act 1975* that is the subject-matter of this Report requires the Commission to examine a specific aspect of defamation law. As noted in the Overview above, the Attorney General's request under the 1975 Act followed remarks she had made in December 2015 in which she had referred to the potential "chilling" impact on the current level and quality of court reporting if those involved in court reporting were at risk of being sued in respect of a "simple oversight, omission or error" in reporting court proceedings.¹ As noted in this Chapter below, the absolute privilege in section 17 of the *Defamation Act 2009* provides a high level of protection to journalists (in effect, immunity from being sued) who provide the quality of court reporting to which the Attorney General referred in her remarks in 2015. The Commission therefore proceeded on the clear assumption that the absolute privilege in section 17 of the 2009 Act should be retained. The Attorney General's request thus requires the Commission to examine whether it should separately be provided that, in respect of a report of court proceedings, no claim under the 2009 Act should be brought in the absence of proof of malice, and that any such action would also require prior leave of the court. The Commission therefore examines whether a new qualified privilege defence for reports of court proceedings, where such reports do not meet the "fair and accurate" test, should be enacted.

[1.2] The *Defamation Act 2009* (the 2009 Act)² repealed and replaced the *Defamation Act 1961*, and it also constituted a significant codification of many existing common law principles and rules on defamation.³ The Department of Justice and Equality is, at the

¹ See Overview and Executive Summary above, paragraph 2.

² The 2009 Act was enacted against the background of a number of significant reviews of the existing law, including the Commission's 1991 *Report on the Civil Law of Defamation* (LRC 38-1991) and the 2003 *Report of the Legal Advisory Group on Defamation* (the Mohan Group Report).

³ The leading texts on this area are: Cox and McCullough, *Defamation: Law and Practice* (Clarus Press 2014); McMahon and Binchy, *Law of Torts*, 4th ed (Bloomsbury Professional, 2013), Chapter

time of writing (July 2019), carrying out a general review of the 2009 Act, as required by section 5 of the 2009 Act, and the Commission understands that the narrow subject-matter of this Report will not affect the generality of that statutory review.

- [1.3] While the issues under review in this Report thus involve a narrow aspect of the law of defamation, the Commission considers that it is important to examine them taking account of the relevant constitutional and international human rights standards that apply in this area of the law. The leading writers in this area have all identified that the law of defamation involves the interaction between, on the one hand, the right to a good name recognised in Article 40.3 of the Constitution and in Article 8 of the Council of Europe Convention on Human Rights and Fundamental Freedoms (the ECHR), and, on the other hand, the right to freedom of expression recognised in Article 40.6.1°.i of the Constitution and Article 10 of the ECHR.⁴ Article 34.1 of the Constitution, which provides that court proceedings are usually to be held in public (save in such special and limited cases as may be prescribed by law), is also of direct relevance to the subject-matter of this Report. This is because, as the Attorney General noted in her remarks in December 2015, reports of such proceedings are, in practice, the means by which most people are informed about the workings of the courts.
- [1.4] The extent to which the law of defamation gives priority to the right to a good name or to the right to freedom of expression has varied over time. At one time, case law in Ireland gave significant weight to the right to a good name, and relatively little weight to freedom of expression. More recently, the courts have given more weight to freedom of expression, notably influenced by the case law of the European Court of Human Rights (the ECtHR) on Article 10 of the ECHR.⁵ An example of this changed approach can be seen in the decision of the High Court (Ó Caoimh J) in *Hunter and Callaghan v Duckworth & Co Ltd and Blom-Cooper*.⁶ In that case, the plaintiffs, two of the “Birmingham Six”, claimed that a booklet published by the defendants wrongly implied that the quashing of their convictions by the English Court of Appeal did not mean they were entitled to be presumed innocent.
- [1.5] The defendants applied to the High Court to have the case dismissed on the basis that it was covered by the “*Reynolds* defence” established by the UK House of Lords in

34; and Maher, *The Law of Defamation* (Round Hall, 2011). One of the leading English texts is Mullis and Parkes, *Gatley on Libel and Slander*, 12th ed (Sweet and Maxwell, 2013).

⁴ See generally Cox and McCullough, *Defamation: Law and Practice* (Clarus Press 2014), Chapters 1 and 13; McMahon and Binchy, *Law of Torts*, 4th ed (Bloomsbury Professional, 2013), Chapter 34; Maher, *The Law of Defamation* (Round Hall, 2011), Chapter 1; and Mullis and Parkes, *Gatley on Libel and Slander*, 12th ed (Sweet and Maxwell, 2013), Chapter 1.

⁵ See Kelly: *The Irish Constitution*, 5th ed (Bloomsbury Professional, 2018), at paras 7.6.76 -7.6.81.

⁶ [2003] IEHC 81.

*Reynolds v Times Newspapers Ltd.*⁷ The UK House of Lords held that, in some instances, a defence of qualified privilege could apply to some publications where it was established that the media had a duty to publish and which the public had an interest in hearing. In the *Reynolds* case, Lord Nicholls set out 10 factors that were relevant to determine whether the *Reynolds* defence applies. In the *Hunter* case, the High Court accepted that the courts had to balance the often conflicting rights of freedom of expression and the individual's right to a good name. The Court also accepted that the role of the press was crucial in a democratic society and that, in certain instances, their duty to inform the public outweighed the rights of individuals about whom wrong things were written. To help achieve this balance, the Court approved what it described as the "flexible approach" set out by Lord Nicholls in the *Reynolds* case. The Court ultimately dismissed the defendants' application to have the case struck out, but also allowed them to amend their pleadings so that the issue of the *Reynolds* defence could be argued at a later stage of the case itself. It is worth noting that section 26 of the 2009 Act has since incorporated a defence of fair and reasonable publication on a matter of public interest, broadly in line with the approach underlying the *Reynolds* defence.⁸

- [1.6] This changing approach can also be seen in the case law concerning the claim of journalists not to be required to disclose their sources in court.⁹ In *In re O'Kelly*¹⁰ the Court of Criminal Appeal in 1974 rejected the claim by journalists that they had a right to refuse to disclose sources of confidential information. The Court held that journalists or reporters are no more constitutionally or legally immune than other citizens from disclosing information received in confidence. By contrast, in *Mahon v Keena*¹¹ the Supreme Court held in 2009 that limitations on the confidentiality of journalistic sources called for careful scrutiny, having regard to the importance for press freedom in a democratic society of protecting such sources, and that an order for disclosure could have a chilling effect on the exercise of that freedom. In this respect, the Supreme Court was directly influenced by the relevant case law of the

⁷ [1999] UKHL 45, [2001] 2 AC 127.

⁸ See Cox and McCullough, *Defamation: Law and Practice* (Clarus Press 2014), Chapter 9; McMahon and Binchy, *Law of Torts*, 4th ed (Bloomsbury Professional, 2013), Chapter 34; and Maher, *The Law of Defamation* (Round Hall, 2011), Chapter 9.

⁹ See Maher, *The Law of Defamation* (Round Hall, 2011), at para 1.13. The issue of non-disclosure by a journalist of his or her sources usually arises in the context of whether a journalist may, as a result, be held in contempt of court, which was the context in the three cases discussed immediately below. The Commission is currently (July 2019) engaged in preparing a *Report on Contempt of Court*, which will follow from its *Issues Paper on Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (LRC IP 10-2016).

¹⁰ (1974) 108 ILTR 97.

¹¹ [2007] IEHC 348, [2009] IESC 64, [2009] IESC 78, [2010] 1 IR 336.

ECtHR under Article 10 of the ECHR, including the decision in *Goodwin v United Kingdom*.¹² In light of this case law, the Commission has approached the issues in this Report taking account of the need to ensure an appropriate balance between, on the one hand, the right to a good name and, on the other, the right to freedom of expression.

- [1.7] As already noted, and as the Attorney General commented in her remarks in 2015 that immediately preceded this request,¹³ the Commission also considers that reports of court proceedings play a significant role in ensuring that, in accordance with Article 34.1 of the Constitution, the administration of justice is communicated to the general public. As the Supreme Court noted in *Irish Times Ltd v Ireland*,¹⁴ it is not possible for all members of the public to be present in court, so that in order to comply with Article 34.1, the public “are entitled to be informed of the proceedings in the court and to be given a fair and accurate account of such proceedings and the media are entitled to give such an account to the wider public.” The Supreme Court thus emphasised that the fairness and accuracy of such reporting is an important component of that communication, and of providing an appropriate balance between the right to a good name and of freedom of expression.

(b) Defamatory statements include those published on the internet and through social media

- [1.8] Section 2 of the 2009 Act defines a defamatory statement as one that “tends to injure a person’s reputation in the eyes of reasonable members of society.” The defamatory statement must also be untrue, since section 16 of the 2009 Act provides that truth is a defence to a defamation claim. Section 6(2) of the 2009 Act provides that defamation consists of the publication, by any means, of a defamatory statement concerning a person to one or more than one person (other than the first-mentioned person). It has been pointed out that section 6(2) of the 2009 Act reflects well-established case law that no act of defamation has occurred until it is published to someone other than the allegedly defamed person.¹⁵ Liability for a defamatory statement does not attach to the person who wrote it, but rather to the person who made it public, though in practice they are often one and the same.
- [1.9] Section 2 of the 2009 Act defines “statement” to include: (a) a statement made orally or in writing, (b) visual images, sounds, gestures and any other method of signifying meaning, (c) a statement broadcast on the radio or television or published on the

¹² [1996] ECHR 16, (1996) 22 EHRR 123.

¹³ See Overview and Executive Summary above, paragraph 2.

¹⁴ [1998] 1 IR 359, at 383.

¹⁵ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press, 2014), at para 2.01.

internet, and (d) an electronic communication. This is a broad definition, covering any method by which a statement, which may be defamatory, is conveyed to a third party. In the context of this Report, it is notable that it includes publication on the internet and any other form of electronic communication such as through social media.

- [1.10] The 2009 Act does not, therefore, make specific provision for a separate category of defamation law relating to internet or social media communications. The advent of such relatively new media in recent decades, and in particular the ability of people to publish content online through social media or personal blogs, can in some cases make it more difficult to ascertain the publisher of material. Section 6(2) of the 2009 Act refers to publication “by any means”, so that the 2009 Act applies to defamation in newspapers, whether in their paper or online editions, defamation on television, regardless of how that is accessed, or defamation through any other medium, such as through blogs, social media or other internet platforms.

(c) Defences in the 2009 Act, including defences of absolute and qualified privilege for “fair and accurate” reports of court proceedings

- [1.11] Section 15(1) of the 2009 Act abolished, in general terms, all previous common law and statutory defences to defamatory statements and, in their place, sections 16 to 27 of the 2009 Act contain a codified list of defences. Some of these defences re-enact the pre-existing common law and statutory defences, while others are new.¹⁶
- [1.12] The defences of relevance to the Attorney General’s request are those involving absolute privilege, contained in section 17 of the 2009 Act, and those involving qualified privilege, found in section 18. As discussed below, the absolute privilege defence in section 17 of the 2009 Act applies to reports of court proceedings in the State, in Northern Ireland and in certain international courts, such as the Court of Justice of the European Union (CJEU). The qualified privilege defence in section 18, by reference to Schedule 1 to the 2009 Act, applies to reports of court proceedings in places other than those referred to in section 17. Section 18, by reference to Schedule 1, thus applies the qualified privilege defence to “fair and accurate” reports of proceedings in courts in, for example, England, Wales, Scotland, France, Germany, Australia, South Africa and the US.
- [1.13] It has been noted that the defence of absolute privilege is based on public policy considerations, as opposed to other defences, which tend to focus more on freedom of expression as an important factor.¹⁷ For example, section 17 of the 2009 Act

¹⁶ Maher, *The Law of Defamation* (Round Hall, 2011), at para 1.04; and Mohan and Murphy, “Defamation Reform and the 2009 Act: Part 1” (2010) 15(2) *Bar Review* 33, at 35.

¹⁷ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press 2014), at para 7.01.

provides a defence of absolute privilege in a defamation claim in respect of: statements made in either House of the Oireachtas by a member of either House; statements made by a judge or other person performing a judicial function; and statements made by a party, witness, legal representative or juror in the course of proceedings presided over by a judge or other person performing a judicial function.

- [1.14] It is an important aspect of public policy that those in public office or involved in the administration of justice should freely be able to speak their minds without fear of legal challenge. For the same reasons, the “fair and accurate” reporting of such statements, discussed below, is covered by the defence of absolute privilege in section 17, and the defence of qualified privilege in section 18, by reference to Schedule 1.
- [1.15] Qualified privilege is a less powerful defence than absolute privilege, in that, by virtue of section 19, it applies only where the person who published the statement has acted in the absence of malice. Malice can be established by examining the motivation of the publisher and his or her belief in the truth, or otherwise, of the publication.¹⁸ As with absolute privilege, this defence also has public policy roots. Thus, in *Hynes-O’Sullivan v O’Driscoll*¹⁹ the Supreme Court held that it is “founded upon the needs of the common good.” The meaning of “malice” in defamation law is discussed further in Chapter 3 below.

(d) Absolute and qualified privilege defences for “fair and accurate” reports of court proceedings

- [1.16] Section 17(1) of the 2009 Act broadly re-enacted the pre-2009 law on the defence of absolute privilege, by providing that it is a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought would, if it had been made immediately before the commencement of section 17, have been considered under the pre-2009 law, as having been made on an occasion of absolute privilege. Section 17 also prescribes a number of instances in which the defence arises. Of relevance to this Report, section 17(2) provides that:

“... it shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought was...

- (i) a fair and accurate report of proceedings publicly heard before, or decision made publicly by, any court –

¹⁸ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press 2014), at para 8.01.

¹⁹ [1988] IR 436, at 453.

(i) established by law in the State, or

(ii) established under the law of Northern Ireland,

(j) a fair and accurate report of proceedings to which a relevant enactment referred to in section 40 of the *Civil Liability and Courts Act 2004* applies,

(k) a fair and accurate report of proceedings publicly heard before, or decision made public by, any court or arbitral tribunal established by an international agreement to which the State is a party including the Court of Justice of the European [Union], the [General Court (European Union)], the European Court of Human Rights [of the Council of Europe] and the International Court of Justice.”

- [1.17] Section 17(2)(i) thus provides that a fair and accurate report of court proceedings heard publicly before any court in Ireland and Northern Ireland, and of proceedings heard before, and decisions made by, the named European and international courts, is absolutely privileged. Section 17(2)(j), which refers to section 40 of the *Civil Liability and Courts Act 2004*,²⁰ concerns the extent to which certain cases heard otherwise than in public (*in camera*), such as those involving sensitive matters related to family or children, can be reported.
- [1.18] Section 18(1) of the 2009 Act broadly re-enacted the pre-2009 law on the defence of qualified privilege by providing that it is a defence for the defendant to prove that the statement in respect of which the defamation action was brought would, if it had been made immediately before the commencement of section 18, have been considered under the pre-2009 law (other than the *Defamation Act 1961*) as having been made on an occasion of qualified privilege.
- [1.19] Section 18(2) provides that, without prejudice to the generality of section 18(1), it is a defence for the defendant: (a) to prove that the statement was published to a person or persons who had a duty to receive, or interest in receiving, the information contained in the statement, or the defendant believed upon reasonable grounds that the said person or persons had such a duty or interest; and (b) the defendant had a corresponding duty to communicate, or interest in communicating, the information to such person or persons.

²⁰ Section 40 of the 2004 Act has been amended by the *Civil Law (Miscellaneous Provisions) Act 2008* and the *Courts and Civil Law (Miscellaneous Provisions) Act 2013*.

[1.20] Of direct relevance to this Report, section 18(3) provides that, without prejudice to the generality of section 18(1), it is a defence for the defendant to prove that the statement to which the defamation action relates is either: (a) a statement to which Part 1 of Schedule 1 applies; or (b) contained in a report, copy, extract or summary referred to in that Part. Part 1 of Schedule 1 contains an extensive list of circumstances in which the qualified privilege defence applies and, in applying the defence to a “report” of various bodies listed in Part 1 of Schedule 1, the term “fair and accurate” is often used. Thus, item 2 in Part 1 of Schedule 1 is:

“2. A fair and accurate report of any proceedings publicly heard before, or decision made public by a court (including a court-martial) established under the law of any state or place (other than the State or Northern Ireland).”

[1.21] Section 18, by reference to Schedule 1, thus applies the qualified privilege defence to “fair and accurate” reports of proceedings in courts in, for example, England, Wales, Scotland, France, Germany, Australia, South Africa and the US.

[1.22] It is also important to note that section 19(1) of the 2009 Act provides that, in a defamation action, the defence of qualified privilege will fail if, in relation to the publication of the statement in respect of which the action was brought, the plaintiff proves that the defendant acted with malice. Thus, the burden of proving malice is on the plaintiff. The Commission discusses the concept of malice to which section 19 refers in Chapter 3 below.

(e) “Fair and accurate” reports and the administration of justice

[1.23] The defence of absolute privilege in section 17 of the 2009 Act for a fair and accurate report of court proceedings held in the State, in Northern Ireland and in certain international courts (and the qualified privilege in section 18 by reference to Schedule 1 in respect of reports of courts in other jurisdictions) reflects the public interest in the administration of justice. Article 34.1 of the Constitution provides that, except in special and limited cases as may be prescribed by law (for example, those under section 40 of the *Civil Liability and Courts Act 2004*, referred to above), justice shall be administered in courts in public. In practice, as noted by the Supreme Court in *Irish Times Ltd v Ireland*,²¹ it is not possible for all members of the public to be present in court. Thus, in order to comply with Article 34.1 the public “are entitled to be informed

²¹ [1998] 1 IR 359.

of the proceedings in the court and to be given a fair and accurate account of such proceedings and the media are entitled to give such an account to the wider public.”²²

- [1.24] It is notable that the Court referred to a “fair and accurate” account in this respect, which indicates the importance attached to the need to ensure a high quality of reporting. This, in turn, reflects the need to ensure that, in reporting court proceedings, there is an appropriate balance struck between the competing individual rights engaged, the right to a good name and the right to freedom of expression. In respect of court proceedings held in the State, in Northern Ireland and in certain international courts, such as the CJEU, section 17 of the 2009 Act provides that a “fair and accurate” report attracts an absolute privilege defence. It is notable that the Oireachtas, in conferring a qualified privilege, in section 18, by reference to Schedule 1, in respect of reports of court proceedings in jurisdictions other than those referred to in section 17, also requires that such reports comply with the “fair and accurate” test.

(f) Accuracy in reporting applies in a variety of circumstances under the 2009 Act, and under the *Data Protection Act 2018*

- [1.25] It is worth noting that the concept of accuracy in court reporting is found in a number of other provisions of the 2009 Act, and also in the *Data Protection Act 2018* (the 2018 Act) where similar competing rights are at issue.
- [1.26] As already noted, the “fair and accurate” test is used in section 17(2)(i), (j) and (k) of the 2009 Act to confer an absolute privilege defence on reports of certain court hearings, and in section 18(3) of the 2009 Act, by reference to Schedule 1 of the 2009 Act, to confer a qualified privilege defence in connection with the other court proceedings referred to in Schedule 1. Section 19 of the 2009 Act confirms the long-established position that the defence of qualified privilege is not available if it is established that the defendant acted with malice (which, as noted above, the Commission discusses in Chapter 3 below).
- [1.27] As also already noted, section 18(2) of the 2009 Act provides that it is a defence to a defamation action to prove that “the defendant had a corresponding duty to communicate, or interest in communicating, the information to such person or persons.” It could be argued that a person making a report of court proceedings, in the fulfilment of the duty to provide wider information to the public, could be considered to have a duty to communicate as specified in section 18(2). In any event, he or she is covered by the explicit provisions in section 18(3), by reference to Schedule 1, concerning reports of certain court proceedings.

²² [1998] 1 IR 359, at 383.

- [1.28] Another context where the accuracy of court reporting is referred to is section 44 of the 2009 Act by reference to Schedule 2 to the 2009 Act, which provides for the statutory recognition of a body as the Press Council for the purposes of the 2009 Act. Anticipating the enactment of the 2009 Act, the Press Council was established by the newspaper industry in 2008, to provide an independent means of dealing with complaints about the contents of Irish newspapers and magazines. Section 44 of the 2009 Act provides for the recognition of such a body provided that it complies with the minimum requirements of a Press Council in Schedule 2 to the 2009 Act. In 2010, the Minister for Justice and Equality made an order under section 44 recognising the Press Council for these purposes.²³
- [1.29] It is notable in this respect that Schedule 2, paragraph 10, of the 2009 Act provides that the Press Council shall adopt a “code of standards” to which its members are to adhere, which includes “rules and standards intended to ensure the accuracy of reporting where a person’s reputation is likely to be affected”. Thus, the 2009 Act, in providing for the recognition of a body as the Press Council, also emphasises the importance of accuracy of reporting.
- [1.30] The Press Council has adopted a Code of Practice,²⁴ which contains a number of principles. Principle 1 requires that in reporting news and information its members “shall strive at all times for truth and accuracy.” Principle 3 requires that members “shall strive at all times for fairness and honesty” in procuring and publishing news and information. Principle 4 requires that members “must take reasonable care in checking facts before publication.”
- [1.31] Most significantly for the purposes of this Report, Principle 7 of the Press Council Code of Practice addresses court reporting and states that members:
- “are entitled to be informed of the proceedings in the court and to be given a *fair and accurate account* of such proceedings and the media are entitled to give such an account to the wider public.” (emphasis added)
- [1.32] The “fair and accurate” test is also found in section 159(7) of the *Data Protection Act 2018* (the 2018 Act), discussed further in Chapter 2 below. Section 159(7) of the 2018 Act provides that statutory rules may be made authorising the disclosure of information contained in a record of proceedings before a court “for the purpose of facilitating the fair and accurate reporting of the proceedings.” This again underlines

²³ *Defamation Act 2009 (Press Council) Order 2010* (SI No.163 of 2010).

²⁴ The Press Council Code of Practice (first published in 2008) is available at <http://presscouncil.ie/press-council-of-ireland-1/code-of-practice->

the important standard-setting nature of the “fair and accurate” test in connection with the disclosure of court-related personal data under the 2018 Act.

- [1.33] It is therefore clear that the 2009 Act and the 2018 Act both underline the importance of fairness and accuracy in reporting, whether of courts or of other decision-making bodies. This approach reflects an important aspect of the balance between the right to a good name and the right of freedom of expression. It is at least arguable that this could be undermined if the Commission were to recommend the enactment of a form of privilege where the test to be applied fell below a “fair and accurate” standard. It would also involve what appears to be a unique example of an exception to the “fair and accurate” test. It could also potentially cause confusion between the instances of absolute privilege in section 17 of the 2009 Act and those involving qualified privilege under section 18, by reference to Schedule 1. The 2009 Act provides for an absolute privilege defence in section 17 for fair and accurate reports of proceedings in courts in the State, in Northern Ireland and in certain international courts, while section 18 provides for a qualified privilege defence for fair and accurate reports of court proceedings in other jurisdictions. The Commission discusses in detail the arguments for and against enacting such a qualified privilege in Chapter 3 below.
- [1.34] The Commission now turns to discuss the interpretation and application of the “fair and accurate” test under the 2009 Act, as well as general guidance from the Press Council and the Broadcasting Authority of Ireland on the importance of accuracy in court reporting.

2. Case law and guidance on fairness and accuracy of reports of court proceedings under 2009 Act

(a) Case law on “fair and accurate” report of court proceedings

- [1.35] The leading case on the meaning of a “fair and accurate” report of proceedings under section 17 of the 2009 Act is the decision of the High Court (Barrett J) in *Philpott v Irish Examiner Ltd*,²⁵ which was decided after the date of the Attorney General’s request to the Commission. The *Philpott* case concerned two articles published in the *Irish Examiner* newspaper relating to employment proceedings brought by the plaintiff against his former employer. The plaintiff sought an order under section 33 of the 2009 Act, which provides that the High Court may make an order prohibiting the publication, or further publication, of a defamatory statement. The plaintiff sought an order directing the newspaper to remove these articles from its website on the ground that they were defamatory of him. The High Court held that the articles were not

²⁵ [2016] IEHC 62.

defamatory as they amounted to fair and accurate reports of court proceedings under section 17 of the 2009 Act.

- [1.36] In *Philpott*, the High Court largely adopted the principles or criteria as to what constitutes a “fair and accurate” report of court proceedings set out in the leading English textbook *Gatley on Libel and Slander*.²⁶ It is important to note in this respect that section 14 of the UK *Defamation Act 1996*, like section 17 of the 2009 Act, also provides for an absolute privilege defence to a defamation action in respect of a fair and accurate report of UK court proceedings and of certain international courts; and that section 15 of the UK 1996 Act also provides for a qualified privilege defence in respect of reports of other courts, which is also broadly comparable to section 18, by reference to Schedule 1, of the 2009 Act.
- [1.37] The relevant principles or criteria set out in *Gatley on Libel and Slander*, as discussed in *Philpott*²⁷ and endorsed as good law in this jurisdiction, are:

- “(1) It is not necessary that a court report should be verbatim.
- (2) An abridged or condensed court report will be privileged, provided it gives a correct and just impression of what took place in court.
- (3) It is sufficient to publish a fair, summarised account of court proceedings.
- (4) If the report as a whole is accurate, then slight inaccuracies or omissions are immaterial. Fair and reasonable latitude must be given by the courts; trifling slips do not deprive a court report of privilege.
- (5) A report in a daily newspaper is not to be judged by the same strict standard of accuracy as a report coming from the hand of a trained lawyer.
- (6) Where an inaccuracy is of a substantial kind, a report is not privileged.
- (7) An abridged or condensed court report must be fair and not garbled so as to produce a misrepresentation.
- (8) A court report must not by deliberate suppression of some portion of the evidence give an entirely false and unjust impression to the prejudice of one of the parties involved.

²⁶ Mullis and Parkes, *Gatley on Libel and Slander*, 12th ed (Sweet and Maxwell, 2013), at paras 13.38-13.49. The many cases cited in *Gatley* supporting these principles were not included in the judgment of the High Court in the *Philpott* case.

²⁷ [2016] IEHC 62, at para 33.

(9) It is not enough to report part of the proceedings correctly, if by leaving out other parts, a false impression is thereby created.

(10) Reports assuming a verdict are not privileged.

(11) A report which accurately sets out the summing-up or judgment of a judge is privileged, even though the summing-up or judgment may contain statements that are defamatory...²⁸

(13) A more liberal view of the immunity of reporters is taken now than in former times. Common sense is allowed a larger share in determining any liability that may arise on their part."

[1.38] In addition, listed by the High Court in *Philpott* as principle or criterion number 12, the Court noted that *Gatley* queried whether, in a protracted trial, a newspaper could be liable if it reported, for example, days 1 to 3 of a trial but failed to report what happened at the conclusion. The Court in *Philpott* noted that this point did not arise in the case, but nonetheless expressed the view that:²⁹

"Irish law may well depart from what *Gatley* states in this regard. Why, for example, should a newspaper prove ultimately liable for publishing what, in and of themselves, are separate, fair and accurate reports? And why should the law dictate to editors what the contents of tomorrow's newspapers or news programmes should be?"

[1.39] The view expressed in *Philpott* that such a report would meet the fair and accurate test was, as the Court noted, not a matter that arose in the case and was therefore *obiter*, so that it remains to be reconsidered in a suitable case. The Commission notes that *Gatley* suggests that this precise point may, indeed, also remain an open question in UK law.³⁰

[1.40] In *Philpott*, the High Court added that a person need not necessarily be present in court for the entire case in order for a report of court proceedings to come within section 17 of the 2009 Act.³¹ The Court also held that a report of court proceedings

²⁸ The principle or criterion listed as number 12 in the Court's judgment is discussed immediately below.

²⁹ [2016] IEHC 62, at para 33.

³⁰ Mullis and Parkes, *Gatley on Libel and Slander*, 12th ed (Sweet and Maxwell, 2013), at para 13.45, citing the decision of the Scottish Court of Session in *Pope v Outram Ltd* 1909 SC 230.

³¹ [2016] IEHC 62, at para 34.

could be based solely on a written judgment of a court and still constitute a report for the purposes of the absolute privilege defence.³²

- [1.41] However, if a report contains a substantial inaccuracy, it will not be regarded as “fair and accurate” and therefore will not enjoy the absolute privilege defence in section 17 of the 2009 Act. An example of this is *Christie v TV3 Television Networks Ltd*,³³ in which the defendant company was broadcasting on TV a contemporaneous account of the criminal trial of a former solicitor who had been charged with a range of fraud-related offences. The accused former solicitor had been on bail throughout the trial, and the trial had received widespread media attention. The plaintiff in the defamation action had been the solicitor for the accused. As the trial was nearing its conclusion, the broadcast in question named the accused and that he had pleaded not guilty to 50 counts of theft, forgery, using forged documents and deception. The words in the report were accompanied solely by footage of the plaintiff making his way, on his own, into the Criminal Courts of Justice building where the trial was being held. The footage showed the plaintiff alone, unaccompanied by his client. The plaintiff was not mentioned by name during this broadcast. The High Court and Court of Appeal described this as a serious defamation, a conclusion with which the Commission agrees.
- [1.42] *Gatley* also cites a number of English cases that have met the “fair and accurate” test, and those that have not. In *Kimber v Press Association*,³⁴ the English Court of Appeal held that a report that did not state the name of the applicant in bankruptcy proceedings or the name of the bankrupt was not an unfair report. The plaintiff claimed that someone reading the report might suppose that the plaintiff himself was bankrupt and that the report was therefore unfair. The Court held, however, that the omissions were immaterial and therefore the report could not be considered unfair.
- [1.43] In *Karim v Newsquest Media Group Ltd*,³⁵ the English High Court held that a failure to present fully one party’s side of a case did not render the report of proceedings unfair or inaccurate. This case concerned an article with the headline “Crooked solicitors spent client money on a Rolex, loose women and drink.” The article did not mention a statement given by the claimant where he stated that the money had come from another source and not the client.

³² *Ibid.*

³³ [2015] IEHC 694, [2017] IECA 128. The case is also discussed at paragraphs 3.14-3.32 of the Report below, in the context of the arguments for and against the introduction of a new qualified privilege defence.

³⁴ [1893] 1 QB 65.

³⁵ [2009] EWHC 3205.

- [1.44] Similarly, in *Deman v Associated Newspapers Ltd*,³⁶ the English High Court held that a report containing a “number of sloppy but peripheral inaccuracies”³⁷ would not lose its absolute privilege. The inaccuracies, such as reporting that the case was heard in the English High Court when in fact it took place before an English Employment Tribunal, were held not to undermine the fair and accurate nature of the report, or “indeed its overall character.”³⁸ In *Deman*, it was also noted that the courts have long adopted a broad interpretation of the concept of “fair and accurate” reports of proceedings, particularly in relation to reports compiled by persons other than professional journalists.
- [1.45] *Gatley* also provides a number of examples of substantial inaccuracies that have caused reports to lose their privilege. In the Canadian case *Geary v Alger*,³⁹ in a criminal trial for assault of a police officer, to which the accused had pleaded guilty, his defence counsel had suggested by way of mitigation that the accused had committed this assault because he had felt betrayed by a person, who counsel did not name, and who had previously been the accused’s friend. Counsel said that this person had betrayed the accused by being a police informer who had provided the accused’s name to the police. Counsel added that this person was “a man who is lower than the mongrel cur that trots along the street, and is as great a betrayer as the greatest of all time, who sold his Lord and Master for 30 pieces of silver.”⁴⁰ The defendant’s newspaper report of the criminal assault trial had reported the plaintiff’s name as the person to whom counsel had been referring. The language used by counsel had also been reproduced in the headlines accompanying the court report. In the plaintiff’s defamation claim, the Ontario Appellate Court (Riddell J) held that the report did not constitute a “fair and accurate” report. The Court commented that the intention of the legislation that included the fair and accurate test was to permit a newspaper to publish what went on before a court of justice, because this was a matter of interest to the public. The Court added, however, that “what is intended is a report which will reproduce substantially what does take place in the court, and not a statement of some part of the proceedings, or flaming headlines which form no part of a proceeding.”⁴¹

³⁶ [2016] EWHC 2819.

³⁷ *Ibid*, at para 20.

³⁸ *Ibid*.

³⁹ (1925) 57 OLR 218.

⁴⁰ *Ibid*, at 219.

⁴¹ *Ibid*, at 220.

- [1.46] In *Qadir v Associated Newspapers Ltd*,⁴² defence counsel, again arguing in mitigation of an accused, had stated that the claimant in the defamation claim had been “intimately involved in Britain’s biggest mortgage fraud”. This had been accurately reported by the defendant in its report of the trial, but had not included in the report that the trial judge had rebuked the defence counsel for the quoted words because he was not entitled to determine the claimant’s complicity. Because of the failure to include this rebuke, the English High Court held that the report was not fair and accurate.
- [1.47] In *Grech v Odhams Press Ltd*,⁴³ a statement by a witness in evidence (which is subject to absolute privilege) was presented in the court report as fact rather than being reported as the testimony of the witness. For this reason, the report was held not to be fair and accurate.
- [1.48] Neither will the defence be available where a publication involves a wide-ranging discussion of a person, interspersed with limited references to the person’s involvement in a court case. In *Rahman v ARY Network Ltd*,⁴⁴ the English High Court held that independent material that discusses a person involved in a court case, but not the case itself, could not be regarded as a report of court proceedings to which the fair and accurate defence might apply. This case involved a claim that the defendants, a number of news broadcast channels, over the course of a year conducted a “campaign of abuse and defamation against the claimant.”⁴⁵ The Court agreed that it was clear that the claimant was singled out by the programme and continuously taunted and ridiculed on air. The defendants claimed that the broadcast in question was a fair and accurate court report of a case involving the claimant before the High Court of Sindh in India. However, the English High Court held that the broadcast “made no mention of the proceedings and, therefore, could not be regarded as a report for this purpose.”⁴⁶ The material was “independent” and could not be held to constitute a report of court proceedings.⁴⁷
- [1.49] In summary, these principles and criteria indicate that it is not necessary to provide a word-for-word account, and that a well-grounded summary, even with slight inaccuracies, that provides an overall account will be acceptable; but that significant

⁴² [2012] EWHC 2606.

⁴³ [1958] 2 QB 275.

⁴⁴ [2016] EWHC 3110.

⁴⁵ *Ibid*, at para 4.

⁴⁶ *Ibid*, at para 39.

⁴⁷ *Ibid*.

inaccuracies that give a false impression or prejudice a verdict before a verdict has been given will fail the “fair and accurate” standard.

(b) Press Council and BAI guidance on accuracy in reports of court proceedings

[1.50] It is also worth noting that the Press Council has published a Handbook on its Code of Practice,⁴⁸ which contains examples of the application of the principles in the Code of Practice.⁴⁹ As noted above, Principle 7 requires that Press Council members ensure that court reports are fair and accurate. The Handbook provides the following 3 examples where the issue was discussed by the Press Ombudsman, the Press Council’s independent adjudicator of complaints:

- A man complained that an article which reported on two criminal court cases in which he had been a defendant was not accurate, as it had stated that he had been sent to jail, when he had not. Although a sentence of imprisonment had been handed down, the complainant had not served time in prison and the conviction in each of the cases had been successfully appealed. The Press Ombudsman decided that reporting that the complainant had been “sent to jail” and that a judge had “jailed” him was sufficiently inaccurate to warrant a decision that the article had breached Principle 7 of the Code of Practice. In that case, the Press Ombudsman also decided that the need for fairness in court reporting in Principle 7 requires publications to complete appropriately their coverage of relevant judicial proceedings, after a successful appeal against a guilty verdict, which they previously reported, has been brought to their attention.
- A man complained about an article which was a brief summary of a lengthy and complex decision by the Court of Justice of the European Union on a number of issues referred to that Court by the High Court in connection with a long-running legal case involving the complainant. The Press Ombudsman found that the complaint was supported by persuasive evidence that the summation of the case in the article in question was in breach of Principle 7 of the Code.
- The editor of a newspaper group complained about the accuracy of the headline to a number of articles in another newspaper, each of which stated that the Circuit Court had handed down fines of €2,000 to his newspapers and that they were in contempt of court. He also complained about the accuracy of statements in each of the articles that his newspapers had each been fined €1,000 for contempt of court, and that the judge had “instructed” him to attend court. The

⁴⁸ The Press Council’s Code of Practice is discussed at paragraph 1.30-1.31 of the Report above.

⁴⁹ The Press Council Handbook on the Code of Practice (January 2014) is available at <http://www.presscouncil.ie/fileupload/Handbook%20on%20Code%20of%20Practice.pdf>.

Press Ombudsman found that there was no evidence that the newspapers had been convicted of contempt of court, that they had been fined by the court, or that the complainant had been instructed by the judge to attend court. In these circumstances, he found the statements complained about were significantly inaccurate in breach of Principle 7 of the Code.

- [1.51] Similarly, the Broadcasting Authority of Ireland (BAI), in accordance with its remit as broadcasting regulator under the *Broadcasting Act 2009*, is required by section 42 of that Act to prepare broadcasting codes with which broadcasters must comply; and such codes must provide that all news broadcast by a broadcaster is reported and presented in an “objective and impartial manner” and that “the broadcast treatment of current affairs, including matters which are either of public controversy or the subject of current public debate, is fair.” In accordance with this statutory remit, the BAI has published a statutory *Code of Fairness, Objectivity and Impartiality in News and Current Affairs*.⁵⁰ While this BAI Code does not expressly refer specifically to accuracy in court reporting, the requirements of objective, impartial and fair broadcasting of news is relevant to broadcasts of court reports.
- [1.52] By way of example of the application of the BAI Code, in 2018 a person made a complaint under the Code about a broadcast, on the Six-One News programme on Radio Telefís Éireann (RTÉ), of a report of court proceedings in which the complainant appeared as the defendant.⁵¹ Among other matters raised, the complainant stated that, while the report presented information about the court proceedings, including details of his arrest and subsequent charges, it had failed to mention details from the defence case or the fact that the defendant had been acquitted of some charges. RTÉ stated that the report was based on court copy which was supplied by a freelance journalist, a common method for obtaining news copy. The copy, which was received by RTÉ at 1.51pm, detailed the morning’s court proceedings. The Six-One News broadcast that was the subject of the complaint was based on this copy. RTÉ stated that further copy was received at 6.23pm, too late for the report to be updated before being aired. It stated that full details were, however, made available on the RTÉ website. RTÉ therefore maintained that the report was accurate and fair having regard to the circumstances and facts known at the time of preparing and broadcasting the content.

⁵⁰ *Code of Fairness, Objectivity and Impartiality in News and Current Affairs* (2013), available at <https://www.bai.ie/en/codes-standards/>.

⁵¹ The full decision on this complaint, which also involved other matters concerning the broadcast, is set out in Broadcasting Authority of Ireland, *Broadcasting Complaints Decisions* (October 2018), pp.5-6, available at https://www.bai.ie/en/media/sites/2/dlm_uploads/2018/10/20181016_ComplaintsPublicationDoc_AR.pdf.

[1.53] The BAI's Compliance Committee, which assesses complaints under the Code, determined that the broadcast infringed some requirements of the Code and it upheld the complaint in part. The Committee was mindful that the information contained in the short news broadcast was factually accurate at the time of preparation. However, the Committee noted that the report was prepared several hours before the broadcast, and it did not feel that sufficient steps had been taken by the broadcaster to ensure that the accuracy of the report was adequate and appropriate with regard to the circumstances at the time of the broadcast. The Committee was mindful that the update on the story was not received by the broadcaster until 6.23pm, 6 minutes prior to the actual broadcast, but that the Code states that "accuracy is a fundamental principle associated with the broadcast of news and current affairs content and should always take priority over the speed with which content can be delivered". The Committee noted that the broadcaster did not include the updated information, nor did the report include reference to the fact that the trial was ongoing at the time of preparation. It was the view of the Committee that the broadcaster did not take sufficient steps to ensure that it complied with the principle of accuracy which underpins the Code.

[1.54] While these examples do not involve adjudications by a court, they nonetheless provide useful instances of how the concept of accuracy in court reporting has been applied within the context of the Press Council and of the Broadcasting Authority of Ireland, which are both leading standard-setting bodies for professional journalists.

(c) Conclusions

[1.55] The Commission's Issues Paper asked whether the principles cited and approved by the High Court in the *Philpott* case are sufficiently clear and well understood as to what constitutes a fair and accurate report of court proceedings under the 2009 Act. The submissions received in response, which included submissions from media who are members of the Press Council or who come within the remit of the Broadcasting Authority of Ireland, considered that they are.

[1.56] The Commission accepts that professional journalists in the established media are conscious of the general requirements involved to ensure that court reports meet the "fair and accurate" test in the 2009 Act. The Commission is also of the view that the case law that underpins the principles set out in the *Philpott* case represents a useful guide and provides clarity to those who may wish to report on court proceedings. The Commission also considers, however, that the guidance from the Press Council or the Broadcasting Authority of Ireland may not be accessible to, or accessed by, others who publish court reports – including bloggers and those who are sometimes described as citizen journalists – and who fall outside the remit of those bodies.

- [1.57] The Issues Paper also asked whether some, or all, of these principles should be incorporated into the 2009 Act. Submissions received by the Commission on this question were almost unanimous. With the exception of one consultee who welcomed the inclusion of the *Philpott* principles in any reform of the 2009 Act, other submissions expressed concern that setting out of the principles in statutory form could run the risk of reducing or eliminating the flexibility necessary to meet the variety of cases and circumstances coming before the courts.
- [1.58] The Commission agrees that it is important that the law should remain capable of adapting to new situations and circumstances. Thus, on the one hand, it is arguable that, if the *Philpott* principles were to be incorporated into the 2009 Act, there is a risk that they would be regarded as exhaustive and inflexible, and that therefore the law would be unable to adapt to changing circumstances as they might arise. On the other hand, an advantage of incorporating at least some of the *Philpott* principles into the 2009 Act is that, if this was done on a non-exhaustive basis that did not restrict the ability to adapt to new circumstances, it would provide greater legal certainty in this area, while also providing those who wish to compile reports of court proceedings with an indicative set of guidelines.
- [1.59] In its *Report on Consolidation and Reform of Aspects of the Law of Evidence*,⁵² the Commission considered the duties and responsibilities of expert witnesses, including the list of 7 duties described by the English High Court (Cresswell J) in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)*.⁵³ The Commission noted that other jurisdictions had developed statutory statements of such duties, though not necessarily as detailed as that list of 7 duties. The Commission concluded that it would be appropriate to include within the proposed *Evidence Bill* appended to its Report a select list of 4 fundamental duties of experts.⁵⁴
- [1.60] The Commission considers that the same may be said as to what constitutes a “fair and accurate” report of court proceedings as set out in the *Philpott* case. Incorporation of at least some of those principles into the 2009 Act would provide legal certainty as to what constitutes a fair and accurate report, and would provide those who wish to compile such reports with clear guidance. This may be of especial significance in the

⁵² *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016).

⁵³ [1993] 2 Lloyd’s Rep 68.

⁵⁴ See *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016), at paragraphs 8.60-8.95, and section 96 of the *Draft Evidence (Consolidation and Reform) Bill* in Appendix A of the Report. In *O’Leary v Mercy University Hospital Cork Ltd* [2019] IESC 48, the Supreme Court made extensive reference to the Commission’s Report on this issue, and also approved the Commission’s analysis of the duties of experts in that Report. In addition, the Court considered that it might be useful to set out a list of the duties of experts in a Practice Direction, without precluding the enactment of legislation to the same effect.

context of the changing face of court reporting and the impact of online reporting by bloggers and “citizen journalists”, who may not have the benefit of the structure and related standards provided by the Press Council and its Code of Practice, or of the comparable Broadcasting Authority of Ireland Codes.

- [1.61] The Commission has therefore concluded, and recommends, that principles based on those numbered 2, 4, 6, 9 and 10 by the High Court in *Philpott v Irish Examiner Ltd*⁵⁵ should be incorporated into the 2009 Act and that, to avoid any risk that this could lead to a lack of flexibility, this should be done on a non-exhaustive basis in which a court would consider such principles in the context of all of the circumstances of the case. These principles or criteria clearly indicate that a report of court proceedings would meet the “fair and accurate” test in the 2009 Act even where, to echo the remarks of the Attorney General in 2015 that preceded this request,⁵⁶ it includes a simple oversight, omission or error. Inserting them into the 2009 Act would therefore support the view that a person making such a report of court proceedings would not be exposed to the risk of being sued in a defamation action. This would also assist in underpinning the high quality of court reporting to which the Attorney General also referred, and therefore continue to serve the important public interest of informing the people of the work of the courts in the administration of justice under Article 34 of the Constitution.

⁵⁵ [2016] IEHC 62, at para 33: see paragraph 1.37 of the Report above.

⁵⁶ See Overview above, paragraph 2.

- R. 1.01** The Commission recommends that the *Defamation Act 2009* should be amended to provide that, in determining whether a report of court proceedings is “fair and accurate”, all of the circumstances of the case are to be considered, including the following non-exhaustive list of circumstances:
- (a) An abridged court report will 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.

CHAPTER 2 PERSONS WHO MAY CLAIM PRIVILEGE DEFENCES FOR REPORTS OF COURT PROCEEDINGS AND IMPACT OF SOCIAL MEDIA

1. Persons who may claim privilege defences for reports of court proceedings under the 2009 Act

(a) Report of court proceedings need not be contemporaneous under 2009 Act

- [2.1] Under the *Defamation Act 1961*, it was necessary that a report of proceedings be contemporaneous in order to attract absolute privilege. However, section 17, and section 18, by reference to Schedule 1 to the 2009 Act, no longer require this. Therefore, it is possible for a report published later in time to be considered a report of court proceedings under sections 17 or 18.
- [2.2] In *Philpott v Irish Examiner Ltd*,¹ the High Court held, as noted in Chapter 1 above, that a person need not necessarily be present in court for the entire case for a report of court proceedings to come within section 17 of the 2009 Act.² The Court also held that a report of court proceedings could be based solely on a written judgment of a court and still constitute a report for the purposes of the absolute privilege defence.³ This is a necessarily pragmatic approach. In the context of the traditional news media, it would be difficult for newspapers, particularly smaller local papers, to send a journalist to every case that they wished to cover. Indeed, it is also the case that academic writers, bloggers or those who may be described as “citizen journalists” may report, or comment on, court decisions, including judgments posted online, without having been physically present in court.

(b) Current law not confined to reports by professional journalists

- [2.3] As McMahon and Binchy note, the long-standing position in the case law is that the absolute privilege defence under section 17 of the 2009 Act, and the qualified privilege defence in section 18 by reference to Schedule 1, is not confined to reports of court proceedings by professional journalists, but applies to *any* fair and accurate reports.⁴ This is reflected in the case law discussed in Chapter 1 above.
- [2.4] In the Issues Paper, the Commission asked whether the “fair and accurate” privilege defences under the 2009 Act should remain applicable not only to professional

¹ [2016] IEHC 162: see paragraphs 1.35-1.40 of the Report above.

² [2016] IEHC 162, at para 34.

³ *Ibid.*

⁴ McMahon and Binchy, *Law of Torts*, 4th ed (Bloomsbury Professional, 2013), at para 34.173.

journalists but also to “citizen journalists” such as social media users or bloggers. The Commission also asked whether they should be applied to a limited group of prescribed persons, along the lines of the categories allowed to report family law and child care proceedings, that is to say, *bona fide* members of the media, and other specified persons such as legal researchers.

- [2.5] The overwhelming views expressed in the responses received was that the current scope of the privilege should be retained. The Commission agrees with this view, and turns now to discuss the reasons for reaching this conclusion.
- [2.6] To begin with, the principles and criteria accepted by the High Court in *Philpott* reflect a pragmatic approach, which is equally applicable to professional journalists who compile court reports and to non-professionals such as bloggers. Similarly, in *Deman v Associated Newspapers Ltd*,⁵ the English High Court noted that the courts have long adopted a broad interpretation of the concept of “fair and accurate” reports of proceedings, particularly in relation to reports compiled by persons other than professional journalists.⁶ The current law also reflects the relevant constitutional, European Union (EU) law and international human rights standards that are engaged, to which the Commission now turns.

(c) Constitutional, EU law and international human rights standards engaged

- [2.7] There is no doubt that the reporting of court proceedings represents an important tool for the administration of justice. Traditionally, virtually all reporting of court proceedings was carried out by professional journalists, who were also court reporters. Such professionals continue to play an important role by facilitating public access to information about civil and criminal proceedings in courts. It is not feasible for all members of the public to have physical access to court cases, and reports of court proceedings extend access to those proceedings to the public in general. As already noted in Chapter 1, in *Irish Times Ltd v Ireland*⁷ the Supreme Court held that, because justice is to be administered in public by the courts on behalf of the people of Ireland, it follows that the public:

⁵ [2016] EWHC 2819: see paragraph 1.44 of the Report above.

⁶ The Commission notes that the issue of confining the privilege defences to professional journalists may be considered by the UK Government in the context of a public consultation launched in 2019 on a White Paper on Online Harms, available at <https://www.gov.uk/government/consultations/online-harms-white-paper>. See the discussion in the Gillen Review Report, *Report into the law and procedures in serious sexual offences in Northern Ireland* (April 2019), at para 7.84 and Recommendation 58, available at www.gillenreview.org. The results of any such consideration in the UK are not available at the time of writing (July 2019). However, the Commission has had the benefit of its consultative process (including the submissions received following the publication of the Issues Paper on this project) in making the recommendations in this Report.

⁷ [1998] 1 IR 359, at 383.

“are entitled to be informed of the proceedings in the court and to be given a fair and accurate account of such proceedings and the media are entitled to give such an account to the wider public.”

- [2.8] To restrict the availability of the privilege defences in the 2009 Act could give rise to a conflict with the right to freedom of expression under Article 40.6.1° of the Constitution. It has been noted that Article 40.6.1° “protects the dissemination of information as well as the expression of convictions and opinions.”⁸ This is supported by the approach of the Supreme Court in *Irish Times Ltd v Ireland*,⁹ in which Barrington J stated:¹⁰

“A constitutional right which protected the right to comment on the news but not the right to report it would appear to me to be a nonsense. It therefore appears to me that the right of the citizens ‘to express freely their convictions and opinions’ guaranteed by Article 40 of the Constitution is a right to communicate facts as well as a right to comment on them. It appears to me also that when the European Convention on Human Rights states that the right to freedom of expression is to include ‘freedom... to receive and impart information’ it is merely making explicit something which is already implicit in Article 40.6.1° of our Constitution.”

- [2.9] It is arguable that restricting the privilege defences to a limited, prescribed, group of persons would constitute an infringement of the right to freedom of expression of persons such as bloggers or “citizen journalists”. It has been noted that:¹¹

“the rationale behind this extraordinary protection [absolute privilege] is that publication occurs in a context which is regarded as so significant, from a public policy perspective, that there should be no fetter or chill on the speech even though it may, on occasion, result in the publication of a statement about an individual that is untrue and defamatory. In other words, it is an instance of the law saying that the needs of the individual in a particular case must be subservient to the needs of the public.”

⁸ *Kelly: The Irish Constitution*, 5th ed (Bloomsbury Professional, 2018), at para 7.6.08.

⁹ [1998] 1 IR 359.

¹⁰ *Ibid*, at 405.

¹¹ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press 2014), at para 7.05.

- [2.10] It follows that the focus of the defence of absolute privilege is the occasion of publication as opposed to the publisher. There is no public interest in restricting the right to freedom of expression of online commentators and “citizen journalists” by not allowing them to avail of the absolute privilege defence, in circumstances in which it would be available to them were they professional journalists. In the event that a citizen journalist goes too far in a report that he or she writes, the same measures are in place to deal with that situation, should it arise.
- [2.11] This approach is, as a number of consultees noted, also consistent with the view expressed by the Court of Justice of the European Union (CJEU) in *Buivids v Datu Valsts Inspekcija (National Data Protection Agency of Latvia)*.¹² In that case, the CJEU agreed with the Opinion of Advocate General Sharpston in which she argued that video recordings made by an individual who was not a journalist and which were uploaded to the internet (in that case to YouTube.com), could fall within the “journalistic purposes” exemption in Article 9 of Directive 95/46/EC, the 1995 Data Protection Directive.¹³ The CJEU held that even though Mr Buivids was not a professional journalist, this did not exclude the possibility that the recording in question and its publication on a video website, on which users can send, watch and share videos, could come within the scope of Article 9 of the 1995 Directive. The CJEU reaffirmed its case law to the effect that “journalistic activities” are those that have as their purpose “the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them.”¹⁴
- [2.12] In addition, retaining the existing law is consistent with relevant international human rights standards. In this context, it is worth noting a 2018 report on the regulation of user-generated online content by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.¹⁵ In his report, the Special Rapporteur referred to the importance of public participation as an aspect of freedom of expression. He also referred to Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which Ireland has ratified, and which guarantees the right to hold opinions without interference and

¹² Case C-345/17, EU:C:2019:122, Opinion of Advocate General Sharpston, 27 September 2018; judgment of Court, 14 February 2019.

¹³ The 1995 Directive has, since May 2018, been replaced by Regulation (EU) 2016/679, the 2016 General Data Protection Regulation (GDPR), discussed at paragraphs 2.23-2.24 of the Report below.

¹⁴ Case C-345/17, EU:C:2019:122, judgment of Court, 14 February 2019, at para 53, citing the Court’s decision in *Satakunnan Markkinapörssi v Satamedia*, C 73/07, EU:C:2008:727, judgment of Court, 16 December 2008, at para 61.

¹⁵ UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression A/HRC/38/35* (2018), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/096/72/PDF/G1809672.pdf?OpenElement>.

the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers and, the Special Rapporteur adds, “through *any* medium.”¹⁶

Additionally, he noted that “[t]he duty to ensure freedom of expression obligates States to promote, *inter alia*, media diversity.”¹⁷

- [2.13] To confine the privilege defences in the 2009 Act to a limited group of prescribed persons would conflict with the constitutional provisions discussed above, with EU case law and with international obligations. Section 40 of the *Civil Liability and Courts Act 2004* (as amended)¹⁸ allows “*bona fide* representatives of the Press” to report on certain types of family law and child law proceedings. This is subject to specified conditions, including conditions that prohibit the release of any information that could lead to the identification of any of the parties involved. There is a clear public policy reason for this restriction, namely, the protection of the privacy of parties to such cases. The Commission considers that no such public policy justification exists for restricting the availability of the privilege defences to a similarly limited group of prescribed persons.
- [2.14] Two other cases also provide guidance on this issue. In *Cornec v Morrice & Ors*,¹⁹ the High Court examined the question as to whether a blogger could be considered a journalist for the purpose of availing of a journalistic privilege in order to avoid testifying for the purpose of proceedings in the USA. The blogger in this case, Mr Garde, who was a director of an independent organisation called Dialogue Ireland, regularly appeared in the media and blogged about issues relating to cults. The High Court (Hogan J) stated that:

“While Mr Garde is not a journalist in the strict sense of the term, it is clear from [the evidence] that his activities involve the chronicling of the activities of religious cults. Part of the problem here is that the traditional distinction between journalists and laypeople has broken down in recent decades, not least with the rise of social media.”²⁰

- [2.15] The Court added:²¹

¹⁶ *Ibid*, at para 5 (emphasis added).

¹⁷ *Ibid* at para 6.

¹⁸ Section 40 of the 2004 Act has been amended by the *Civil Law (Miscellaneous Provisions) Act 2008* and the *Courts and Civil Law (Miscellaneous Provisions) Act 2013*.

¹⁹ [2012] IEHC 376, [2012] 1 IR 804.

²⁰ *Ibid* at 825.

²¹ *Ibid*.

“Yet Mr Garde’s activities fall squarely within the ‘education of the public’ envisaged by Article 40.6.1°. A person who blogs on an internet site can just as readily constitute an ‘organ of public opinion’ as those which were more familiar in 1937 and which are mentioned (but only as examples) in Article 40.6.1°, namely, the radio, the press and the cinema. Since Mr Garde’s activities fall squarely within the education of public opinion, there is a high constitutional value in ensuring that his right to voice these views in relation to the actions of religious cults is protected.”

- [2.16] A similar New Zealand case, *Slater v Blomfeld*,²² involved a blogger being sued for defamation. The issues to be considered by the court were whether the blogger could be considered a “journalist” and whether his blog could be considered a “news medium” for the purposes of section 68 of the New Zealand *Evidence Act 2006*, which deals with the protection of journalists’ sources. Section 68(1) of the 2006 Act provides that, if a journalist has promised an informant not to disclose the informant’s identity, neither the journalist nor his or her employer is compellable in civil or criminal proceedings to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.
- [2.17] Section 68(2) of the 2006 Act provides that this general non-disclosure rule does not to apply if a court is satisfied that, having regard to the issues to be determined in the proceedings, the public interest in the disclosure of evidence of the identity of the informant: (a) outweighs any likely adverse effect of the disclosure on the informant or any other person, and (b) outweighs the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts. Section 68 defines “journalist” as “a person who in the normal course of that person’s work may be given information by an informant in the expectation that the information may be published in a news medium”; and defines “news medium” as “a medium for the dissemination to the public or a section of the public of news and observations on news.”
- [2.18] The New Zealand High Court (Asher J) noted that “[d]ifferences between bloggers and traditional news media must be recognised.”²³ One such difference is the cost factor, that is, that it costs little or no money to establish a blog website and update it. As such, “websites are considerably more susceptible to operators who do not

²² [2014] NZHC 2221.

²³ *Ibid*, at para 48.

observe good journalistic standards than traditional members of the media.”²⁴ On the other hand, the Court observed that “the public is advantaged by the availability of blog sites which are often free and provide instant access to commentary and sometimes breaking news.”²⁵ In addition, the existence of such websites means that “fresh perspectives are presented and the public have more choice.”²⁶ The Court concluded in the *Slater* case that the blogger in this case was a journalist. It held that “a blogger who regularly disseminates news to a significant body of the public can be a journalist... a blog that publishes a single news item would not qualify. The blog must have a purpose of disseminating news.”²⁷

- [2.19] Both cases involve authority for the proposition that in some instances bloggers can have a status and role comparable to those of the traditional media. Moreover, in the *Cornec* case, the High Court held that bloggers and other internet users have, in some instances at least, a constitutional status as organs of public opinion comparable to that of journalists. It thus appears that, if one blogs in an informative and regular manner about issues that could reasonably be considered to be matters of “public opinion”, the views expressed may attract constitutional protection.

(d) Conclusions

- [2.20] As noted above, the long-established position is that the privilege defences for reports of court proceedings under the 2009 Act apply both to professional journalists and non-professional journalists. This approach is reinforced by reference to the relevant constitutional provisions, EU law and international human rights standards discussed above. For these reasons, the Commission has concluded that the current scope of the persons to whom the privilege defences for reports of court proceedings in section 17 and section 18, by reference to Schedule 1, of the 2009 Act apply, should be retained. They should continue to apply not only to professional journalists such as those falling within the remit of the Press Council or the Broadcasting Authority of Ireland, but also to others, such as bloggers, social media users and other persons who are sometimes described as citizen journalists.

²⁴ [2014] NZHC 2221, at para 48.

²⁵ *Ibid*, at para 49.

²⁶ *Ibid*.

²⁷ *Ibid*, at para 54.

R. 2.01 The Commission recommends that the privilege defences for “fair and accurate” reports of court proceedings under sections 17 and 18 of the *Defamation Act 2009* should remain applicable not only to professional journalists, such as those falling within the remit of the Press Council or the Broadcasting Authority of Ireland, but also to others, such as bloggers, social media users and other persons who are sometimes described as citizen journalists.

2. Data protection, court practice and the impact of social media

(a) Fair and accurate court reporting and data protection

- [2.21] The privilege defences in the 2009 Act must also be considered against the background that those who publish a report of court proceedings, notably professional journalists, may require access to accurate and detailed information, including personal data.
- [2.22] To take a simple example, it is a basic but vital part of a report of a criminal prosecution that a fair and accurate report would go beyond stating that “Joe Bloggs is on trial for murder”. This is for the simple reason that a person named Joe Bloggs, other than the murder accused, might rightly object if he was wrongly identified by persons who knew him as someone accused of murder. The standard report of a murder trial will therefore state that “Joe Bloggs (28), of Main Street, Ballyplacename, is on trial for murder”; and, in order to have that accurate information, the person making the report will usually confirm this with a relevant court official. This additional information is clearly personal data.
- [2.23] The question therefore arises whether access to such information is permitted under Regulation (EU) 2016/679, the 2016 General Data Protection Regulation (GDPR), whose key requirements were implemented by the *Data Protection Act 2018* (the 2018 Act).²⁸ The answer is, broadly, yes, but subject to specific requirements.
- [2.24] Article 23 of the GDPR provides that certain limitations can be placed on the general rights of data subjects, such as the general obligation that the data subject’s consent must be obtained before access to his or her personal data may be obtained. Article 23 provides that the obligation to obtain consent can be restricted where this is consistent with fundamental rights and freedoms and is a

²⁸ For discussion of the non-statutory arrangements in place prior to 2018, see: Working Group on a Courts Commission, *Working Paper: Information and the Courts* (1997). The Working Group, which also produced 6 reports during its existence between 1995 and 1998, made a series of recommendations which led to the establishment of the Courts Service under the *Courts Service Act 1998*.

necessary and proportionate measure in a democratic society to safeguard, among others: the prevention, investigation, detection or prosecution of criminal offences; the protection of judicial independence and judicial proceedings; and the enforcement of civil law claims. Article 23 was implemented by sections 158 to 160 of the 2018 Act.

[2.25] Thus, section 159 of the 2018 Act provides that statutory rules may be made:

“(a) authorising the disclosure, for the purpose of facilitating the fair and accurate reporting of the proceedings, to a *bona fide* member of the Press or broadcast media and at the member’s request, of information contained in a record of proceedings before a court for which the Committee is the rule-making authority, and

(b) prescribing any conditions subject to which such disclosure is to be made.”

[2.26] It is notable that section 159 of the 2018 Act uses the term “fair and accurate reporting”, which reflects the language of section 17 of the *Defamation Act 2009*. Section 159 also refers to “a *bona fide* member of the Press or broadcast media” in relation to the scope of its application, broadly reflecting the language used in section 40 of the *Civil Liability and Courts Act 2004* (as amended).²⁹

[2.27] The *Data Protection Act 2018 (Section 159(1)) Rules 2018*,³⁰ made under section 159 of the 2018 Act, provide that a court official may disclose – by transmission, dissemination or otherwise – personal data related to a court record to a range of persons, including the party to proceedings, a legal representative of the party and

²⁹ Section 40 of the 2004 Act has been amended by the *Civil Law (Miscellaneous Provisions) Act 2008* and the *Courts and Civil Law (Miscellaneous Provisions) Act 2013*. See also paragraph 2.13 of the Report above.

³⁰ SI No.659 of 2018. These Rules were made by the Superior Courts Rules Committee on 11 June 2018 and came into effect on 1 August 2018. They were originally published on the website of the Courts Service in 2018 and were not, initially, published as a statutory instrument. It appears that, subsequently, it was decided to publish them as a statutory instrument, and notice of their making as a statutory instrument was published in *Iris Oifigiúil* of 26 April 2019. The 2018 Rules were then given a 2018 statutory instrument number. The comparable Rules for the Circuit Court are the *Data Protection Act 2018 (Section 159(2)) Rules 2018* (SI No.661 of 2018), and those for the District Court are the *Data Protection Act 2018 (Section 159(3)) Rules 2018* (SI No.663 of 2018). See also the *Data Protection Act 2018 (Section 159(4)) Rules 2018* (SI No.665 of 2018), which govern, for the purposes of Article 28(3) of the GDPR, the processing by a processor of personal data that are not personal data contained in a court record, and in respect of which a court, when acting in its judicial capacity, is a controller.

“a *bona fide* member of the Press or broadcast media” in accordance with rules made under section 159(7) of the 2018 Act.

- [2.28] The relevant rules made under section 159(7) of the 2018 Act include the *Data Protection Act 2018 (Section 159(7): Superior Courts) Rules 2018*.³¹ Rule 3(3) of these 2018 Rules, concerning access to court documents in the superior courts, provides that a court official may make a disclosure authorised by the rules by: (i) allowing inspection of the court record under the supervision of the court official; (ii) providing, or allowing the making by the requester of, a copy of a document forming part of the court record which relates to the request, on the undertaking of the requester to return any such copy provided or made following completion of the reporting of the hearing by the requester; or (iii) the provision of a press release or the provision in oral or written form of other information concerning the proceedings prepared by that person.
- [2.29] Rule 3(4) of these 2018 Rules provides that the conditions for granting such an access request are: (i) that the requester has sufficiently verified to the satisfaction of the court official his or her identity and his or her status as a *bona fide* member of the Press or broadcast media; and (ii) that the court official is satisfied that the requester will comply with any undertaking given under sub-rule 3(ii) referred to above.
- [2.30] It is clear that these arrangements provide for a process by which *bona fide* members of the Press or broadcast media can continue to obtain access to important information, including personal data, in order to facilitate as far as possible that the reports of proceedings are fair and accurate under section 17 of the *Defamation Act 2009*, while also complying with the requirements of the GDPR and the 2018 Act.
- [2.31] While section 159 of the 2018 Act refers to *bona fide* members of the Press or broadcast media, there is no statutory definition of this term. This is understandable, given the changing nature of the media in general in recent years, in particular with the advent of online media, some of which can now be regarded as part of mainstream media. Much of what the “traditional” paper-based media publish nowadays is either enhanced by an online presence, is placed behind an online paywall, or in some instances has an online presence only.
- [2.32] Nonetheless, for the purposes of implementing the 2018 Rules made under section 159 of the 2018 Act, the Courts Service Media Office issued the following two part

³¹ SI No.660 of 2018. The comparable Rules for the Circuit Court are the *Data Protection Act 2018 (Section 159(7): Circuit Court) Rules 2018* (SI No.662 of 2018), and those for the District Court are the *Data Protection Act 2018 (Section 159(7): District Court) Rules 2018* (SI No.664 of 2018).

“working definition” of what constitutes a *bona fide* member of the Press or broadcast media:

- Members of the press (including online media) who hold a National Press Card issued by the National Union of Journalists, a card demonstrating employment by a member of the Press Council of Ireland or the Broadcasting Authority of Ireland, or an International Federation of Journalists Press Card;
- People who do not hold any such card but who, based on a letter signed by their publisher or editor-in-chief, are recognised by the Courts Service Media Relations Office as *bona fide* members of the media.

[2.33] This working definition provides clarity around the scope of the term *bona fide* member of the Press or broadcast media, and the second part notably means that it is not confined to members of the National Union of Journalists or international equivalent. However, it appears unlikely to include persons such as bloggers or other non-professional reporters of court proceedings.

(b) 2019 Practice Direction restricting access to original court files

[2.34] Separately, the need to have an appropriate structure in place to control access to original court documents, whether by media representatives or others, was underlined by the circumstances considered by the High Court (Kelly P) in *Michael and Thomas Butler Ltd v BOSOD Ltd*.³² This involved the application of the terms of a settlement entered into by the plaintiffs in 2008, the terms of which the Court had been informed in 2008. The High Court held that the 2008 settlement (which was handwritten) and consequent order of the Court contained a particular clause – referred to in the case as the “default clause” – which provided that, if the plaintiffs defaulted on completing the terms of settlement (and the Court held that they had), the defendants were entitled to enter a judgment for joint and several liability against the plaintiffs. The plaintiffs denied that the settlement or Court order contained the default clause.

[2.35] The Court listened to the Digital Audio Recording (DAR) and read the transcript of the settlement hearing in 2008, and also heard evidence from the senior counsel who had represented the plaintiffs in 2008, and concluded from this that the settlement contained the default clause. The reason why the Court was required to rely on the DAR, as well as the transcript and the evidence of counsel, was that the High Court Central Office file for the 2008 proceedings did not contain, as it should have, the original Order signed by the Registrar with a copy of the original settlement appended. Instead, it contained 2 versions of the 2008 court order, with

³² [2018] IEHC 702.

2 different versions of the settlement, one of which contained the default clause while the other did not.³³ The Court heard evidence that the practice in the High Court Central Office was that the parties to litigation and their legal representatives could apply for unsupervised access to the original file in the Central Office.

- [2.36] The Court also heard from an expert witness in the scientific examination of handwriting, signatures and disputed documents, who expressed the opinion that the reason that one version of the Court order did not contain the default clause was that there was evidence to show that the handwritten settlement had been copied or scanned and that the default clause had been removed. The Court accepted this evidence, namely, that the court file in question had been interfered with to bring about the unsatisfactory situation with which the Court had to contend, though the Court was unable to say when or by whom this interference occurred.
- [2.37] The Court held that the long-standing practice of allowing High Court files to be inspected by persons expressing a direct interest in such files in an unsupervised fashion, which in this instance had resulted in serious interference with the court file, was “completely unsatisfactory”. The Court therefore stated that it would discuss with the Chief Justice and the President of the Court of Appeal alterations in the system of inspection of High Court files so as to ensure that files are not interfered with and that they accurately record orders of the court. The Court concluded that it was essential that the integrity of High Court Central Office files be protected.³⁴
- [2.38] As a result, in April 2019 the Chief Justice, the President of the Court of Appeal and the President of the High Court published 3 Practice Directions³⁵ to the effect that the files maintained in the offices of the High Court, the Court of Appeal and the Supreme Court “shall not be made available to any person attending at any of those offices”, including the parties to the proceedings and the solicitors on record. The Practice Directions also provide that this does not preclude the provision of a copy of a document on a file to a solicitor on record, or a party to the proceedings where not legally represented, upon payment of the relevant fee provided for in the Courts Fees Order. These Practice Directions are, of course, without prejudice to the 2018 Rules made under section 159 of the *Data Protection Act 2018*, discussed

³³ [2018] IEHC 702, at para 67.

³⁴ [2018] IEHC 702, at para 68.

³⁵ The 3 Practice Directions, HC86, CA12 and SC 20, are each titled *Access to Court Files in the Superior Courts*. They are available at: <http://www.courts.ie/courts.ie/library3.nsf/PageCurrentWebLookUpTopNav/PRACTICE%20DIRECTIONS?opendocument&l=en>

above, which ensure access to relevant information in order to underpin fair and accurate reports of court proceedings.

(c) 2018 Practice Direction restricting live social media posting from courtrooms

- [2.39] As the Commission noted in its 2016 *Report on Harmful Communications and Digital Safety*,³⁶ we live in an increasingly online, digital, world, which has produced countless benefits. The internet allows for greater public discourse on social and political issues, and allows people to share ideas and opinions. However, the anonymous nature of some internet-based sites, such as certain message boards, forums and blogs, means that potentially harmful, including defamatory, material is more likely to be published online than in more traditional forms of media. Due to the open nature of our courts system, any member of the public can observe most court proceedings.
- [2.40] It has been noted that anonymity is something that plays a dual role, in that it may serve to protect fundamental rights as well as threaten them; and that “[s]ocial media impact not only journalistic processes, but also transform and empower the audience for news.”³⁷ Consumers of news nowadays are more likely to access it online: “[r]eaders do not automatically rely on the editorial judgment of professional newspaper editors even to create the front page.”³⁸ The social aspect of news is ever increasing. As such, “the ‘presence’ of the public is now the presence of the media, people working for the established media and, one might now add, members of the unestablished media, ‘citizen journalists.’ In place of ‘live’ scrutiny, public engagement now takes the form of ‘mediated quasi-interaction.’”³⁹
- [2.41] In November 2018, the Chief Justice and the Presidents of the Court of Appeal, High Court, Circuit Court and District Court issued a Practice Direction on the use of cameras, mobile phones and electronic devices in courtrooms.⁴⁰ This provides that such devices may be used only by: (a) a practising member of the legal profession who has *bona fide* business in the court concerned; and (b) a *bona fide* member of the news media profession or professional legal commentator whose professional standing is established to the court’s satisfaction and who is using such device for the purpose of reporting proceedings before the court. It is notable that, in 2011, the then Lord Chief Justice of England and Wales issued a similar Practice Guidance

³⁶ *Report on Harmful Communications and Digital Safety* (LRC 116-2016).

³⁷ Levi, “Social Media and the Press” (2012) 90 *NCL Rev* 1531, at 1550.

³⁸ *Ibid.*

³⁹ Moran, “Mass-mediated ‘open justice’: court and judicial reports in the Press in England and Wales” (2014) 34 (1) *Legal Studies* 143, at 144.

⁴⁰ The Practice Direction is available at:

<http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/31177D386FC544E98025834A003A8E25?opendocument>

that placed significant restrictions on live text-based communications, including on the use of Twitter, from courts;⁴¹ and that, in 2016, a similar Practice Note was issued by the Lord Chief Justice of Northern Ireland.⁴²

- [2.42] In announcing the 2018 Practice Direction, the Chief Justice, Mr Justice Clarke, pointed to the risks posed to the right to a fair trial, in particular in criminal trials before a jury, if live social media postings in relation to ongoing trials were not subject to some restrictions. Indeed, it is clear that not only is there a risk to the fair trial of a person in such circumstances, but that those engaged in such postings run the risk that they could be held in contempt of court.⁴³ The Chief Justice also stated, at the time the Practice Direction was published, that its terms would be reviewed in the light of experience concerning its application and effect, including whether it should be underpinned by legislation.

(d) Conclusions

- [2.43] The Commission notes that, at the time of writing (July 2019), the 2018 Practice Direction has been in operation for a short period and its full effect is difficult to assess. The Commission also notes that the Practice Direction is limited to restricting the use of devices such as mobile phones within a courtroom. It therefore has no effect on their use outside a courtroom, nor on live social media commentary on ongoing cases where this is done outside a courtroom.
- [2.44] The Commission accepts that there is a legitimate case to be made for restrictions on social media postings to protect the integrity of an ongoing trial process. The Commission also notes that the term *bona fide* members of the media is well understood, and that the two part “working definition” of what constitutes a *bona fide* member of the media, issued for the purposes of the 2018 Rules, referred to in paragraph 2.32 above, provides clear guidance on its meaning. However, the term “professional legal commentator whose professional standing is established to the court’s satisfaction” is less clear. While that term may echo the recognition in case law that certain bloggers and other social media commentators are exercising a right to communicate comparable to *bona fide* members of the press, as affirmed

⁴¹ *Practice Guidance: The Use of Live Text-Based Forms of Communication (Including Twitter) From Court for the Purposes of Fair and Accurate Reporting*, issued by Lord Judge, Lord Chief Justice of England and Wales, 14 December 2011, available at: <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/lbc-guidance-dec-2011.pdf>.

⁴² *Practice Note 1/2016: Note taking and the use of live text-based forms of communication (including Twitter) from court for the purpose of fair and accurate reporting*, issued by Sir Declan Morgan, Lord Chief Justice of Northern Ireland, 2 June 2016, available at <https://judiciaryni.uk/judicial-decisions/practice-direction-12016>.

⁴³ The Commission is currently engaged in preparing a *Report on Contempt of Court*, having published an *Issues Paper on Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (LRC IP 10-2016).

by the High Court in *Cornec v Morrice & Ors*,⁴⁴ it is less clear how this element of the Practice Direction is to be applied in individual cases. On that basis, this aspect of the Practice Direction may be open to the criticism that its scope is not sufficiently clear; and that, while its application to criminal trials is well-founded, its application to civil trials, at least those that do not require juries, may be open to question.⁴⁵

- [2.45] It has also been suggested that the Practice Direction may be difficult to apply from a practical perspective, including whether, and, if so, how, a court could carry out a “search” of a device that may contain huge volumes of personal data, in particular having regard to general GDPR principles.⁴⁶ Similar issues have been dealt with by the Supreme Court of Canada. In *R v Mentuck*,⁴⁷ the Court held that once information has entered the public domain of the courtroom, access to disseminate this information should be denied only where its publication would present a real and substantial risk to the proper administration of justice, and where the salutary effects of denying access outweigh the deleterious effects.⁴⁸ It has been noted that “judicial attempts to ban social media use on the basis that it leads to multiple, contestable narratives may attract suspicion of censoring the public’s freedom of speech.”⁴⁹
- [2.46] The Commission fully supports the comments made by the Chief Justice at the time of the publication of the 2018 Practice Direction that it will be subject to review as to its impact and effectiveness. The Commission has concluded that the opportunity could be taken to clarify the aspect of the Practice Direction that refers to a “professional legal commentator whose professional standing is established to the court’s satisfaction” so that it aligns with the case law, such as *Cornec v Morrice & Ors*,⁵⁰ on the role of certain bloggers and other social media commentators.
- [2.47] The Commission is also conscious that the 2018 Practice Direction presents another example of the extent to which social media, and other internet and online forms of communication, should be subject to regulation. As noted above, the Commission examined aspects of this issue in the context of harmful online and digital

⁴⁴ [2012] IEHC 376, [2012] 1 IR 804: see paragraph 2.14 of the Report above.

⁴⁵ For more trenchant criticism of the Practice Direction, see McIntyre, “The compelling case against the blanket ban on social media in our courtrooms”, *Irish Independent*, 21 November 2018.

⁴⁶ See O’Higgins, “Tweet nothings” (2018) 23(6) *Bar Review* 173.

⁴⁷ 2001 SCC 76, [2001] 3 SCR 442.

⁴⁸ *Ibid*, at 462, para 32.

⁴⁹ Hall-Coates, “Following Digital Media into the Courtroom: Publicity and the Open Court Principle in the Information Age” (2015) 24 *Dal J Leg Stud* 101, at 137.

⁵⁰ [2012] IEHC 376, [2012] 1 IR 804.

communications, including online bullying and harassment, in its 2016 *Report on Harmful Communications and Digital Safety*.⁵¹ At the time of writing (July 2019), the Department of Communications, Climate Action and Environment is reviewing the outcome of its public consultation on the implementation of a key recommendation in that 2016 Report, the establishment of a statutory Online Safety Commissioner.⁵² The complexity of, and fast-moving pace within which this area of law and regulation is to be considered, can be gauged from the fact that the Department's consultation process involves the need to consider how the role of such an Online Safety Commissioner will overlap with the changing face of the broadcasting sector. This will therefore include the need to consider how the State will ensure that the proposed regulatory system will interact with the implementation of the 2018 EU Revised Audiovisual Media Services Directive (AVMSD).⁵³

- [2.48] In view of the complexity of this area, on which legislation is being prepared at the time of writing (July 2019), the Commission does not consider that it should make any specific recommendation on the extent to which the 2018 Practice Direction may need to be reviewed. As noted above, the Commission considers that the opportunity could be taken to clarify the aspect of the Practice Direction that refers to a "professional legal commentator whose professional standing is established to the court's satisfaction" so that it aligns with the case law on the role of certain bloggers and other social media commentators.

⁵¹ *Report on Harmful Communications and Digital Safety* (LRC 116-2016).

⁵² Department of Communications, Climate Action and the Environment, *Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive Explanatory Note* (March 2019), available at <https://www.dccae.gov.ie/en-ie/communications/consultations/Documents/86/consultations/Consultation%20Explanatory%20Note.pdf>.

⁵³ The Revised Audiovisual Media Services Directive (AVMSD) is Directive (EU) 2018/1808, amending Directive 2010/13/EU on the provision of audiovisual media services. The 2018 Directive is to be implemented by Member States by 19 September 2020.

CHAPTER 3 WHETHER TO ENACT A NEW QUALIFIED PRIVILEGE DEFENCE FOR REPORTS OF COURT PROCEEDINGS

- [3.1] In this Chapter, the Commission considers the aspect of the Attorney General’s request that requires the Commission to examine whether, in respect of a report of court proceedings, no claim under the 2009 Act should be actionable in the absence of proof of malice. As already noted above, the Attorney General’s request under the 1975 Act followed remarks she had made in December 2015 in which she had referred to the potential “chilling” impact on the current level and quality of court reporting if those involved in court reporting were at risk of being sued in respect of a “simple oversight, omission or error” in reporting court proceedings.¹
- [3.2] In Chapter 1, it was also noted that the absolute privilege in section 17 of the 2009 Act provides a high level of protection to journalists (in effect, immunity from being sued) who provide the quality of court reporting to which the Attorney General referred in her remarks in 2015. The Commission has therefore proceeded on the clear assumption that the absolute privilege in section 17 of the 2009 Act should be retained. In Chapter 1, the Commission also concluded that a non-exhaustive list of criteria as to what constitutes a fair and accurate report should be incorporated into the 2009 Act. This is intended to clarify that a report of court proceedings would meet the “fair and accurate” test in the 2009 Act even where, to echo the remarks of the Attorney General in 2015 that preceded this request, it includes a simple oversight, omission or error. Inserting those criteria into the 2009 Act would therefore support the view that a person making such a report of court proceedings would not be exposed to the risk of being sued in a defamation action.
- [3.3] The Commission therefore examines in this Chapter whether a new qualified privilege defence for reports of court proceedings, where such reports do not meet the “fair and accurate” test, should be enacted. The Commission begins by examining the meaning of malice in this context, and then discusses the arguments for and against the introduction of such a qualified privilege defence.

1. Qualified privilege and malice

- [3.4] Section 19(1) of the 2009 Act provides:

“In a defamation action, the defence of qualified privilege shall fail if, in relation to the publication of the statement in

¹ See Overview and Executive Summary above, paragraph 2.

respect of which the action was brought, the plaintiff proves that the defendant acted with malice.”

- [3.5] Section 19 of the 2009 Act does not define malice, and it has been therefore assumed that the reference to malice in section 19(1) of the 2009 Act operates in the same manner as common law malice.² This assumption is supported by the progress through the Oireachtas of the *Defamation Bill 2006*, which was enacted as the 2009 Act though subject to important amendments during the Oireachtas debates. Section 19 of the 2009 Act, which has the marginal note³ “loss of defence of qualified privilege”, began its legislative life as section 17 of the 2006 Bill, which contained the same marginal note. As initiated, section 17(1) of the 2006 Bill contained far more detail on the issue of malice, and also proposed to expand the grounds on which qualified privilege would fail, by contrast with what was ultimately enacted as section 19(1) of the 2009 Act. As initiated, section 17(1) of the 2006 Bill proposed:

“In a defamation action, the defence of qualified privilege shall fail if, in relation to the publication of the statement in respect of which the action was brought, the plaintiff proves that—

- (a) the defendant did not believe the statement to be true,
- (b) the defendant acted in bad faith or out of spite, ill will or improper motive,
- (c) the statement bore no relation to the purpose of the defence, or
- (d) the manner and extent of publication of the statement exceeded what was reasonably sufficient in all the circumstances.”

- [3.6] The 4 paragraphs, (a) to (d), in section 17(1) of the 2006 Bill were removed during the Oireachtas debates, and, as noted above, section 19(1) of the 2009 Act simply provides that the defence of qualified privilege fails “if the plaintiff proves that the defendant acted with malice.” The then Minister for Justice explained during the Oireachtas debates that the removal of those 4 paragraphs and their replacement with the single reference to malice was done following consultation with the then

² Cox and McCullough, *Defamation: Law and Practice* (Clarus Press, 2014), at para 8.103.

³ Marginal notes were, until recently, located at the side of the text of sections. They are now located above the text of sections, and are therefore referred to as shoulder notes.

Attorney General. The Minister noted that section 17(1) of the 2006 Bill would have “expanded the number of situations in which the defence of qualified privilege would fail”; and added that:

“following consultation with the Attorney General on the legal issues involved, I am advised it would be prudent to amend section 17(1) so as not to alter the existing law. The revised position now reflects the existing position in law. It makes loss of the defence of qualified privilege solely dependent on proving that the defendant acted in malice.”⁴

- [3.7] Thus, what became section 19(1) of the 2009 Act is confined to providing that the defence of qualified privilege fails where the plaintiff proves that the defendant acted with malice.
- [3.8] At common law, qualified privilege applies where communications take place for honest purposes, and, therefore, this privilege can be defeated by malice.⁵ Such qualified privilege arose at common law when, for example, there was a legal, moral or social duty to publish the information in question, and when the person who received the information had an interest in receiving it.⁶ This was placed on a statutory footing by section 18(2) of the 2009 Act.⁷ For the purposes of this defence, if publication occurs where the privilege applies and the publication is warranted by the occasion, the defence applies even if the material published is untrue, provided the plaintiff cannot prove the defendant acted with malice.⁸
- [3.9] It has been suggested that the difference between the definition of malice in the context of qualified privilege and the ordinary dictionary definition of the word renders it a difficult defence in practice.⁹ As regards qualified privilege, the vital aspect of the definition of malice is the motivation for the publication of the defamatory material. Therefore, malice will not be proven if the defendant was merely negligent or if he or she conducted insufficient research prior to

⁴ Vol.196 *Seanad Éireann Debates*, p.1011 (9 July 2009): Defamation Bill 2006 [*Seanad Bill amended by the Dáil*]: Report and Final Stages (Deputy Dermot Ahern TD, Minister for Justice), available at: <https://data.oireachtas.ie/ie/oireachtas/debateRecord/seanad/2009-07-09/debate/mul@/main.pdf>.

⁵ McGonagle, *Media Law*, 2nd ed (Thomson Roundhall, 2003), at para 4.5.4.2.

⁶ *Ibid.*

⁷ See paragraph 1.19 of the Report above.

⁸ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press, 2014), at para 8.01.

⁹ *Ibid.*, at para 8.105.

publication.¹⁰ Malice may also be inferred from the fact that a publisher knew that the material in question was false or had been reckless as to its content.¹¹

- [3.10] In *Bray v Deutsche Bank AG*¹² the English High Court found malice to be established where the defendant bank published material which it knew to be untrue, but did not know was defamatory. It is also possible for malice to be found if someone publishes a statement that is true, but does so for an improper motive.¹³
- [3.11] The presence of malice can be inferred from internal or external factors.¹⁴ Internal factors include the tone of the language or the relevance of the material published, for example, if the language used was disproportionate to the situation involved.¹⁵ External factors include the relationship between the parties and the circumstances of how the material was published.
- [3.12] As to the specific matter arising in this aspect of the Report, it is clear that, as already discussed in Chapter 2 above, reports of court proceedings perform an important public service in informing the public of court proceedings. Where a report is contemporaneous (bearing in mind that such a condition is not required for the report to fall within section 17 of the 2009 Act) and being made to a tight deadline, inaccuracies may occur.
- [3.13] The Commission now turns to discuss the arguments for and against the introduction of a new qualified privilege defence.

2. Arguments for and against the introduction of a new qualified privilege defence

(a) Arguments for the introduction of a new qualified privilege defence

(i) Potential chilling effect on the media under the current system

- [3.14] It is arguable that the current system under section 17 of the 2009 Act, under which inaccuracies can expose the publisher of a report of court proceedings to liability for defamation, may have a "chilling effect" in that such reports might no longer be seen to be financially viable. It might be argued that this could be said to be

¹⁰ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press, 2014), at para 8.109.

¹¹ *Ibid*, citing *Loveless v Earl* [1998] EWCA Civ 1670.

¹² [2009] EWHC 1356.

¹³ *Friend v Civil Aviation Authority* [2005] EWHC 201.

¹⁴ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press, 2014), at para 8.113.

¹⁵ *Hynes-O'Sullivan v O'Driscoll* [1988] IR 436.

illustrated by the decision in *Christie v TV3 Television Networks Ltd*.¹⁶ Here, the defendant company was broadcasting on TV a contemporaneous account of the criminal trial of a former solicitor who had been charged with a range of fraud-related offences. The accused former solicitor had been on bail throughout the trial, which had received widespread media attention. The plaintiff in the defamation proceedings was the solicitor for the accused. As the criminal trial was nearing conclusion, the defendant company broadcast on TV the following: "The jury in the trial of solicitor Thomas Byrne will resume its deliberations tomorrow morning. It has already spent several hours considering its verdict. The 23-day trial ended this morning with a summing-up from Judge Patrick McCartan. Thomas Byrne has pleaded not guilty to 50 counts of theft, forgery, using forged documents and deception. The total amount involved is almost €52m." These words were accompanied solely by footage of the plaintiff making his way, on his own, into the Criminal Courts of Justice building where the trial was being held. The footage showed the plaintiff alone, unaccompanied by his client. The plaintiff was not mentioned by name during this broadcast.

- [3.15] The defendant broadcast an apology a number of days later, in which it acknowledged that the plaintiff was a well-respected solicitor. It also apologised for any distress and embarrassment that may have been caused by the error. The plaintiff subsequently issued High Court proceedings for defamation, during which the defendant made an offer of amends under section 22 of the 2009 Act. The parties requested the High Court (O'Malley J) to assess damages under section 23 of the 2009 Act. While the defendant company appeared to assert during the hearing that the case involved an innocent mistake, the Court held that, as the defendant had chosen to make an unqualified offer of amends, "that means accepting that the plaintiff was defamed."¹⁷ The Court concluded that the starting point for assessing damages in the serious type of defamation involved was in the region of €200,000, but that it was appropriate to allow a discount in the region of one third, to take account of the offer to make amends and the apology. The Court held that it did not seem appropriate to allow further mitigation in the absence of a more comprehensive apology and because of the failure, in the running of the action, to take responsibility for the fact that the plaintiff was damaged in his reputation as a result of the broadcast. The Court therefore awarded the plaintiff €140,000 in damages.¹⁸

¹⁶ [2015] IEHC 694, [2017] IECA 128. See also paragraph 1.41 of the Report above and paragraph 3.31 below.

¹⁷ [2015] IEHC 694, at para 101, following the approach of the English High Court (Eady J) in *Nail v Jones and News Group Newspapers Ltd* [2004] EWHC 647.

¹⁸ [2015] IEHC 694, at paras 109-110.

[3.16] The defendant company did not appeal the High Court finding of defamation, and appealed the level of the award only. On appeal, the Court of Appeal noted (see also Chapter 1, above) that defamation law involves the striking of a balance by the Oireachtas between two potentially competing constitutional rights, namely, the protection of the right of a good name under Article 40.3.2° and right of free speech and expression under Article 40.6.1°. The Court added:¹⁹

“This constitutional balance necessarily implies that an award of damages for defamation must be measured and proportionate. An excessive award plainly impacts on the right of free speech and the special role which Article 40.6.1° ascribes to the organs of public opinion in the respect of ‘their rightful liberty of expression’ and the ‘education of public opinion.’ This might be thought to be especially true in the present case, since commentary on an important criminal trial is all part and parcel of this education of public opinion which is constitutionally designated as a core function of the media generally. On the other hand, an award of damages which did not adequately compensate the party defamed for injury, personal hurt and damage would amount to a failure to give effect to the substance of the guarantee of good name contained in Article 40.3.2°.”

[3.17] The Court accepted that this was a serious defamation, a conclusion with which the Commission agrees, the Court noting that:²⁰

“[t]he casual viewer of the programme might well confuse Mr Christie with [the accused] Mr Byrne. Those who knew Mr Christie simply to see might think that he was actually Mr Byrne. In the wake of the transmission of the newscast the potential for confusion, distress and embarrassment was admittedly considerable. It is also possible that some existing – and perhaps especially potential – clients would have been tempted to give him a wide berth in the light of the broadcast.”

[3.18] At the same time, the Court considered that it should also take account of all the other relevant factors in the case, namely:²¹

“a once-off nine second broadcast, the fact that the plaintiff was not named, the very limited range of viewers who might think that the news item referred to Mr Christie, the absence of any animus towards the plaintiff, coupled with the fact that it was plainly a case of mistaken identity...”

¹⁹ [2017] IECA 128, at para 34.

²⁰ [2017] IECA 128, at para 36.

²¹ *Ibid.*

- [3.19] For these reasons, the Court of Appeal held that a starting point of €60,000 for quantifying damages was “appropriate and proportionate.”²²
- [3.20] As to the level of discount for the apology and the offer of amends, the Court held that, in recognition of the swiftness of the apology and the general prominence given to the apology, the defendant should receive a discount of 40% by comparison with the discount of one third applied in the High Court.²³ The plaintiff’s award was accordingly revised to €36,000 in damages. The decision is also discussed below in the context of the Court’s discussion of the offer of amends procedure in the 2009 Act.
- [3.21] The Commission received submissions to the effect that the current absolute privilege defence provides court reporters and publishers with relatively little protection where the claim relates to an error that does not involve malice but where entering into a settlement may be more cost effective than proceeding to trial. To that extent, it was contended that the reality of the costs involved in litigation involves a chilling effect that is not avoided by the presence of the absolute privilege defence in section 17 of the 2009 Act. On that basis, it was argued that a qualified privilege applicable to reports that fall short of the “fair and accurate” test would be of assistance.
- [3.22] Moreover, it has been argued that, when such matters do proceed to trial, some of the awards made by juries have been very high (in comparison, for example, to personal injury awards) and, it was alleged, threatened the very survival of some of the smaller newspapers.²⁴ As such, it is at least arguable that the absolute privilege defence does not currently provide sufficient protection for those publishing reports of court proceedings.

(ii) Other challenges faced by the media

- [3.23] Some consultees who were in favour of the introduction of a new qualified privilege defence referred to the variety of challenges that the media are nowadays facing. One such challenge is limited budgets and diminishing revenue. For many publishers, particularly local media, court reporting is becoming increasingly economically unviable. The risks involved in court reporting, in terms of the threat of being sued for defamation in the event of an honest mistake occurring, are very high from a financial perspective, even if the court reporter or court reporting agency would be likely to succeed at trial.

²² [2017] IECA 128, at para 40.

²³ [2017] IECA 128, at para 42.

²⁴ McMahan and Binchy, *Law of Torts*, 4th ed (Bloomsbury Professional, 2013) at para 34.03, citing McGonagle, *A Textbook on Media Law* (Thomson Roundhall, 1996).

- [3.24] One consultee suggested that there has been a reduction in the coverage of legal proceedings due to this. It contended that, if this trend continues, there will be considerable damage done to the judicial system and to public confidence in the administration of justice. As such, the argument in favour of a new qualified privilege defence is that it would mitigate these fears about the potential financial consequences of inadvertent or honest mistakes.
- [3.25] The consultee suggested that such a change would not be as significant as might be thought. It argued that: if the error in the report is made with malice, the proposed new qualified privilege will fail; that the publisher will, at the least, have to adduce evidence that some system of checks was in place; that if the proposed privilege were to be abused, a plaintiff would be able to prove malice; and that this would probably be easier in cases involving non-professionals, who rarely provide public coverage of proceedings, than with reports by media organisations.
- [3.26] Another challenge faced by court reporters raised by a consultee is that errors are bound to occur where there is human input. It commented that the news industry is one which nowadays operates on a 24 hour basis, and that the role of a court reporter is a highly pressurised one, where the multiple tasks of listening, note-taking, copy writing, filing and liaising with clients must be executed simultaneously. The consultee also mentioned that despite checks being in place, journalists cannot be expected to catch every error, especially not what it described as the kind of technical errors which are usually brought to light only after publication.²⁵

(b) Arguments against the introduction of a new qualified privilege defence

(i) Risk of decline in the quality and standard of court reports

- [3.27] A significant number of submissions received by the Commission pointed out that a new qualified privilege defence for reports of court proceedings, in which the “fair and accurate” requirement would not apply, could create a number of risks. First, it could lead, in the case of professional journalists and their editors, to a decline in journalistic standards; and such a risk must be at least as high in the case of bloggers and other online commentators. Second, it could significantly increase the

²⁵ The Commission also notes that a qualified privilege defence for court reports that do not meet the fair and accurate test may be considered by the UK Government in the context of a public consultation launched in 2019 on a White Paper on Online Harms, available at <https://www.gov.uk/government/consultations/online-harms-white-paper>. See the discussion in the Gillen Review Report, *Report into the law and procedures in serious sexual offences in Northern Ireland* (April 2019), at para 7.84 and Recommendation 58, available at www.gillenreview.org. The results of any such consideration in the UK are not available at the time of writing (July 2019). However, the Commission has had the benefit of its consultative process (including the submissions received following the publication of the Issues Paper on this project) in making the recommendations in this Report.

risk of increased dissemination of incorrect information to the public about the administration of justice. Third, it could leave the individuals who are the subject of such inaccurate and unfair reporting without an effective remedy to protect their reputations. This would also run counter to the ongoing development of standards through bodies such as the Press Council and the Broadcasting Authority of Ireland.

[3.28] In addition, it may be said that the current system under section 17 of the 2009 Act incentivises the prompt correction of any mistakes, should they occur. The introduction of a new qualified privilege defence, which would protect what have been described as “honest mistakes”, could significantly reduce the burden to ensure that court reports are fair and accurate. In turn, the existence of a new qualified privilege defence could reduce the incentive for publishers to rectify mistakes in the event of their publication.

[3.29] In the Commission’s view, these constitute a compelling set of arguments against the introduction of a qualified privilege for reports that fall below the “fair and accurate” test. The Commission agrees with the view that those subjected to inaccurate and defamatory reports should be protected in circumstances in which reports that fall below the “fair and accurate” standard could have catastrophic implications for those defamed. Moreover, such a qualified privilege would run counter to the general standards that underpin the 2009 Act, including the standard-setting role of the Press Council, and the comparable standards in the Broadcasting Authority of Ireland’s Codes.

(ii) Failure to achieve appropriate balance between competing constitutional rights

[3.30] The Commission also considers that a new qualified privilege defence, in which the “fair and accurate” requirement would not apply, would involve a failure to provide for the appropriate balance between the competing constitutional rights – the right to a good name and the right to freedom of expression – which defamation law seeks to achieve.²⁶ Such a new qualified privilege defence would, in the Commission’s view, constitute a disproportionate restriction on the right to a good name under Article 40.3.2° of the Constitution. This would be the case in particular because fewer safeguards, whether those arising from the meaning given to the term “fair and accurate” in the case law, or from the guidance on accuracy provided by the Press Council or by the Broadcasting Authority of Ireland, would then exist to protect and vindicate that right in the context of a report of court proceedings. The Commission considers that the current law, which requires accuracy in court

²⁶ See the discussion of the balance sought to be achieved between these competing rights at paragraphs 1.3-1.7 of the Report above.

reporting, constitutes an appropriate balance between the competing rights engaged.

(iii) Current law facilitates cost-limiting process through offer of amends

- [3.31] The Commission also considers that, where a mistake occurs, publishers can take prompt action to rectify the mistake under the new offer of amends process in the 2009 Act and, by doing so, can significantly reduce their potential exposure. Returning to the example of *Christie v TV3 Television Networks Ltd*,²⁷ discussed above, the Commission acknowledges that, while the defamation in that case was a serious one, the financial implications arising from engaging in the litigation also imposed a significant burden on the defendant company.
- [3.32] Nonetheless, as the Court of Appeal pointed out in the *Christie* case, the defendant did not accept, until the assessment of damages hearing under section 23 of the 2009 Act was very far advanced, that the defamation involved was serious. The Court noted that this had also occurred in *Ward v Donegal Times Ltd*,²⁸ in which the High Court (McDermott J) had analysed in detail the offer of amends procedure under the 2009 Act, and the case law under the broadly comparable provisions in section 3 of the UK *Defamation Act 1996*. In the *Ward* case, the High Court approved the view of the English High Court (Eady J) in *Nail v Jones and News Group Newspapers Ltd*²⁹ that “[t]he offer of amends regime provides, as it was supposed to, a process of conciliation.” The Court of Appeal in *Christie* echoed this approach, by stating that “it is very much in the public interest that the parties engage in what amounts to a conciliation process”³⁰ under the new offer of amends procedure in the 2009 Act. The Court also expressed the hope that the offer of amends procedure in the 2009 Act would be used more effectively, in order to reduce the cost of defamation claims. The Court noted that this had been the effect under the comparable provisions in the UK.³¹ The Commission fully endorses the view expressed by the Court of Appeal in the *Christie* case.³²

²⁷ [2015] IEHC 694, [2017] IECA 128.

²⁸ [2016] IEHC 711.

²⁹ [2004] EWHC 647, at para 34, quoted with approval in *Ward v Donegal Times Ltd* [2016] IEHC 711, at para 69.

³⁰ [2017] IECA 128, at para 41.

³¹ [2017] IECA 128, at para 41, referring to the UK 1996 Act, and the subsequent decisions in *Cleese v Clark* [2003] EWHC 137, *Nail v Jones and News Group Newspapers Ltd* [2004] EWHC 647, [2004] EWCA Civ 1708 and *KC v MGN Ltd* [2013] EWCA Civ 3.

³² In the joined cases *Higgins v Irish Aviation Authority; White v Sunday Newspapers Ltd* [2018] IESC 29, the Supreme Court held that, since sections 22 and 23 of the 2009 Act do not expressly provide that an offer of amends hearing is to be determined by a judge sitting alone, the plaintiffs were entitled, in a High Court defamation action, to have damages assessed by a jury. The Court noted that the comparable provisions in section 3 of the UK

(c) Conclusions

[3.33] The Commission considers that the arguments against the introduction of a new qualified privilege defence, which would apply to a report of court proceedings that falls below the “fair and accurate” standard, far outweigh the arguments in its favour. In particular, the Commission considers that such a privilege defence runs clear risks of a reduction in the standard and quality of reporting of court proceedings. This would adversely affect the appropriate balance that defamation law seeks to achieve between the competing constitutional rights, namely, the protection of the right of a good name under Article 40.3.2° and right of free speech and expression under Article 40.6.1°, the importance of which the Commission has emphasised throughout this Report. The Commission also notes in this respect that, as discussed in Chapter 1 above, and echoing the remarks of the Attorney General in 2015, a report of court proceedings that contains a simple oversight, omission or error, would meet the “fair and accurate” test, particularly taking account of the recommendation made in Chapter 1. For all these reasons, including those set out above in this Chapter, the Commission has concluded that such a new qualified privilege defence should not be introduced.

R. 3.01 The Commission recommends that a new qualified privilege defence, which would apply to a report of court proceedings that falls below the “fair and accurate” standard, should not be introduced into the *Defamation Act 2009*.

1996 Act, on which sections 22 and 23 of the 2009 Act were largely modelled, expressly provide that such hearings are to be heard by a judge alone. The Court concluded, at para 49, that: “[i]f this matter is to be the subject of further review or amendment it would be very desirable that consideration is given to setting out very clearly the mechanism envisaged and how it would function in a range of different circumstances.” This wider question is outside the scope of this Report, and may fall to be considered by the Department of Justice and Equality as part of its general review of the 2009 Act, in which it is currently (July 2019) engaged.

CHAPTER 4 LEAVE TO BRING PROCEEDINGS

[4.1] The Attorney General’s request also required the Commission to consider whether a plaintiff in a defamation claim concerning a report of court proceedings should first be required to seek leave of the Court to bring the action, and to demonstrate on affidavit any *mala fides* alleged. The Commission now turns to consider this in the light of the case law on this area, and also having regard to the recommendation made in Chapter 3 above.

1. Case law on leave to bring proceedings

[4.2] The courts have held that the right of access to the courts under Article 40.3 of the Constitution constitutes, in effect, a right to litigate.¹ However, this right is not absolute and may be restricted in certain circumstances. A number of cases have held that, notwithstanding Article 40.3, it is constitutionally permissible to require an applicant to obtain leave to institute proceedings in certain instances. In *In re the Illegal Immigrants (Trafficking) Bill 1999*² the Supreme Court upheld the constitutionality of what became section 5 of the *Illegal Immigrants (Trafficking) Act 2000*, which requires an applicant seeking judicial review of a decision or order made under the 2000 Act, to first seek leave of the court and to demonstrate “substantial grounds” that the decision or order should be quashed.

[4.3] In *McNamara v An Bord Pleanála (No.1)*³ the High Court (Carroll J) held that the “substantial grounds” requirement that was required to be met in order to bring judicial review proceedings must include grounds that are reasonable, arguable and weighty, and not trivial or tenuous.⁴ Similarly, the Supreme Court noted in *G v Director of Public Prosecutions*⁵ that, in the context of judicial review proceedings, a requirement to seek leave of the court acts as a “screening process to litigation” and helps to prevent trivial cases being brought to hearing.

[4.4] However, the Supreme Court has also held that a leave requirement must only restrict the right of access to the courts in a manner that is proportionate; otherwise, it will not be constitutionally permissible. In *Blehein v Minister for Health and Children*⁶ the Supreme Court held that the restriction on the right of access to

¹ See *Kelly: The Irish Constitution*, 5th ed (Bloomsbury Professional, 2018), at paras 7.3.181-7.3.234.

² [2000] 2 IR 360.

³ [1995] 2 ILRM 125.

⁴ *Ibid*, at 130.

⁵ [1994] 1 IR 374, at 382.

⁶ [2008] IESC 40, [2009] 1 IR 275.

the courts created by the leave requirement in section 260 of the *Mental Treatment Act 1945* was not proportionate. Section 260 of the 1945 Act required an applicant to obtain leave before bringing a negligence claim concerning the committal of a person to a psychiatric hospital. In order to obtain leave, the applicant had to demonstrate that there were substantial grounds for contending that the person against whom the claim was brought had acted in bad faith or without reasonable care. The Supreme Court held that section 260 involved an impermissible interference with the right of access to the courts because it was restricted to specific grounds. The Court noted that many other Acts apply the “substantial grounds” requirement to an application for leave in judicial review proceedings. In such applications, the High Court has discretion to decide what grounds would justify an application, if they are substantial. However, under section 260, the Court was confined to considering only two grounds, and its discretion was limited to determining whether those two specific grounds were “substantial”. Therefore, the Supreme Court held that section 260 was unconstitutional on the ground that it failed to comply with the test of proportionality.

- [4.5] In *Governey v Financial Services Ombudsman*⁷ the Supreme Court held that where a restriction on the right to appeal involves a requirement to apply for leave, the criteria to be fulfilled should be clear.⁸ If the court considers that the criteria are not sufficiently clear, it should interpret the legislation in a way that confers the wider entitlement to appeal.⁹ This case involved a request for leave to appeal a decision made by the High Court to the Supreme Court. The High Court had previously rejected the application for leave to appeal to the Supreme Court,¹⁰ but the plaintiff then applied to the Supreme Court for leave to appeal to the Court. The Supreme Court held that, because the default position was that a right of appeal existed from the High Court to the Supreme Court, any leave requirement that narrowed that constitutional right “should be strictly construed in a manner designed to confer rather than deny the constitutional entitlement to appeal.”¹¹ The Court also emphasised that there is nothing wrong with legislation that restricts a right of appeal, stating that, rather: “the point is that where such restriction or exclusion is sought to be achieved, it should be done by clear wording.”¹² The Court concluded that, as the legislation at issue in this case was silent on any criteria to be applied when considering a question of leave to appeal, it must be interpreted broadly to

⁷ [2015] IESC 38, [2015] 2 IR 616.

⁸ [2015] IESC 38, [2015] 2 IR 616, at para 3.4.

⁹ *Ibid.*

¹⁰ *Governey v Financial Services Ombudsman* [2013] IEHC 403.

¹¹ [2015] IESC 38, [2015] 2 IR 616, at para 3.4.

¹² *Ibid.*

mean that leave should be granted if there is a stateable basis for appeal.¹³ Ultimately, leave to appeal was granted in this case.

- [4.6] The European Court of Human Rights (ECtHR) has also held that the right of access to the courts is not absolute. In *Běleš and Ors v Czech Republic*,¹⁴ the ECtHR held, in respect of Article 6 ECHR rights, that “the limitations applied must not restrict or reduce the individual’s access in such a way or to such an extent as to impair the very essence of the right.”¹⁵ Thus, limitations on access to justice will only be compatible with Article 6 of the ECHR if there is a “reasonable relationship of proportionality between the means employed and the aim pursued.”¹⁶ The ECtHR held that the procedure applicable in this case in relation to admissibility of appeals at national level did not allow for the proper administration of justice, and deprived the applicants of the right of access to the court. Therefore, there had been a violation of Article 6 of the ECHR.

2. Consideration of reforming leave to bring proceedings under the 2009 Act

(a) The current position in the 2009 Act and submissions received

- [4.7] Of relevance to this aspect of the Attorney General’s request is section 11 of the 2009 Act. Section 11(1) of the 2009 Act provides that, subject to section 11(2) – which contains the leave provision (see below) – a person has one cause of action only in respect of a multiple publication. Section 11(3) defines “multiple publication” quite narrowly, that is, “publication by a person of the same defamatory statement to 2 or more persons (other than the person in respect of whom the statement is made) whether contemporaneously or not.” Section 11(1) abolished the pre-2009 “multiple publication” rule, by which it was possible to bring separate claims for each defamatory publication, regardless of whether they emanated from one or multiple publishers.¹⁷
- [4.8] Section 11(2) of the 2009 Act provides that a court “may grant leave to a person to bring more than one defamation action in respect of a multiple publication where it considers that the interests of justice so require”. Although this is clearly limited to

¹³ [2015] IESC 38, [2015] 2 IR 616, at para 3.6.

¹⁴ [2002] ECHR 729, Application No.47273/99 (12 November 2002). The Court had also previously taken the same view in *Garcia Manibardo v Spain* [2000] ECHR 77, Application No.38695/97 (15 February 2000), and *Mortier v France* [2001] ECHR 494, Application No.42195/98 (31 July 2001).

¹⁵ [2002] ECHR 729, at para 61.

¹⁶ *Ibid.* See also *Edificaciones March Gallego SA v Spain* [1998] ECHR 6, Application No.28028/95 (19 February 1998).

¹⁷ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press, 2014), at para 2.57.

the narrow multiple publication situation as defined in section 11(3), and while It has been observed that “[i]t is difficult to see where this [namely, leave being granted in the interests of justice] might be the case”,¹⁸ it nonetheless provides an instance in which the 2009 Act provides for leave being granted to bring proceedings by a potential plaintiff.

- [4.9] In the Commission’s view, of more significance for the purposes of this Report, section 8(1) of the 2009 Act provides that where the plaintiff in a defamation action serves on the defendant any pleading containing assertions or allegations of fact, he or she “shall swear an affidavit verifying those assertions or allegations.” Section 8(6) of the 2009 Act provides that it is an offence for a person to make a statement in such an affidavit (a) that is false or misleading in any material respect and (b) that he or she knows to be false or misleading. Section 8(7) provides that a person guilty of an offence under section 8(6) of the 2009 Act is liable: on summary conviction, to a fine not exceeding €3,000, or imprisonment for a term not exceeding 6 months or to both; or, on conviction on indictment, to a fine not exceeding €50,000, or imprisonment for a term not exceeding 5 years, or to both.
- [4.10] The Issues Paper sought the views of consultees as to whether the current provisions on leave in the 2009 Act should be reformed. The submissions that the Commission received on this issue were mixed.
- [4.11] A number of consultees were of the opinion that section 8 of the 2009 Act does not effectively discourage unfounded claims. These consultees were also of the view that under the 2009 Act as it stands, it is more cost effective to settle an action than to proceed to trial. One consultee also suggested that the introduction of a leave requirement would expedite defamation hearings. Conversely, the Commission received a number of submissions which argued against the introduction of a leave requirement. These consultees argued that the current system in section 8 requiring the filing of a verifying affidavit is a sufficient protection against claims that may be unfounded, frivolous or vexatious.¹⁹

¹⁸ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press, 2014), at para 2.61.

¹⁹ The Commission also notes that the issue of requiring leave to bring defamation proceedings may be considered by the UK Government in the context of a public consultation launched in 2019 on a White Paper on Online Harms, available at <https://www.gov.uk/government/consultations/online-harms-white-paper>. See the discussion in the Gillen Review Report, *Report into the law and procedures in serious sexual offences in Northern Ireland* (April 2019), at para 7.84 and Recommendation 58, available at www.gillenreview.org. The results of any such consideration in the UK are not available at the time of writing (July 2019). However, the Commission has had the benefit of its consultative process (including the submissions received following the publication of the Issues Paper on this project) in making the recommendations in this Report.

(b) Conclusions

- [4.12] Having regard to the case law discussed above, it is clear that it would be constitutionally permissible, and also not in breach of the ECHR, to place a requirement to seek leave on a potential plaintiff where this would involve a proportionate obligation. The Commission considers, however, that the imposition of such a requirement in the context of a defamation claim that falls outside the narrow category in section 11 of the 2009 Act would nonetheless be undesirable. This is because it would restrict the right of access to the courts and a potential plaintiff's ability to defend his or her good name under Article 40.3. In addition, having regard to the recommendation made in Chapter 3 above that no new qualified privilege defence should be enacted, a recommendation concerning a leave requirement could have effects beyond the scope and context of the Attorney General's request to the Commission. Such a provision would therefore be better examined as part of the general review of the 2009 Act, in which the Department of Justice and Equality is currently (July 2019) engaged.
- [4.13] Moreover, the Commission considers that such a leave requirement would arguably be superfluous, because section 8 of the 2009 Act already requires that a plaintiff or defendant in a defamation action must swear an affidavit verifying any allegations of fact. McMahon and Binchy have noted that the requirement under section 8(6) of the 2009 Act "should ensure that the parties will take great care in giving instructions to their lawyers."²⁰ The Commission has therefore concluded that section 8 of the 2009 Act, and in particular section 8(6), already provides sufficient protection against unfounded claims.

R. 4.01 The Commission recommends that, taking account of Recommendation R3.01, a leave requirement should not be introduced into the *Defamation Act 2009* for claims relating to a report of court proceedings.

²⁰ McMahon and Binchy, *Law of Torts*, 4th ed (Bloomsbury Professional, 2013), at para 34.17.

APPENDIX A SUMMARY OF RECOMMENDATIONS

Chapter 1 Overview of defamation law and guidance on privilege for reports of court proceedings

- R 1.01** The Commission recommends that the *Defamation Act 2009* should be amended to provide that, in determining whether a report of court proceedings is “fair and accurate”, all of the circumstances of the case are to be considered, including the following non-exhaustive list of circumstances:
- (a) An abridged court report will 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.

Chapter 2 Persons who may claim privilege for a “fair and accurate” report of court proceedings and impact of social media

- R 2.01** The Commission recommends that the privilege defences for “fair and accurate” reports of court proceedings under sections 17 and 18 of the *Defamation Act 2009* should remain applicable not only to professional journalists, such as those falling within the remit of the Press Council or the Broadcasting Authority of Ireland, but also to others, such as bloggers, social media users and other persons who are sometimes described as citizen journalists.

Chapter 3 Whether to enact a new qualified privilege defence for reports of court proceedings

R 3.01 The Commission recommends that a new qualified privilege defence, which would apply to a report of court proceedings that falls below the “fair and accurate” standard, should not be introduced into the *Defamation Act 2009*.

Chapter 4 Leave to bring proceedings

R 4.01 The Commission recommends that, taking account of Recommendation R 3.01, a leave requirement should not be introduced into the *Defamation Act 2009* for claims relating to a report of court proceedings.

APPENDIX B DRAFT DEFAMATION (AMENDMENT) BILL 2019

Draft Defamation (Amendment) Bill 2019

CONTENTS

Section

1. Short title and commencement
2. Interpretation of "fair and accurate" in relation to report of court proceedings

ACT REFERRED TO

Defamation Act 2009 (No.31)

Draft Defamation (Amendment) Bill 2019

DRAFT BILL

Entitled

An Act to amend the Defamation Act 2009 and to provide for related matters.

Be it enacted by the Oireachtas as follows:

Short title and commencement

1. (1) This Act may be cited as the Defamation (Amendment) Act 2019.
(2) This Act shall come into operation on such day as the Minister for Justice and Equality may appoint by order.

Explanatory Note

Section 1 is a standard provision providing for a Short Title and for commencement arrangements.

Interpretation of “fair and accurate” in relation to report of court proceedings

2. The Defamation Act 2009 is amended by the insertion of the following section:

“Interpretation of ‘fair and accurate’ in relation to report of court proceedings

18A. Where a court is required to determine whether a report of the proceedings of any court referred to in section 17, or a report of the proceedings of any court to which, by reference to Schedule 1, section 18 refers, is “fair and accurate”, the court shall consider all of the circumstances of the case, including the following non-exhaustive list of circumstances—

- (a) an abridged court report will 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, and
- (e) a report assuming a verdict, before any verdict has been delivered, is not privileged.”

Explanatory Note

Section 2 implements **Recommendation 1.01** in Chapter 1 of the Report that the *Defamation Act 2009* should be amended to provide that, in determining whether a report of court proceedings is “fair and accurate”, all of the circumstances of the case are to be considered, including the following 5 non-exhaustive list of circumstances, which are based on principles and criteria numbered 2, 4, 6, 9 and 10 by the High Court in *Philpott v Irish Examiner Ltd* [2016] IEHC 62 (see paragraph 1.37 of the Report above): (a) an abridged court report will 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; and (e) a report assuming a verdict, before any verdict has been delivered, is not privileged.

The recommendations in Chapters 2, 3 and 4 of the Report were that no further amendments should be made to the 2009 Act arising from the scope of this Report, and they therefore did not require inclusion of any further provisions in this draft Bill.

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

The Commission's law reform role is carried out primarily under a Programme of Law Reform. Its Fifth Programme of Law Reform was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act it was approved by the Government in March 2019 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

The Commission's Access to Legislation work makes legislation more accessible online to the public. This includes the Legislation Directory (an electronically searchable index of amendments to Acts and statutory instruments), a selection of Revised Acts (Acts in their amended form rather than as enacted) and the Classified List of Legislation in Ireland (a list of Acts in force organised under 36 subject matter headings).



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The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975