
ISSUES PAPER

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

(LRC IP 16 – 2018)

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About the Law Reform Commission

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. Since it was established, the Commission has published over 200 documents (Working Papers, Consultation Papers, Issues Papers and Reports) containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have contributed in a significant way to the development and enactment of reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. Its Fourth 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 October 2013 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 project makes legislation in its current state (as amended rather than as enacted) more easily accessible to the public in three main outputs: the Legislation Directory, the Classified List and the Revised Acts. The Legislation Directory comprises electronically searchable indexes of amendments to primary and secondary legislation and important related information. The Classified List is a separate list of all Acts of the Oireachtas that remain in force organised under 36 major subject-matter headings. Revised Acts bring together all amendments and changes to an Act in a single text. The Commission provides online access to selected Revised Acts that were enacted before 2005 and Revised Acts are available for all Acts enacted from 2005 onwards (other than Finance and Social Welfare Acts) that have been textually amended.

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BACKGROUND TO THIS ISSUES PAPER AND ISSUES RAISED

Introduction

1. In accordance with section 4(2)(c) of the *Law Reform Commission Act 1975*, the Attorney General 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. This project thus requires the Commission to review the current absolute privilege, or immunity, that applies under section 17 of the *Defamation Act 2009* in respect of a “fair and accurate” report of court proceedings. It also requires the Commission to examine whether it should additionally 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 leave of the court.
3. In order to address the Attorney General’s request, the following matters are examined in this Issues Paper.
4. **Issue 1:** the Paper begins with a brief overview of the *Defamation Act 2009*, and in particular the defences of absolute immunity and qualified immunity that apply under it. Since absolute privilege applies only to a “fair and accurate” report of court proceedings under section 17 of the 2009 Act, the Paper then examines the meaning given to what a “fair and accurate” report entails. The Commission seeks views as to whether the current interpretation of “fair and accurate” provides sufficient guidance on this matter.
5. **Issue 2:** the Paper examines who may be described as a person making a “report of proceedings” for the purposes of section 17 of the 2009 Act. It is long-established that the absolute privilege is not confined to reports of court proceedings by professional journalists but also applies to reports by others, such as bloggers and so-called “citizen journalists.” The Commission seeks 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 “citizen journalists” who report proceedings using, for example, social media or blogs. Views are 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.

6. **Issue 3:** the Attorney General's request also requires the Commission to examine whether, in addition to retaining the absolute immunity in section 17 of the 2009 Act, a new defence of qualified privilege should be introduced for a report of court proceedings that falls short of being a "fair and accurate" report. Such a qualified privilege could only be defeated by proof of malice, and the Paper seeks views as to whether such a new privilege should be introduced.
7. **Issue 4:** the Attorney General's request also asks whether it would be appropriate to attach a requirement to obtain leave from the court before bringing a defamation action involving a report of court proceedings, and to demonstrate on affidavit the malice alleged. The current law requires both parties to swear an affidavit verifying their allegations; and the Paper asks whether this provides sufficient protection against unfounded defamation claims.

Seeking your views on the questions raised in the Issues Paper

An Issues Paper contains an analysis of issues that the Commission considers arise in a particular law reform project, together with a series of questions intended to assist consultees. An Issues Paper does not usually contain any settled view of the Commission. It is therefore intended to provide consultees with an opportunity to express their views and to make any related submissions on the questions that arise in the Issues Paper.

Consultees need not answer all questions and are also invited to add any additional comments they consider relevant.

Consultees should note that submissions are, in principle, subject to the possibility of disclosure under the *Freedom of Information Act 2014*. Any person may make a submission saying that he or she is making it on a confidential basis, especially if it contains personal information, and we would then treat it as confidential as far as possible. In the event that we receive a request for any material to be disclosed under FOI, we will, before releasing the information, contact the person concerned for their views.

Submissions can be sent in either of the following ways:

(a) You can email your submission – in whichever format is most convenient to you – to the Commission at ag48@lawreform.ie

or

(b) You can post your submission to :
Law Reform Commission,
Styne House,
Upper Hatch Street,
Dublin 2,
Ireland.

We would like to receive submissions on this Issues Paper no later than close of business on **Friday 26th October 2018** if possible.

ISSUE 1

OVERVIEW OF DEFAMATION LAW AND MEANING OF “FAIR AND ACCURATE” REPORT OF PROCEEDINGS

A. Overview of Defamation Law in Ireland

1.01 The *Defamation Act 2009*¹ repealed the *Defamation Act 1961* and codified and consolidated many existing common law principles on defamation.

1. Main ingredients of defamation

1.02 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 the 2009 Act provides that truth is a defence to a defamation claim.

1.03 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). Cox and McCullough point 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 victim.²

1.04 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-

(i) broadcast on the radio or television, or

(ii) published on the internet, and

¹ The 2009 Act implemented recommendations in the Commission’s 1991 *Report on the Civil Law of Defamation* (LRC 38-1991) and in the 2003 *Report of the Legal Advisory Group on Defamation*.

² Cox and McCullough, *Defamation: Law and Practice* (Clarus Press, 2014), at 21.

(d) an electronic communication.”

- 1.05 This is a broad definition, covering any method by which a statement, which may be defamatory, is conveyed to a third party.
- 1.06 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 these are often one and the same. The advent of new media, 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. The 2009 Act does not make specific provision for a separate category of defamation law relating to internet publications. Section 6(2) of the 2009 Act refers to publication “by any means”, so that the Act applies to defamation in newspapers, whether their paper or online editions, defamation on television, regardless of how that is accessed, or defamation through any other medium, such as through social media or other internet platforms.
- 1.07 To be defamatory, the publication must have a meaning that can undermine the plaintiff’s reputation. Defamation does not occur simply because the subject of the publication does not like how they are portrayed; there must be harm to the reputation of the plaintiff. Therefore, if a publicised statement is proven to be false, this does not necessarily mean that it will be defamatory.
- 1.08 McMahon and Binchy point out that it is not necessary for a person to have a public profile, for example a politician or celebrity, to hold a claim of reputation.³
- 1.09 The plaintiff must prove that the statement accused of being defamatory has the tendency to injure his or her reputation.⁴ McMahon and Binchy suggest that the provision in the 2009 Act that the defamatory statement “tends to injure a person’s reputation” did not alter the common law position that anything which “holds a person up to hatred, ridicule or contempt, or causes him or her to be shunned in society”⁵ would amount to a defamatory statement. The intention of the person who published the defamatory statement is not relevant when assessing the meaning of the statement and whether the statement is defamatory.⁶ However, the intention of the publisher may become important when discussing possible defences or calculating any damages that may be awarded.
- 1.10 The 2009 Act introduced the requirement that the plaintiff’s reputation may be damaged “in the eyes of reasonable members of society.” The criterion of “reasonable man” has long been used in relation to negligence, but McMahon and Binchy question whether this is a different standard than that set by “reasonable members of society”. They suggest that different groups of reasonable members of society may hold different views on what may or may not constitute a statement that

³ McMahon and Binchy, *Law of Torts*, 4th ed (Bloomsbury Professional 2013) at 1259.

⁴ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press 2014) at 72.

⁵ McMahon and Binchy, *Law of Torts*, 4th ed (Bloomsbury Professional 2013) at 1259.

⁶ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press 2014) at 72-73.

causes damage to someone's reputation.⁷ However, they also suggest that, by using this standard, it is relatively easy to deduce what unreasonable members of society would think, and this view would be rejected by the law.⁸ McMahon and Binchy therefore conclude that, although the 2009 Act introduces a new criterion, it does not introduce any major change or clarity to the law.⁹ Whether or not a statement is defamatory in the "eyes of reasonable members of society" will still be debated by judges and juries.

- 1.11 Another important requirement in defamation is that the plaintiff can be reasonably identified as the person about whom the allegedly defamatory statement is made. This must be proven by the plaintiff. Section 6(3) of the 2009 Act provides that "a defamatory statement concerns a person if it could reasonably be understood as referring to him or her". This applies an objective test to the question of whether or not the plaintiff is the person referred to in the statement. The objective test focuses on the response of a reasonable reader to the statement and not the plaintiff himself or herself.¹⁰

2. Absolute privilege and qualified privilege as defences to a defamation action

- 1.12 Section 15(1) of the 2009 Act abolished all prior common law and statutory defences to libel and slander and, in their place, sections 16 to 27 of the 2009 Act contain a codified list of defences, some of which re-enact the prior common law and statutory defences, while others are new.¹¹ Section 17, which concerns absolute privilege, and section 18, which concerns qualified privilege, address the defences of relevance to the Attorney General's request.
- 1.13 Cox and McCullough comment that the defence of absolute privilege is based on public policy considerations, unlike other defences which tend to focus more on freedom of expression as an important factor.¹² By way of example, section 17 of the 2009 Act provides absolute privilege from a defamation claim in respect of statements made in either House of the Oireachtas by a member of either House of the Oireachtas, statements made by a judge, or other person, performing a judicial function, or 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. It is an important aspect of public policy that those in public office or

⁷ McMahon and Binchy, *Law of Torts*, 4ed (Bloomsbury Professional 2013) at 1274.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press 2014) at 117.

¹¹ Mohan and Murphy, "Defamation Reform and the 2009 Act: Part 1" (2010) 15(2) *Bar Review* 33 at 35.

¹² Cox and McCullough, *Defamation: Law and Practice* (Clarus Press 2014) at 205.

involved in the administration of justice should freely be able to speak their minds without fear of legal challenge.

- 1.14 It flows from this that “fair and accurate” reporting of such statements is also covered by the section 17 defence of absolute privilege.
- 1.15 Qualified privilege is a less powerful defence than absolute privilege, in that it does not apply where the person who published the statement acted with malice. Malice can be established by examining the motivation of the publisher and their belief in the truth of the publication.¹³ As with absolute privilege, this defence also has public policy roots. Thus, in *Hynes O’Sullivan v O’Driscoll*¹⁴ the Supreme Court held that it is “founded upon the needs of the common good.”

3. Absolute Privilege

- 1.16 Section 17 of the 2009 Act broadly re-enacted the pre-2009 law on absolute privilege and prescribes a number of instances in which the privilege arises. Section 17(2) of the 2009 Act 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 –

(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 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 is absolutely privileged. It also applies to reports of proceedings heard before, and decisions made by, the named European and international courts.

¹³ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press 2014) at 243.

¹⁴ [1988] IR 436, at 453.

1.18 The defence of absolute privilege reflects the public interest in court proceedings, and that those proceedings should, except in limited cases, be held in public. Article 34.1 of the Constitution provides that:

“Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.”

1.19 It was noted by Hamilton CJ in the Supreme Court decision in *Irish Times Ltd v Ireland*¹⁵ that 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.”

4. Qualified Privilege

1.20 Section 18 of the 2009 Act broadly re-enacted the pre-2009 law on qualified privilege and its application to certain statements, examples of which are set out in the Schedule to the 2009 Act. Part 1 of the Schedule extends qualified privilege to fair and accurate reports of any matter to which absolute privilege could apply, other than those mentioned in section 17(2), and to fair and accurate reports of proceedings under the law of any state or place, other than Ireland or Northern Ireland.

1.21 Section 18(2) also 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 information to the wider public, could be considered to have a duty to communicate as specified in section 18(2).

1.22 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. This issue is discussed further in Issue 3, below.

5. The meaning of a “fair and accurate” report of proceedings adopted in *Philpott v Irish Examiner Ltd*

1.23 In *Philpott v Irish Examiner Ltd*¹⁶, the High Court (Barrett J) considered the meaning of a “fair and accurate” report of proceedings under section 17 of the 2009 Act. The *Philpott* case concerned two articles published in the *Irish Examiner* newspaper relating to employment proceedings brought by the plaintiff against his former

¹⁵ [1998] 1 IR 359 at 383.

¹⁶ [2016] IEHC 62.

employer. The plaintiff sought an order under section 13 of the *Defamation Act 2009* requiring that the newspaper be directed 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 defamatory as they amounted to fair and accurate reports of court proceedings under section 17 of the 2009 Act.

1.24 The High Court endorsed 12 of the 13 principles as to what is a “fair and accurate” report of proceedings set out by the leading English textbook *Gatley on Libel and Slander*.¹⁷

- (1) It is not necessary for the report to be word for word.¹⁸
- (2) An abridged court report will be privileged provided that it gives a correct and just impression of the proceedings.¹⁹
- (3) It is sufficient to publish a fair, summarised account.²⁰
- (4) If the report as a whole is accurate, then slight inaccuracies or omissions are immaterial.
- (5) A report in a daily newspaper is not held to the same standard as a professional law report.²¹
- (6) If a report contains a substantial inaccuracy, then it will not be privileged.
- (7) An abridged report must be fair and not misrepresent the proceedings.
- (8) A report must not deliberately omit evidence such that a false and unjust impression of proceedings is given.
- (9) It is not enough to correctly report part of the proceedings if by leaving out other parts you create a false impression.
- (10) Reports assuming a verdict are not privileged.
- (11) A report that accurately sets out the summing-up or judgment is privileged, even if defamatory statements are made in that summing-up or judgment.²²
- (12) Gatley suggested that 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 its conclusion. The High Court in *Philpott* noted that this point did not arise in the case, but the Court nonetheless expressed the view that “Irish law may well

¹⁷ Mullis and Parkes, *Gatley on Libel and Slander*, 12th ed (Sweet and Maxwell, 2013). The cases cited in footnotes 18-21 are those in *Gatley*, and were not cited in the judgment in *Philpott*.

¹⁸ *Lewis v Levy* (1858) EB & E 537.

¹⁹ *Turner v Sullivan* (1862) 6 LT (NS) 130.

²⁰ *Macdougall v Knight & Son* (1886) 17 QBD 636.

²¹ *Hope v Leng* (1907) TLR 243.

²² This was also the view taken by the High Court (Peart J) in *McKeogh v Doe* [2012] IEHC 95, where the Court held that “the mere reporting of proceedings in which the plaintiff claims against others that he has been defamed does not of itself constitute a repetition of that defamation, provided that it is fair and accurate.”

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? On this point the Court departs from the *Gatley* principles."

(13) A liberal and common sense approach should be taken.

1.25 It is therefore clear from these principles that a report of proceedings will not lose its privilege if it contains a slight inaccuracy. In *Kimber v Press Association*,²³ 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 could not make the report unfair.

1.26 Similarly, in *Karim v Newsquest Media Group*,²⁴ the English High Court held that a failure to present the claimant's side of the story fully 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.

1.27 However, if a report contains a substantial inaccuracy, it will not be regarded as "fair and accurate" and will therefore forfeit the absolute privilege in section 17 of the 2009 Act. *Gatley on Libel and Slander* provides a number of examples of substantial inaccuracies which have caused court reports to lose their privilege. These include:

- (1) *Geary v Alger*,²⁵ where the report contained statements not actually made in court;
- (2) *Grech v Odhams Press Ltd*,²⁶ where a witness statement was presented as fact; and
- (3) *Qadir v Associated Newspapers Ltd*,²⁷ where the trial judge clarified a statement made by counsel in court but this clarification was not reported.

1.28 Where a substantial inaccuracy exists, the report will not be privileged, even if the publisher exercised all due diligence in verifying the facts, and even if the mistake

²³ [1893] 1 QB 65.

²⁴ [2009] EWHC 3205.

²⁵ (1925) 57 OLR 218.

²⁶ [1958] 2 QB 271.

²⁷ [2012] EWHC 2606.

was an honest one. It may be difficult, however, to differentiate clearly between what amounts to a significant inaccuracy as opposed to a minor inaccuracy.

Questions for Issue 1

Q 1.01 Do you consider that the current principles used to interpret what constitutes a “fair and accurate” report of proceedings under section 17 of the *Defamation Act 2009*, as applied in *Philpott v Irish Examiner Ltd*, are sufficiently clear and well-understood?

Q 1.02 If the answer to Q 1.01 is yes, do you consider that these principles, or some of them, should be incorporated into the 2009 Act?

ISSUE 2

WHO MAY CLAIM THE ABSOLUTE PRIVILEGE FOR A “FAIR AND ACCURATE” REPORT?

2.01 Under the *Defamation Act 1961*, it was necessary that a report of proceedings be contemporaneous to attract absolute privilege. However, the *Defamation Act 2009* no longer places this requirement on a publication. Therefore, it is possible for a report published later in time to be considered a report of proceedings in court under section 17 of the 2009 Act.

2.02 In *Philpott v Irish Examiner Ltd*,²⁸ the High Court, as already noted above, held that a person need not necessarily be present in court for the entire case for a report of proceedings to come within section 17 of the 2009 Act.²⁹ The Court in *Philpott* also held that a report of proceedings in court could be based solely on a written judgment of a court and could still constitute a report for the purposes of the absolute privilege defence.³⁰

2.03 This can be seen as, essentially, a necessarily pragmatic approach. In the context of the traditional news media, it would be difficult for newspapers, in particular smaller local papers, to send a representative journalist to every case they wished to cover. Indeed, it is also the case that others, such as journalists who are also opinion writers, academic writers, and members of the public generally – including “citizen journalists” – may report, or comment on, court decisions, including judgments posted online, without having been physically present in court.

2.04 The approach taken in *Philpott* reflects well-established case law. In *Deman v Associated Newspapers Ltd*,³¹ the English High Court (Eady J) 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 lay people. In *Deman* the Court held that a report containing a “number of sloppy but peripheral inaccuracies”³² would not lose its absolute privilege. The inaccuracies, such as reporting that the case was heard in the High Court when in fact it took place before

²⁸ [2016] IEHC 62.

²⁹ *Ibid* at [34].

³⁰ *Ibid*.

³¹ [2016] EWHC 2819.

³² *Ibid* at [20].

the English Employment Appeals Tribunal, were held not to undermine the fairness and accuracy of the report, or “indeed its overall character.”³³ The Court also noted that, traditionally, the courts have adopted a broad interpretation of the concept of “fair and accurate” reports of proceedings, particularly in relation to reports compiled by lay people. (The long line of case law to the effect that the absolute privilege applies to reports of court proceedings by persons other than professional journalists is discussed below.)

2.05 Nonetheless, at the other end of the spectrum, the defence will not 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*,³⁴ the English High Court (Eady J) held that independent material which discusses a person involved in a court case, but not the case itself, cannot be regarded as a report of court proceedings to which the fair and accurate defence can apply. This case involved a claim that the defendants, a number of news broadcast channels, over the course of a year committed a “campaign of abuse and defamation against the claimant.”³⁵ 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 before the High Court of Sindh, in India, involving the claimant. However, the Court held that the broadcast “made no mention of the proceedings and, therefore, could not be regarded as a report for this purpose.”³⁶ The material was “independent” and could not be held to constitute a report of court proceedings.³⁷

1. Who may claim the absolute privilege for a “fair and accurate” report of proceedings?

2.06 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 individuals continue to play an important role by enabling the public to have 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 of those proceedings to the public in general. As already noted, in *Irish Times Ltd v Ireland*³⁸ 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 they “are entitled to be informed of the proceedings in the

³³ *Ibid.*

³⁴ [2016] EWHC 3110; [2017] 4 WLR 22.

³⁵ *Ibid* at [4].

³⁶ *Ibid* at [39].

³⁷ *Ibid.*

³⁸ [1998] 1 IR 359 at 383.

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.”

2.07 Nonetheless, as noted in *Deman v Associated Newspapers Ltd*,³⁹ the absolute privilege in section 17 for “fair and accurate” reports is not confined to professional journalists but also applies to “fair and accurate” reports by lay people. McMahon and Binchy also note that the privilege under section 17(2)(i) of the 2009 Act is not confined to reports of proceedings by professional journalists, but that the privilege applies to *any* fair and accurate reports.⁴⁰

2. The general impact of the internet and social media

2.08 The internet has been described as a “communications revolution.”⁴¹ Nowadays, material may be published by any person with access to a suitable device and, within a matter of hours, minutes, or even seconds, can be seen by a vast audience. The internet allows communication with a worldwide audience. The internet also potentially entails permanence, in that material posted online may stay there indefinitely.

2.09 It is therefore prudent to include some discussion on the impact the internet and social media has on the question posed by the Attorney General.

2.10 The anonymous nature of internet websites, such as message boards, forums and blogs, means that potentially defamatory material is more likely to be published online than in more traditional forms of media. Due to the open nature of our court system, any member of the public can observe most court proceedings. If they so wish, they can publish comments relevant to the proceedings online, either on their own personal social media accounts, or on sites such as discussion forums. This applies to cases other than those in respect of which, in accordance with Article 34 of the Constitution, proceedings are held in private (*in camera*), such as family law or child care proceedings, or for which specific restrictions may apply, such as the exclusion of the general public from attending criminal proceedings involving children or from attending rape trials.

2.11 Furthermore, “[s]ocial media impact not only journalistic processes, but also transform and empower the audience for news.”⁴² Consumers of news nowadays are more likely to access it online and “[r]eaders do not automatically rely on the editorial judgement of professional newspaper editors even to create the front page.”⁴³ The social aspect of news is ever increasing. As such:

³⁹ [2016] EWHC 2819.

⁴⁰ McMahon and Binchy, *Law of Torts*, 4th ed (Bloomsbury Professional, 2013) at 1302.

⁴¹ Collins, *The Law of Defamation and the Internet*, 3ed (Oxford University Press, 2010) at 3.

⁴² Levi, “Social Media and the Press” (2012) 90 NCL Rev 1531, at 1550.

⁴³ *Ibid.*

“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.’”⁴⁴

- 2.12 The internet has also changed the nature of communication. Sites such as Twitter and Snapchat encourage the shortening of messages. Another way that the nature of communication has been changed by the internet is the growth in popularity of emoticons – small pictorial representations of a person’s feelings. It might be thought that, from a legal perspective, emoticons are rather innocuous. However, in *McAlpine v Bercow*⁴⁵ the English High Court held that a “tweet suffixed with an emoticon could be defamatory.”⁴⁶ The defendant, Ms Bercow, had published a tweet on her account which read “Why is Lord McAlpine trending?” which was followed by “*Innocent face*”. This tweet was published following the broadcast of a BBC current affairs programme, *Newsnight*, in which it was alleged that a “leading Conservative politician from the Thatcher years” had abused a boy living in care facilities a number of decades previously.
- 2.13 Unsurprisingly, the programme resulted in much discussion and speculation, particularly with regard to the identity of the “leading Conservative politician.” The English High Court noted that “speculation was rife as to the identity of the accused and Lord McAlpine’s name had been repeated on Twitter to the extent that it began to ‘trend’”.
- 2.14 Lord McAlpine subsequently issued legal proceedings and applied for a preliminary ruling on the tweet’s meaning. It was held that the “reasonable reader would understand the words “*Innocent face*” to be insincere and ironical”⁴⁷ in circumstances where the tweet asked why Lord McAlpine was trending when he was not otherwise in the public eye and where there was much speculation as to the identity of an unnamed senior political figure. As such, it “was therefore reasonable for the reader to infer that the claimant’s name was trending because he fitted the description of the unnamed abuser.”⁴⁸ As a result, the Court “found the Tweet to mean that the claimant was a paedophile who was guilty of sexually abusing boys living in his care.”⁴⁹ A settlement of the proceedings was reached after the Court’s finding.
- 2.15 Agate comments that the decision “highlights the inherent risk of using emoticons and other such devices which demonstrate state of mind or intention behind a tweet

⁴⁴ Moran, “Mass-mediated ‘open justice’: court and judicial reports in the Press in England and Wales” (2014) 34(1) *Legal Studies* 143, at 144.

⁴⁵ [2013] EWHC 1342.

⁴⁶ Agate, “McAlpine, the Attorney General and the Defamation Act – social media accountability in 2013” (2013) 24(7) *Ent LR* 233, at 233.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid* at 234.

or other publication... The use of such phrases, in addition to emoticons could clearly make the court's role a little easier when establishing the state of mind of the writer, most notably where malice is at issue."⁵⁰ It has been noted that the decision represents "a warning to social media users"⁵¹ which could also apply to journalists tweeting from their personal accounts.

2.16 In the United States, in 2011, the Associated Press settled a lawsuit with an NBA referee for \$20,000 over a tweet which, it was claimed, implied that the referee fixed a game.⁵² This is just one example of many involving a defamatory comment being made online via social media. More notable, however, is the impact that social media has had on the *effect* of defamation laws in the USA as opposed to social media resulting in direct changes to the laws themselves. Levi notes that "it is likely that journalistic shortcuts enabled and perhaps even fostered by social media will increasingly focus courts on judging the appropriateness of journalistic practices."⁵³ For instance, in *Herbert v Lando*,⁵⁴ the US Supreme Court allowed defamation plaintiffs to make enquiries as to the editorial practices of the press. In *Harte-Hanks v Connaughton*,⁵⁵ appellate courts were given the right of independent review of the existence of actual malice in defamation cases.

2.17 Additionally, "[t]o the extent that journalism involving social media relies on 140 character Twitter quotes, citizen journalist video footage, open newsrooms, and collaborative journalism, there is a greater likelihood that courts will find liability on the ground that a report was defamatory because it was insufficiently contextual."⁵⁶ As such, journalists must take care to ensure that their articles are sufficiently clear and that they are not ambiguous or capable of being interpreted in a manner different to that intended. It has been argued that "[j]ournalistic changes may also help defamation plaintiffs more easily establish actual malice on the part of defamation defendants."⁵⁷

3. To what extent should existing law be reformed to reflect the influence of the internet?

2.18 The discussion above indicates that the advent of the internet has changed traditional journalistic practices while also heralding in a new form of "citizen journalism" and these developments have also begun to have an impact on the operation of defamation laws. The Commission now turns to consider what effect, if any, these developments should have on section 17 of the 2009 Act, in particular to what extent

⁵⁰ *Ibid* at 233.

⁵¹ *Ibid*.

⁵² <http://www.adweek.com/digital/the-ap-settles-over-nba-twitter-lawsuit-pays-20000-fine/>

⁵³ Levi, "Social Media and the Press" (2012) 90 NCL Rev 1531, at 1575.

⁵⁴ 441 US 153 (1979).

⁵⁵ 491 US 657 (1989).

⁵⁶ Levi, "Social Media and the Press" (2012) 90 NCL Rev 1531, at 1576.

⁵⁷ *Ibid*.

it may need to be reformed to reflect the significant role that the internet now plays in the publishing of reports of court proceedings.

2.19 Research carried out by Ipsos MORI in 2017 indicated that 3 million adults in Ireland aged between 18 and 75, equivalent to 90% of the adult population, were smartphone users, checking their devices an average of 57 times a day.⁵⁸ It is reasonable to assume that most of those 3 million adults use their devices to access the internet. Countless news sources are now available to citizens on the internet. The impact of the internet on news and court reporting should not be ignored, and has already been commented on in the Irish courts. In *Tansey v Gill*⁵⁹ the High Court (Peart J) stated:

“The Internet has facilitated an inexpensive, easy and instantaneous means whereby unscrupulous persons or ill-motivated malcontents may give vent to their anger and their perceived grievances against any person... By such means, anything can be said publicly about any person, and about aspect of their life whether private or public, with relative impunity, and anonymously, whereby reputations can be instantly and permanently damaged.”

2.20 The New Zealand Law Commission has also commented on the impact of modern communication technology:

“Old format-based distinctions between print and broadcasting are dissolving as news media companies create and distribute content in a variety of formats and channels for access via an array of devices. And increasingly, mainstream media are harnessing the power of social media and user-generated content to source, promote and distribute their own content.”⁶⁰

2.21 A significant result of this is that “the direct relationship that once existed between the courts and the public has been largely displaced; the modern public relies heavily – often exclusively – on the news media to provide it with information about the courts.”⁶¹ Since the news media now carries out this function online (at least to a large extent), it is prudent to consider who or what exactly qualifies as the “news media” in today’s internet-enabled culture of instant communication. Additionally, consideration should also be given to the exact level of freedom that the news media enjoys.

⁵⁸ <https://www.rte.ie/news/2017/1205/925007-smartphone/>.

⁵⁹ *Tansey v Gill* [2012] IEHC 42 at para. 25. The Commission discussed the positive, and negative, effects of the digital revolution in communications in its 2016 *Report on Harmful Communications and Digital Safety* (LRC 116-2016).

⁶⁰ New Zealand Law Commission, *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* Report 128 (2013) at 22.

⁶¹ Rodrick, “Achieving the Aims of Open Justice – The Relationship between the Courts, the Media and the Public” (2014) 19 *Deakin L Rev* 123, at 131-132.

4. What does “freedom of the press” involve?

2.22 It has long been established that the idea of journalistic freedom is an essential aspect of a free and democratic society. This may also be referred to “freedom of the press”. However, it has been noted that “there is no common ground as to what the ‘freedom of the press’ actually means.”⁶² A full discussion of the various interpretations of the term “freedom of the press” is beyond the scope of this Paper. One interpretation, favoured by Rytter, is that of “public watchdog” – “the function of the press is not merely that of providing independent information, but also one of controlling authorities on the public’s behalf... an institution performing the task of ‘public watchdog’.”⁶³

2.23 This phrase refers to the role that the media plays as many people’s “eyes and ears”, particularly with regard to reports of court proceedings. Since many people do not attend courts in person to observe proceedings as they take place, they rely on the media to report on this and impart this information. This interpretation “ensures that the press will be effective in its function of ‘public watchdog’, since it may only be restricted in its efforts to gather and disseminate information of public interest, even by general laws, when in the circumstances of each case overriding considerations so require.”⁶⁴

2.24 Following on from this, the question of who exactly should be afforded the privileges that attach to media status, as well as the responsibilities attached to it, must be considered. The traditional news media may no longer be the first to publish news stories, and are no longer regarded as the *sole* source of news stories. In New Zealand, this has resulted in “a growing concern about the disparity in the ethical and legal standards and accountabilities... applied to mainstream media and new media.”⁶⁵

5. Who or what qualifies as the “news media”?

2.25 It is therefore necessary to attempt to define the term “news media” before considering whether the privileges that attach to such media should be extended to others who may discuss and comment on the news in an online setting. The New Zealand Law Commission consider that a key feature of the news media is that:

2.26 “the public must be able to rely on the truthfulness, or accuracy, of what they read. Fact and opinion needed to be clearly differentiated. And the public needed to be

⁶² Rytter, “Which Freedom of the Press? – The Press Conceived as an ‘Open Forum’ or a ‘Privileged Watchdog’ (2010) 55 *Scandinavian Studies in Law*, 181, at 182.

⁶³ *Ibid* at 193.

⁶⁴ *Ibid* at 195.

⁶⁵ New Zealand Law Commission, *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* Report 128 (2013) at 30.

confident that the news media did not use its considerable power and influence to deliberately mislead or cause unjustifiable harm.”⁶⁶

2.27 It is unlikely that this feature of the news media is applicable to most online bloggers or commentators, in particular because they are not currently subject to any significant oversight. Conversely, it may be argued that due to the massive growth of information technology and the internet in recent years, the so-called news media no longer have a monopoly on disseminating and reporting the news.

2.28 It is for this reason that a number of criteria have been suggested by the New Zealand Law Commission for an entity to meet in order to qualify for statutory privileges:⁶⁷

- (1) A significant proportion of their publishing activities involve the generation and/or aggregation of news, information and opinion of current value;
- (2) They disseminate this information to a public audience;
- (3) Publication is regular and not occasional; and
- (4) The publisher is accountable to a code of ethics and a complaints process.

2.29 The New Zealand Law Commission note that, by recommending the implementation of what it has described as a liberal set of criteria, they are “recognising the public interest in fostering a diverse, resilient and truly independent news media. However we do not believe that our liberal definition will undermine the legitimacy of mainstream media.”⁶⁸ This is because the criteria suggested require the publisher to be accountable to a code of ethics and complaints process, thereby alleviating the concerns regarding online commentators who are not journalists and who lack any oversight.

2.30 In Ireland, when the *in camera* reporting restrictions on family law cases were relaxed by section 40 of the *Civil Liability and Courts Act 2004* (later extended to certain child care proceedings by the *Courts and Civil Law (Miscellaneous Provisions) Act 2013*) to allow some reporting of those types of cases, this was confined to “*bona fide* members of the press” and to a prescribed group of other persons, such as family mediators accredited to the Mediators Institute Ireland, persons engaged by the Courts Service to prepare court reports of proceedings, and to persons engaged in family law research nominated by specified bodies such as a university, the Economic and Social Research Institute or the Law Reform Commission.⁶⁹

2.31 Section 40 of the 2004 Act allows bona fide members of the press and other specified persons to report on family law and child care proceedings, subject to strict

⁶⁶ *Ibid* at 56.

⁶⁷ *Ibid* at 66.

⁶⁸ *Ibid* at 71.

⁶⁹ *Civil Liability and Courts Act 2004 (Section 40(3)) Regulations 2005* (SI No.337 of 2005).

conditions, for example, not releasing any information which could lead to the identification of the parties involved. Section 40 of the 2004 Act also provides that the court retains its discretion to exclude the media or other persons from a case where it is in the interests of justice to do so.

2.32 Section 40 of the 2004 Act does not define “bona fide members of the press”, but, in 2018 the Courts Service issued a “working definition” of what constitutes a bona fide member of the media for the purpose of the rules on access to court documents made under the *Data Protection Act 2018*. As discussed further below, this working definition includes 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 (a body recognised under section 44 of the *Defamation Act 2009*)⁷⁰ or the Broadcasting Authority of Ireland, or an International Federation of Journalists Press Card.

2.33 From a more theoretical perspective, Rytter discusses two possible definitions of “the press” – functional and institutional. “A *functional* definition of “the press” would hold that even information gathering activities undertaken by private persons may qualify for a journalist’s privilege, on the condition that the activity was from the outset undertaken for the purpose of subsequent publication to the public.”⁷¹ This definition would cover persons who take it upon themselves to, for example, attend a court case and blog about it online as it progresses. This functional definition also takes account of the enormous impact the internet has had on the dissemination of news. “In an age when the barriers to mass communication have been reduced to previously unimaginably low levels, it is arguable that the public no longer depends on the news media for a clear and truthful account of events.”⁷² An alternative way of interpreting the functional definition would be to require the private journalistic activity “should be performed regularly”.⁷³ This would mean that commentators on forums and social media sites would not fall under the definition unless they were *regularly* disseminating news and information in a manner similar to the media.

2.34 The second definition suggested by Rytter is an institutional definition. He comments that this definition “would seem more in line with the logic and tradition of the ‘privileged watchdog’ conception. Accordingly, [former US Supreme Court] Justice Stewart considers the privileged press to include ‘the organized press... the daily newspapers and other established news media.’”⁷⁴ The New Zealand Law Commission supports this definition, and commented that “there remain[s] a public interest in continuing to recognise the news media as a special class of publisher

⁷⁰ See para. 2.59 below.

⁷¹ Rytter, “Which Freedom of the Press? – The Press Conceived as an ‘Open Forum’ or a ‘Privileged Watchdog’ (2010) 55 *Scandinavian Studies in Law* 181, at 196.

⁷² New Zealand Law Commission, *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* Report 128 (2013) at 56.

⁷³ Rytter, “Which Freedom of the Press? – The Press Conceived as an ‘Open Forum’ or a ‘Privileged Watchdog’ (2010) 55 *Scandinavian Studies in Law* 181, at 196.

⁷⁴ *Ibid.*

with distinguishing rights and responsibilities arising from the functions they perform.”⁷⁵

6. Bloggers may be considered as journalists

- 2.35 As already noted, the High Court decision in *Philpott v Irish Examiner Ltd*⁷⁶ applied a series of principles in determining what constitutes a “fair and accurate” report of proceedings under section 17 of the *Defamation Act 2009*. A number of these principles, including that the report need not be contemporaneous and need not be made by a person present in court for the proceedings, indicate that online “citizen journalists” may come within the ambit of section 17, provided the report meets the other principles of a “fair and accurate” report. This is consistent with other case law, such as the English High Court decision in *Deman v Associated Newspapers Ltd*,⁷⁷ which noted that the courts have long adopted a broad interpretation of what constitutes a “fair and accurate” reports, particularly reports compiled by people other than professional journalists.
- 2.36 Two other cases also provide guidance on this. The New Zealand case *Slater v Blomfeld*⁷⁸ involved the appellant, a blogger, being sued for defamation by the respondent. The issues to be considered by the court were whether the appellant could be considered a “journalist” for the purposes of section 68 of the New Zealand *Evidence Act 2006*, and whether his blog could be considered a “news medium” under that section. Section 68 of the 2006 Act provides that journalists, if they have promised an informant that they will not disclose their identity, are not compellable in civil or criminal proceedings to answer any question or produce any document that would result in the identity of the informant being disclosed. The appellant appealed against a previous decision which declined to extend the application of section 68 to him on the basis that he was not a journalist, and that his website was not a “news medium.”
- 2.37 The New Zealand High Court (Asher J) noted that “[d]ifferences between bloggers and traditional news media must be recognised.”⁷⁹ One such difference is the cost factor, that is, that it costs little to no money to establish a blog website and update it. As such, “websites are considerably more susceptible to operators who do not observe good journalistic standards than traditional members of the media.”⁸⁰ 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

⁷⁵ New Zealand Law Commission, *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* Report 128 (2013) at 57.

⁷⁶ [2016] IEHC 62.

⁷⁷ [2016] EWHC 2819.

⁷⁸ [2014] NZHC 2221.

⁷⁹ *Ibid* at para. [48].

⁸⁰ *Ibid*.

breaking news.”⁸¹ In addition, the existence of such websites means that “fresh perspectives are presented and the public have more choice.”⁸²

2.38 The Court concluded that the appellant 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.”⁸³ This is in line with the recommendations of the New Zealand Law Commission, discussed above, regarding the criteria to be met by a person or entity seeking to qualify for statutory privileges.

2.39 A similar Irish case is *Cornec v Morrice & Ors*.⁸⁴ This case also involved the question of 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, was a director of an independent organisation called Dialogue Ireland who regularly appeared in the media and blogged about issues relating to cults. The High Court (Hogan J) noted that “[w]hile Mr Garde is not a journalist in the strict sense of the term, it is clear from 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.”⁸⁵

2.40 The Court went on to state that:

“Yet Mr Garde’s activities fall squarely within the “education of the public” envisaged by Article 40.6.1° [of the Constitution of Ireland]. 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 those views in relation to the actions of religious cults is protected.”⁸⁶

2.41 This is a strong statement from the High Court regarding the status of bloggers and other internet users as having, in some instances at least, a constitutional status as “organs of public opinion” that is comparable to journalists. It thus appears that that if one blogs, in an informative and regular manner, about issues which could reasonably be considered to be issues of “public opinion”, then it is arguable that the views expressed have constitutional value.

⁸¹ *Ibid* at para. [49].

⁸² *Ibid*.

⁸³ *Ibid* at para. [54] (emphasis added).

⁸⁴ [2012] 1 IR 804.

⁸⁵ *Ibid* at 825.

⁸⁶ *Ibid*.

2.42 There is certainly an argument to be made for affording bloggers and other internet users the same or comparable status as a journalist for certain purposes, provided they meet certain criteria. As noted above, the internet is a powerful tool which “promises to eliminate structural and financial barriers to meaningful public discourse, thereby making public discourse more democratic and inclusive... and, at least, potentially, richer and more nuanced.”⁸⁷

2.43 To conclude, it can be seen that a number of characteristics are common in the above discussion of both the case law and the commentary on who or what constitutes the news media:

- (1) Gathering of information with the intention of publication to the public;
- (2) Such publication is regular; and
- (3) The publication is for the purpose of disseminating news.

7. Reporting court proceedings and data protection

2.44 The absolute privilege in section 17 of 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.

2.45 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 Joe Bloggs, other than the murder accused, may rightly object if he was wrongly identified by persons who knew him as a murder suspect. 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.

2.46 The question therefore arises whether access to such information is permitted under the 2016 General Data Protection Regulation, Regulation (EU) 2016/679 (the GDPR), which was implemented by the *Data Protection Act 2018*. The answer is, broadly, yes but subject to specific requirements.

2.47 Thus, Article 23 of the GDPR provides that certain limitations can be placed on the general GDPR rights of data subjects, such as the general right that the person’s consent must be obtained before access to his or her personal data can be obtained. Article 23 provides that the general right to have the person’s consent can be restricted where this is consistent with fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard, among

⁸⁷ Lidsky, “Silencing John Doe: Defamation and Discourse in Cyberspace” (2000) 49 Duke LJ 855, at 894.

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 in Part 8 of the *Data Protection Act 2018*, in particular by sections 158 to 160 of the 2018 Act.

2.48 Thus, section 159(7) of the 2018 Act provides that a 3 judge Committee nominated by the Chief Justice may make statutory rules:

“(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.”

2.49 It is notable that section 159(7) 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(7) also refers to “bona fide member of the Press or broadcast media” in terms of the scope of its application, which also reflects the language used in section 40 of the *Civil Liability and Courts Act 2004* which, as discussed above, provided for access to what would otherwise be private (*in camera*) court proceedings for bona fide members of the press, and for other specified persons engaged in research.

2.50 The *Data Protection Act 2018 (Section 159(1)) Rules 2018*,⁸⁸ made under section 159 of the 2018 Act, and which came into operation on 1 August 2018, provide that a court official may provide personal data related to a court record to a range of persons, including the party to proceedings, a legal representative of the party and “to a bona fide member of the Press or broadcast media in accordance with rules made under section 159(7) of the 2018 Act.” 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*,⁸⁹ which also came into force on 1 August 2018.

2.51 Rule 3(3) of these 2018 rules, concerning access to court documents in the superior courts, provide 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;

⁸⁸ Section 159(6) of the *Data Protection Act 2018* provides that rules made under 159 of the 2018 Act “shall be published in such manner (which may include publication on the website of the Courts Service) as the [3 person] panel [nominated by the Chief Justice to make the rules] considers appropriate.” At the time of writing (August 2018), the *Data Protection Act 2018 (Section 159(1)) Rules 2018* are available on the website of the Courts Service, www.courts.ie.

⁸⁹ Comparable rules were also made in respect of proceedings in the Circuit Court and the District Court: *Data Protection Act 2018 (Section 159(7): Circuit Court) Rules 2018* and *Data Protection Act 2018 (Section 159(7): District Court) Rules 2018*. As noted in footnote 87, in accordance with section 159(6) of the *Data Protection Act 2018*, each of the 2018 Rules is available on the website of the Courts Service, www.courts.ie. At the time of writing (August 2018), none of these 2018 Rules had a specific number to identify them separately from each other.

(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 the completion of the reporting of the hearing by the requester; or (iii) by the provision of a press release or the provision in oral or written form of other information concerning the proceedings prepared by that person.

2.52 Rule 3(4) of these 2018 rules provide 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 to 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), above.

2.53 It is clear that these arrangements provide for a process by which bona fide members of the press or media can continue to obtain access to important information, including personal data, notably to facilitate as far as possible that the report 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 *Data Protection Act 2018*.

2.54 While section 179 of the 2018 Act, like section 40 of the *Civil Liability and Courts Act 2004* (discussed above), refers to bona fide members of the press and media, there is no statutory definition of this term. Indeed, this may be understandable given the changing nature of the media in general in recent years, in particular the advent of online media, some of which can now be regarded as part of what might be called the mainstream media. Much of what the “traditional” paper-based media published is either enhanced by an online presence, is placed behind an online paywall or in some instances has an online presence only.

2.55 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 “working definition” of what constitutes a bona fide member of the 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.

2.56 The Commission considers that this working definition may be of use in determining the scope of bona fide members of the press and media for the purposes of this project, and seeks the views of interested parties on this matter.

8. Accountability issues: should there be the equivalent of a Press Council for internet journalists?

2.57 In light of the internet's impact on media and court reporting, discussed above, it is appropriate to consider whether, in order to obtain the benefit of the absolute privilege or immunity conferred by section 17 of the *Defamation Act 2009*, some specific form of accountability might be imposed on those who report court proceedings. This presents a number of challenges. The media, as broadly defined, must be held properly accountable whilst at the same time allowing them the freedom and scope to report the news without fear of legal action at every turn. "The problem arises... when defamation law "over-deters" – that is, when it deters speech that is truthful or non-defamatory – for such speech occupies a "preferred position" in the constitutional hierarchy of values."⁹⁰ In other words, any accountability measures must not have a "chilling effect" on media reporting. However, it must be borne in mind that "[i]n the digital environment, damaging content published by the mass media has unprecedented reach and permanence."⁹¹ There needs to be an appropriate balance struck between these considerations.⁹²

2.58 Persons who find themselves affected by a media publication and who wish to seek redress must have viable, practical options available in order to properly be able to achieve this. "[W]hile it is true that citizens have the right to seek redress through the courts when the published content breaches the law, the reality is that the expense of pursuing a civil action for defamation... means this is simply not a meaningful remedy for most private citizens."⁹³

2.59 A possible solution is the establishment of a media standards body that would be responsible for the regulation of all forms of media, not just traditional print and broadcast media. It has been argued that "it is problematic to continue with a parallel regulatory system that involves multiple bodies operating under different criteria."⁹⁴ In Ireland, the media is regulated by the Press Council of Ireland and the Broadcasting Authority of Ireland. 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 *Defamation Act 2009* provides for the recognition of such a body as meeting the requirements in Schedule 2 of the 2009 Act itself. In 2010, the Minister for Justice made an order under section 44 recognising the Press Council for these purposes.⁹⁵

⁹⁰ Lidsky, 'Silencing John Doe: Defamation and Discourse in Cyberspace' (2000) 49 Duke LJ 855, at 888.

⁹¹ New Zealand Law Commission, *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* Report 128 (2013) at 96.

⁹² The Commission also analysed the competing rights and interests in its 2016 *Report on Harmful Communications and Digital Safety* (LRC 116-2016).

⁹³ New Zealand Law Commission, *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* Report 128 (2013) at 96.

⁹⁴ *Ibid* at 130.

⁹⁵ Defamation Act 2009 (Press Council) Order 2010 (S.I. No. 163 of 2010).

The principal objects of the Press Council include protecting the public interest by ensuring ethical, accurate and truthful reporting by the press and maintaining certain minimum ethical and professional standards amongst the press.⁹⁶ The Broadcasting Authority of Ireland is also a statutory body established by the *Broadcasting Act 2009*.

2.60 These bodies were established before the advent of internet media reporting that we see today, and so they do not take full account of this significant development. Two possible solutions have been suggested to address this: a single regulatory body for the media or more express provision for online media within the existing framework.

2.61 The New Zealand Law Commission has expressed a preference for a single converged standards body.⁹⁷ As in Ireland, New Zealand currently has a Press Council and Broadcasting Standards Authority. The primary reason for the New Zealand Law Commission preferring a single body governing all forms of media is due to a “lack of parity and the gaps in the coverage of these two complaints bodies. These gaps have occurred as new web-based publishers undertaking “news-like activities” emerge and as traditional print and broadcast media converge online.”⁹⁸ Indeed, this was foreseen by Ellis in 2005:

“The digital future is one in which convergence will render delivery methods immaterial and the replacement of single-medium organisations with multimedia structures will be complete. As the future unfolds it will be increasingly difficult to clearly differentiate between print and broadcasting (streaming video and customised newspapers will be downloaded to one device) and, hence, the dichotomous treatment of print and broadcast will be increasingly questionable.”⁹⁹

2.62 This approach has also been advocated for in the Australian Finkelstein Report in 2012,¹⁰⁰ which noted that “[w]here many publishers transmit the same story on different platforms it is logical that there be one regulatory regime covering them all.”¹⁰¹

2.63 A second approach is that online media could be regulated within the current framework. This has been the approach in Scandinavian countries. For instance, the Danish Press Council has included blogs and certain Twitter accounts as members. Additionally, the Norwegian Press Council has extended its jurisdiction to social

⁹⁶ *Defamation Act 2009*, Schedule 2.

⁹⁷ New Zealand Law Commission, *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* Report 128 (2013) at 131.

⁹⁸ *Ibid* at 97.

⁹⁹ Ellis, “Different Strokes for Different Folk: Regulatory Distinctions in New Zealand Media” (2005) 11 *Pacific Journalism Review* 63, at 78.

¹⁰⁰ The Hon R Finkelstein QC, *Report of the Independent Inquiry into the Media and Media Regulation* (Report to the Minister for Broadband, Communications and Digital Economy, Canberra, 2012).

¹⁰¹ *Ibid* at 8-9.

media websites where journalists use these sites in connection with their journalism. The following is a brief overview concerning how the media is regulated in a number of European jurisdictions.¹⁰²

- 2.64 The Swedish Press Council was established in 1916 and is therefore one of the oldest in the world. Fielden notes that it has jurisdiction over both traditional print journalism and online journalism. It is notable that “[o]nly those personally affected by a publication can bring a complaint.”¹⁰³ It is also notable that Sweden ranks second in the 2018 World Press Freedom Index.¹⁰⁴
- 2.65 In Germany, the German Press Council is based on a self-regulation model. Thus, only publishers and journalists sit on the Press Council board and there are no independent representatives.¹⁰⁵ There are no restrictions on who can make a complaint to the German Press Council and this has been used by “watchblogs” set up to monitor the German press and hold it to account. These have succeeded in bringing complaints to the Press Council and “illustrate a vibrant context of wider media accountability.”¹⁰⁶
- 2.66 The Finnish press system is, like Germany’s, self-regulatory. Thus, the Council for Mass Media (CMM) has regulated news and current affairs in print and in broadcasting since it was established in 1968, and “has more recently added regulation of related online media and online-only providers.”¹⁰⁷
- 2.67 Fielden describes the Danish system of press regulation as “co-regulation”, which combines a certain amount of statutory regulation but also includes “key self-regulatory elements.”¹⁰⁸ The regulation of print and broadcast journalism is mandatory, whereas “there are strong incentives for online providers voluntarily to register with the Press Council.”¹⁰⁹

¹⁰² This overview is based on Fielden, *Regulating the Press: A Comparative Study of International Press Councils* (Reuters Institute for the Study of Journalism, University of Oxford, 2012).

¹⁰³ Fielden, *Regulating the Press: A Comparative Study of International Press Councils* (Reuters Institute for the Study of Journalism, University of Oxford, 2012) at 15.

¹⁰⁴ RTE.ie, ‘Media watchdog warns Ireland’s press freedom under threat’ 25th April 2018.

¹⁰⁵ Fielden, *Regulating the Press: A Comparative Study of International Press Councils* (Reuters Institute for the Study of Journalism, University of Oxford, 2012) at 16.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

Questions for Issue 2

- Q 2.01 Do you consider that the “fair and accurate” absolute privilege under section 17 of the 2009 Act should remain applicable not only to professional journalists but also to “citizen journalists” such as social media users or bloggers?**
- Q 2.02 Do you consider that the “fair and accurate” absolute privilege 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, bona fide members of the media, persons engaged by the Courts Service to prepare reports of court proceedings, and other persons engaged in legal research nominated by specified bodies such as a university or other statutory bodies?**
- Q 2.03 Do you consider that the working definition of bona fide member of the media issued by the Courts Service for the purposes of implementing the 2018 rules made under section 159 of the *Data Protection Act 2018* would provide a suitable model for the purposes of this project?**
- Q 2.04 Do you consider that the “fair and accurate” absolute privilege under section 17 of the 2009 Act be applied to all persons who subscribe to a specific set of standards that would be prescribed by a body, whether the Press Council or the Broadcasting Authority of Ireland or some other body, which would have responsibility for bona fide members of the media as well as “citizen journalists” such as social media users or bloggers?**

ISSUE 3

A NEW QUALIFIED PRIVILEGE FOR CERTAIN REPORTS OF COURT PROCEEDINGS?

3.01 In accordance with the Attorney General's request, the Commission has considered whether it would be appropriate to introduce a new qualified privilege for reports of court proceedings that do not meet the test of a "fair and accurate" report under section 17 of the 2009 Act. Such a qualified privilege would apply unless malice is established.

3.02 Section 19(1) of the *Defamation Act 2009* provides:

"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 the defendant acted with malice."

3.03 Although the 2009 Act does not define malice, it has been assumed that this statutory reference to malice operates in the same manner as common law malice.¹¹⁰

3.04 Qualified privilege at common law applies where communications take place for honest purposes, and, therefore, this privilege can be defeated by malice.¹¹¹ Such qualified privilege arises on occasions where there is a legal, moral or social duty to publish the information in question or when the person who receives the information has an interest in receiving it.¹¹² It does not matter if the information given turns out to be untrue, provided that the statement was not made with malice.

3.05 Cox and McCullough have 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.¹¹³ In relation to qualified privilege, it would seem that 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 publishing.¹¹⁴ However, malice can also be inferred from the fact that a publisher

¹¹⁰ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press, 2014) at 286.

¹¹¹ McGonagle, *Media Law*, 2nd ed (Thomson Roundhall, 2003) at 122.

¹¹² *Ibid* at 122.

¹¹³ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press, 2014), at 287.

¹¹⁴ *Ibid* at 289.

knew that the material in question was false or was reckless to the truth of the publication.¹¹⁵

3.06 In *Bray v Deutsche Bank AG*¹¹⁶ the English High Court found malice proved 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.¹¹⁷

3.07 The presence of malice can be inferred from internal or external factors.¹¹⁸ 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.¹¹⁹ External factors include the relationship between the parties and the circumstances of how the material was published.

3.08 As to the specific matter arising in this aspect of the Issues Paper, it is clear that, as already discussed in Issue 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 to fall within section 17 of the 2009 Act) and being made to a tight deadline, inaccuracies may occur.

3.09 It could, therefore, be argued, on the one hand, that the current system under section 17 of the 2009 Act, in which inaccuracies can expose a report of court proceedings to liability for defamation, may have a “chilling effect” on the level and quality of such reports.

3.10 It may, however, be argued on the other hand, that as the “fair and accurate” requirement would not apply to such a proposed new qualified privilege, this might lessen the burden placed on those making reports of court proceedings. In the case of professional journalists and their editors, this could lead to a decline in journalistic standards with the risk of increased dissemination of incorrect information to the public. In the case of bloggers and other online social media commentators, the proposed new qualified privilege might also encourage poor standards of reporting of court proceedings.

3.11 There is another constitutional aspect which should be considered, were the “fair and accurate” requirement removed, albeit in the context of the lesser protection of qualified privilege. Article 40.3.2° of the Constitution provides that the State shall protect and, in the case of injustice, vindicate the good name of every citizen. The law of defamation, therefore, must balance the right to a good name against the right to freedom of expression of the media, and of “citizen journalists”, and the right of the

¹¹⁵ *Loveless v Earl* [1999] EMLR 530.

¹¹⁶ [2009] EWHC 1356.

¹¹⁷ *Friend v Civil Aviation Authority* [2005] EWHC 201.

¹¹⁸ Cox and McCullough, *Defamation: Law and Practice* (Clarus Press, 2014), at 287.

¹¹⁹ *Hynes O'Sullivan v O'Driscoll* [1988] IR 43.

public to be informed of court proceedings. The removal of the “fair and accurate” requirement would, it may be argued, constitute a disproportionate restriction on the right to reputation and right to a good name, as fewer standards-based safeguards would then exist to protect and vindicate that right in the context of a report of court proceedings.

3.12 The Commission therefore seeks the views of interested parties on this matter. In addressing this issue, consultees are invited to consider whether, if such a privilege were to be introduced, the type of regulatory oversight discussed in Issue 2, above, would also merit consideration in this context.

Questions for Issue 3

Q 3.01 Do you consider that there should be enacted a new qualified privilege for a report of court proceedings, which would apply in the absence of proof of malice, where such a report falls short of being “fair and accurate”? Please provide your reasons.

Q 3.02 If your answer to Q 3.01 is yes, please indicate what, if any, conditions (whether the regulatory oversight discussed in Issue 2, or any other conditions) might apply to such a qualified privilege.

ISSUE 4

THE NEED FOR LEAVE TO BRING PROCEEDINGS?

4.01 The Attorney General also requested the Commission to consider whether a plaintiff in defamation proceedings 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 the mala fides alleged.

4.02 The right of access to the courts under Article 40.3 of the Constitution has been held by the courts to constitute, in effect, a right to litigate.¹²⁰ However, this right is not absolute and may be restricted. 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*¹²¹ 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.

4.03 In *McNamara v An Bord Pleanála (No. 1)*¹²² the High Court (Carroll J.) held that the “substantial grounds” requirement could include reasonable grounds that are arguable and not trivial or tenuous.¹²³ Similarly, the Supreme Court noted in *G v Director of Public Prosecutions*¹²⁴ 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.

4.04 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*¹²⁵ the Supreme Court held that the restriction on the right of access to 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

¹²⁰ *MacAuley v Minister for Posts and Telegraphs* [1966] IR 345.

¹²¹ [2000] 2 IR 360.

¹²² [1995] 2 ILRM 125.

¹²³ *Ibid.* at 130.

¹²⁴ [1994] 1 IR 374 at 382.

¹²⁵ [2009] IESC 40.

claim was brought had acted in bad faith or without reasonable care. The Supreme Court held that section 260 placed an impermissible interference with the right of access to the courts because it was restricted to two 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, provided that 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 grounds of proportionality.

4.05 In *Governey v Financial Services Ombudsman*¹²⁶ the Supreme Court held that when a restriction on the right to appeal involves a requirement to apply for leave the criteria to be fulfilled should be clear.¹²⁷ 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.¹²⁸ 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 appeal to the Supreme Court¹²⁹ but the applicant then applied to the Supreme Court for leave to apply to that 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 position that narrowed that constitutional right “should be strictly construed in a manner designed to confer rather than deny the constitutional entitlement to appeal.”¹³⁰ The Court also emphasised that there is nothing wrong with “legislation restricting... a right of appeal”¹³¹ but that the legislation should clearly state such a restriction. 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 mean that leave should be granted if there is a stateable basis for appeal.¹³² Ultimately leave to appeal was granted in the case.

4.06 The European Court of Human Rights has also held that the right of access to the courts is not absolute. In *Běleš and Ors v Czech Republic*,¹³³ the Court stated 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.”¹³⁴ Thus, limitations on access to justice will only be compatible with Article 6 of the European Convention on

¹²⁶ [2015] IESC 38.

¹²⁷ *Ibid* at 3.4.

¹²⁸ *Ibid*.

¹²⁹ *Governey v Financial Services Ombudsman* [2013] IEHC 403.

¹³⁰ *Governey v Financial Services Ombudsman* [2015] IESC 38 at 3.4.

¹³¹ *Ibid*.

¹³² *Ibid* at 3.6.

¹³³ No. 47273/99. The Court had also previously taken the same view in *Garcia Manibardo v Spain*, No. 38695/97, at para 36, ECHR 2000-II, and *Mortier v France*, no. 42195/98, at para 33, 31 July 2001.

¹³⁴ *Ibid* at 61.

Human Rights (ECHR) if there is a “reasonable relationship of proportionality between the means employed and the aim pursued.”¹³⁵ The Court 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.

4.07 Section 11(2) of the *Defamation Act 2009* contains a leave requirement in respect of a person seeking to take a defamation action in a case of multiple publications. Section 11 of the 2009 Act allows for one cause of action against multiple publications, unless the court considers it in the interests of justice to allow leave for more than one.

4.08 Although it is constitutionally permissible to place a requirement to seek leave on an applicant where it is proportionate, it could be argued that the imposition of a leave requirement is nonetheless undesirable, as it restricts the right of access to the courts and a potential plaintiff’s ability to defend his good name.

4.09 It could also be argued that a leave requirement is superfluous, because section 8 of the 2009 Act already requires that a plaintiff or defendant in a defamation action must swear an affidavit verifying his or her allegations. Under section 8(6) of the 2009 Act, it is an offence for a person to make a statement in an affidavit “(a) that is false or misleading in any material respect and (b) that he or she knows to be false or misleading.” McMahon and Binchy note that this requirement “should ensure that the parties will take great care in giving instructions to their lawyers.”¹³⁶ It is therefore arguable that section 8(6) of the 2009 Act provides sufficient protection against unfounded claims. The Commission seeks the views of consultees on this issue.

Question for Issue 4

Q 4.01 Do you consider that there should be a leave requirement for any proposed new qualified privilege, or do you consider that section 8 of the *Defamation Act 2009*, which requires both parties to swear an affidavit verifying their allegations, provide sufficient protection against unfounded claims?

¹³⁵ *Ibid.* See also *Edificaciones March Gallego SA v Spain* 19 February 1998.

¹³⁶ McMahon and Binchy, *Law of Torts*, 4th ed (Bloomsbury Professional, 2013) at 1245.

