

The Report is in response to a request in December 2015 from the then Attorney General under the [Law Reform Commission Act 1975](#) to examine and make recommendations on whether changes should be made to the [Defamation Act 2009](#) dealing with privilege for reports of court proceedings. The then Attorney General remarked at that time that those reporting court proceedings serve 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 those reporting court cases 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 for defamation. The Commission was asked to examine whether the law should provide that, in respect of a report of court proceedings, no claim under the 2009 Act should be actionable in the absence of proof of malice.

Current law on absolute privilege or immunity for reports of court proceedings

The current law, in the [Defamation Act 2009](#), is that there is an absolute privilege defence, in other words a complete immunity from being sued for defamation, where the case is about a “fair and accurate” report of court proceedings by any court in Ireland or Northern Ireland, or in certain international courts such as the EU Court of Justice.

Since the Attorney General’s request was made in 2015, the High Court, in *Philpott v Irish Examiner Ltd* (decided in 2016), has set out an indicative list of principles or criteria as to what is required to meet the test of a “fair and accurate” report of court proceedings under the [Defamation Act 2009](#). These include: the report does not have to be a word-for-word report; if the report as a whole is accurate, a slight inaccuracy or omission is not relevant; a report with a substantial inaccuracy will not be privileged; and a report assuming a verdict before any verdict has been delivered is not privileged.

The Commission’s Report also points out that it has long been the law that the privilege defence for reports of court proceedings applies not only to professional journalists but also to non-professionals including those who publish reports through blogs or through social media.

The Commission’s analysis proceeded on the clear assumption that the absolute privilege in section 17 of the 2009 Act should be retained. The Attorney General’s request therefore 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 actionable in the absence of proof of malice.

Criteria to whether court report is fair and accurate should be set out in legislation

The Commission acknowledges that professional journalists are aware of the key principles or criteria that have been described in case law such as the *Philpott* case, and in guidance published

by the Press Council and the Broadcasting Authority of Ireland, to ensure that their reports are as accurate as possible. However, these principles or criteria are not currently set out in the [Defamation Act 2009](#) itself.

As reports of court cases are increasingly being published by non-professionals such as bloggers and “citizen journalists”, the Commission recommends 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 a non-exhaustive list of 5 factors derived from the case law. The non-exhaustive list of factors 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.

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.

Current privilege defences for fair and accurate reports should continue to apply to professional and non-professional court reporters

The current defences to defamation claims that apply to fair and accurate reports of court proceedings are not limited to reports by professional journalists but also apply to reports by others, such as bloggers and those posting on social media. The Commission’s review of relevant constitutional and international standards concerning freedom of expression strongly supports the current position, and the Commission therefore recommends that the scope of persons to whom the current 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.

Separate qualified privilege for reports that are not “fair and accurate” should not be introduced

The Commission also examined 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 approached this on the clear assumption that the absolute privilege in the 2009 Act

would be retained and that, as already recommended, that a non-exhaustive list of criteria as to what constitutes a fair and accurate report should be incorporated into the 2009 Act. The Commission considered the arguments for and against such a new qualified privilege defence, and ultimately concluded that the arguments against its introduction far outweigh the arguments in favour.

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 the Report.

Wider debate on regulating social media

The Commission acknowledges that this Report reflects a wider context concerning the regulation of social media. In 2018, the courts issued a Practice Direction restricting live social media postings from courtrooms during ongoing trials, except where made by a lawyer with a direct interest in the trial, or by a *bona fide* member of the press or media organisation, or 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 Northern Ireland since 2016; and in England and Wales since 2011. The Commission acknowledges the need to ensure that ongoing trials are not adversely affected by prejudicial social media commentary, whether because they may be defamatory, or because they could be in contempt of court or create the risk of mistrials. The Commission also notes that the Chief Justice, in announcing the 2018 Practice Direction, suggested that it may need to be underpinned by legislation.

The Commission's Report notes that the regulation of social media is complex. This is shown by the fact that the Department of Communications is currently preparing legislation to establish an Online Safety Commissioner, which would implement key recommendations in the Commission's 2016 [**Report on Harmful Communications and Digital Safety**](#); and that this legislation must now be considered in the broader setting of implementing the 2018 EU Audiovisual Media Services Directive. In view of this, the Commission also concludes that it should not make any new recommendations on this area.

Draft Legislation in Report

The following draft bills are contained within the report:

1. Draft Defamation (Amendment Bill) 2019

Information on Implementation

