Hello, my name is David Kavanagh. I'm a partner in the Litigation and Dispute Resolution Department in Dillon Eustace. Today I'm going to provide a brief overview of the Defamation Amendment Bill 2024, which is currently before the Houses of the Oireachtas. The Defamation Amendment Bill 2024 is set to significantly transform the landscape of defamation law in Ireland. Changes to Ireland's defamation laws have been a subject of relatively extensive consultation, including the publication of a report and the review of the Defamation Act 2009, in March 2022, and a Joint Committee on Justice Report on free legislative Scrutiny of the General Scheme of the Defamations Bill in September 2023. The stated aim of the Bill is to balance the protection of reputations with the freedom of expression and journalistic integrity, with the intention stated as being to provide robust, fair and proportionate legislation to meet the challenges of an increasingly complex media landscape. As a side note, the Bill was not passed in the lifetime of the previous government and had lapsed.

However, the programme for government had contained a pledge to restore the Bill and to make passing the legislation a priority, and it has now been re-introduced to the Dáil Order Paper. So what are the proposed changes to the current defamation regime in Ireland? Firstly, the Bill proposes to introduce a serious harm test for defamation actions against companies or public authorities.

In other words, in order to successfully bring a defamation claim, a body corporate will have to demonstrate that the publication of a statement caused or is likely to cause serious harm to its reputation and that harm is caused or is likely to cause serious financial loss. This requirement for financial loss is a departure from the current position and adds an additional hurdle to be crossed in bringing a successful defamation action for these entities.

In addition, under the proposals, juries are to be removed from defamation cases so that any proceedings initiated after the legislation comes into operation are heard and determined by the judge only. The rationale for this change is to seek to reduce legal costs and delay by reducing length of hearings and also, to tackle disproportionate awards, and support more consistent, proportionate and predictable redress in defamation cases.

Notably, the Bill inserts a new chapter into the Defamation Act, which contains measures to protect against Strategic Lawsuits Against Public Participation (known for short as SLAPP). SLAPPs are defined in the EU Anti-SLAPP Directive as defamation proceedings, which relate to a person's engagement in public participation on a matter of public interest, are unfounded and abusive, and are brought with the main purpose of preventing, restricting or penalising public participation.

The EU Anti-SLAPP Directive is due to be transposed by May 2026. Under the proposed legislation, a defendant may apply to the court seeking an order to strike out a claim as being manifestly unfounded and a declaration that the proceedings amount to a SLAPP. It will be open to a defendant to apply for such a declaration before, during or after the trial, and the court has to act as “expeditiously as possible, consistent with the administration of justice”.

If a court does declare proceedings as a SLAPP, the Bill states that the court can take that declaration into account when making an order for costs and the court has the power to order a plaintiff in the SLAPP proceedings to pay defendant’s legal costs on a “legal practitioner and client” basis. The Bill provides that where a defendant in defamation proceedings that relate to his or her engagement in ‘public participation’ applies for security for costs in those proceedings, the court shall decide the application as expeditiously as possible, consistent with the administration of justice.

Possible behaviours that could amount to being abusive include intimidation, harassment, or threats made by the plaintiff; use in bad faith of procedural tactics to lengthen the proceedings; multiplicity of proceedings; excessive, disproportionate, or unreasonable claims. Of particular interest to retailers is the new specific form of Qualified Privilege, transient retail defamation, which will provide a defence to retailers where proof of payment is requested.

It will be a defence to show that the disputed statement consisted of (1) asking whether a person had paid for goods or services, (2) asking whether the person had obtained a service, (3) asking whether a person has in their possession goods, or a receipt for goods or services, or (4) stating that a means of payment offered is unable to be accepted (for example, a credit card is blocked or a bank note does not appear to be legal tender). However, in order to avail of the defence, the retailer cannot be found to be acting in malice or the statement in question should not be published excessively. While this may be a subject for interpretation by the courts, it could be making the statement loudly in a crowded setting when it is not necessary to do so.

Further, the statement must have been made by a person who has a duty or interest in making it, for example, the shop owner or retail assistant. Next up, the Bill also seeks to introduce a live broadcast defence. If the defendant can prove that reasonable and prudent precautions were taken prior to and during the live broadcast to prevent the publication of defamatory statements, it will provide a defence in respect of statements during the live broadcast.

The Bill sets out what the court may have regard to in terms of assessing whether reasonable and prudent precautions were taken, such as the level of control the broadcaster could have expected to have had over the relevant person particularly having regard to the location and nature of the live broadcast and whether or not that person was a contributor to the programme and the broadcasters risk management procedures, for example the vetting of contributors and the overall management.

Moving to resolution provisions - In the case of a correction order or apology, the defendants must publish it with the same prominence as the original defamatory statement, unless the person in respect of whom the statement applies requests otherwise. The court can have regard to the conduct of the parties after the offer to make amends has been made when considering a costs order.

Finally, the proposed legislation also includes a new requirement for solicitors to inform their clients of the availability and implications of availing of certain voluntary alternative dispute resolution procedures before initiating proceedings, such as availing of Press Council complaints process or the right to reply provisions of the Broadcasting Act 2009, with a requirement that the solicitor files a statutory declaration confirming compliance with their obligations in this regard. The court can also adjourn proceedings to allow ADR processes to be explored, while conduct in regards to ADR procedures is a factor that the courts can consider when determining costs. The Bill excludes certain recommendations from the previously mentioned Joint Committee report, while additional forms had been identified by the previous government as possibly being introduced during the Bill's ratification process, including a statutory power for the Circuit Court to issue a ‘Norwich Pharmacal’ order, directing a digital services provider to identify anonymous posters of defamatory online material and proposals on the burden of proof for the defence of fair and reasonable publication.

As noted, the Bill has been reintroduced by the current government, and it remains to be seen whether any of the changes to the draft legislation will be made as it makes its way through the Houses of the Oireachtas.