

Dear Sirs

Please find below Aviva's comments regarding the proposed bill noted above.

General comments

Many of the developments within the proposed Bill are welcomed in that a number of items have been adapted from The Defamation Act 2013 in England & Wales.

In relation to the commentary regarding the actionability of defamatory statements, we note that the proposition put forward is that a statement that is false and defamatory will be presumed to have been made with malice. We would suggest that there are numerous circumstances where a statement may be found to be untrue and yet be made with no malicious intent.

We would contend that this is an unhelpful starting point in circumstances where many defences (such as qualified privilege and honest opinion) are only of real significance in circumstances where the statement complained of is untrue (since if the statement were true, the defendant would have the defence of truth). Were it to be the case that any statement that was untrue and defamatory were to be regarded as malicious, this would, on the face of it, significantly undermine both the defence of qualified privilege but also the defence of honest opinion.

It seems to us that slander per se has been specifically excluded from the proposed Bill and is expected to be dealt with under previous legislation and/or common law provisions. It might be helpful to codify the existing law on slander within this Bill.

Specific comments on the proposed Bill

Section 2

The reference in section 2(2) to “[*persons*] whose functions include functions of a public nature.” is, we would suggest, at best ill-defined and at worst potentially dangerous in its consequences. It raises the prospect that any person who exercises some public function might be precluded from bringing a claim even where the allegations bear no relationship to that function. It is suggested that “functions of a public nature” needs to be more clearly defined and the circumstances in which a claim is precluded likewise.

Section 13

One of the unforeseen consequences of the introduction of a requirement for a statement to have caused or be likely to cause serious harm to the claimant's reputation and/or serious financial loss to the claimant has been that in principle it would appear that where an offer of amends is made, this will involve an implicit concession that the statement complained of has caused or is likely to cause serious reputational harm/serious financial loss. This could potentially reduce the effectiveness of the offer of amends procedure in relation to claims where serious harm/financial loss is a finely balanced issue. There may be many situations where a defendant would rather seek to resolve a matter than engage in litigation over

whether serious harm/financial loss has been caused. The cost of such litigation may in many cases be disproportionate in circumstances where the matter might have been resolved at an early stage, bearing in mind the financial risks to both parties. We would suggest therefore that any offer of amends and associated damages could be made without prejudice to the issue of Serious Harm.

Section 20

In relation to the re-branding of verbal injury, whilst in our previous comments we suggested that the causes of action should not be retained, we note the Commission's intention to re-brand three forms of business-related verbal injury. In terms of the wording of the proposed Bill, we would ask whether the references to a "person" in sections 20-22 relate only to natural persons and therefore precludes companies from bringing actions?

Section 24

We note that it is proposed that in determining whether harm has occurred, it is not necessary for the court to determine which of the meanings contended for is conveyed by the statement in the circumstances or that one meaning should be preferred to the exclusion of the other/others. It seems to us that if the court is examining the issue of serious harm, there is every sense in the court also considering the issue of meaning given the benefit to the parties of having this issue determined at an early stage. In such circumstances, even if the court did not dismiss a claim on the basis that no serious harm/financial loss has been caused, the parties would benefit from knowing the meaning that is borne by the statement complained of. This, in turn, would enable them to better understand the merits of the claim and very likely lead to the resolution of the claim in circumstances where meaning would otherwise be contested. Again, this will save enormous costs on both sides and court time.

Yours faithfully,



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