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Ms. Catherine Sheridan
Civil Law Reform Unit
Department of Justice & Equality
Bishop's Square
Dublin 2.

RE: Defamation Act, 2009
Review of Legislation

BY EMAIL: defamationactreview@justice.ie

Dear Ms Sheridan,

Further to previous discussion in relation to the proposed review of the above legislation, and the invitation of the Minister to make submissions, having considered matters I wish to submit as follows:-

Having regard to the provisions of Sections 22 and 23 of the Defamation Act, 2009, such legislative provisions governing situations in the context of a claim or an action for defamation where an offer to make amends is made by the defendant in such an action or claim and given that such an offer can be made upon receipt of the Plaintiff's letter of complaint and at any stage thereafter until the defendant's delivery of a defence, it is noted however that, per Section 23 (1) where an offer to make amends is made but that the parties cannot agree as to the damages or costs that should be paid by the person who made the offer, these matters are to be determined by the High Court or the court in which an action has been brought. A recent decision of the High Court, which has been affirmed by the Court of Appeal has held that in such circumstances a Plaintiff is entitled to have the level of damages and the issue of costs determined by a jury. Of necessity, when matters need to be considered by a jury, one has to ensure that that jury is sufficiently informed of the facts at issue giving rise to the offer to make amends, the history of dealing between the parties, the effect of the alleged defamation upon the plaintiff

and all other factors which they need to take into account in (e.g.) determining the level of damages payable by the alleged wrongdoer in the context of the defamation, and here it can be envisaged that it is necessary to go into as much detail as at a full hearing of the matter which may include the giving of evidence by and the cross-examination of witnesses, all of which would take up substantial Court time and be tantamount to a full hearing giving rise to legal costs which in a case in the High Court could equal or exceed the amount of damages assessed.

Any determination of any matter whatsoever by the Courts incurs a degree of delay, inconvenience, costs and expenses, many elements of which it is submitted`, can be reduced considerably or avoided altogether if, where and/or when the law provides for a remittal of the issue to an alternative dispute procedure i.e. Adjudication or Mediation, either by the Court of its own motion to so remit, or subject to the agreement of the parties.

Any legislative provision in respect of an offer to make amends in defamation should have, one would submit, an element built into it to reduce the exposure of the party making the offer to legal costs as an incentive to make such an offer. However it can easily be envisaged that, where matters, even those limited to the assessment of damages, have to be determined by a jury, as said above, in order to ensure that that jury is in full possession of all the relevant facts it is necessary to open the case to the Court as in a full hearing. It differs little from a contested situation where each side is required to give evidence upon which the other party is entitled to cross examine and in such a situation the costs may be of such a level, one would submit, as to be commensurate with those of a full hearing

The recent High Court matter of *Padraig Higgins v Irish Aviation Authority [2016] IEHC245* held that, where a Defendant makes an offer to make amends and it is accepted but it has not been possible to agree the level of damages payable, the Plaintiff is entitled to have those damages determined by a jury rather than by a judge sitting alone, if he/she so wishes. This position was upheld by the Court of Appeal in November 2016. There is nothing in the Section that provides for a remittal to a jury only in special circumstances which would merit such remittal rather than the less onerous and costly determination by a judge alone, and, noting the imperative phrase *"shall be determined by the High* Court[Judge/Jury]" no provision that would allow the defendant to oppose it having regard to the general rule of costs following the event, as it is the defendant who would ultimately be expected to bear the additional costs incurred in a jury determination which together with the payment to make amends could amount to an onerous imposition giving rise to an inclination to fight rather than settle on the part of a defendant; Subsection (c) provides that " those matters shall be determined by the High Court or, where a defamation action has already been brought, the court in which it was brought and the court shall for those purposes have all such powers as it would have if it were determining damages or costs in a [full] defamation action,…" In *Higgins* the Court of Appeal held that "*any dilution of the right to trial by jury would have to be done in clear language*

and not simply obliquely" within the legislation, noting that this was "a matter of statutory interpretation" The High Court held that the expression contained in the sub-section "*shall be determined by the High Court..."*encompasses a determination by jury where the Plaintiff requests one, in place of a judge sitting alone. Further, where there are no proceedings yet in being when the offer to make amends is made, irrespective of the extent or limit of the level of damage the putative plaintiff alleges he/she suffered, from the wording of this section the offer to make amends failing agreement has to be determined by the High Court incurring delay and costs associated with proceedings in that Court. The Court of Appeal concurred that in the absence of an express intention on the part of the legislature to abrogate the right to a jury trial in Section 23 (1)(c) the Plaintiff was entitled to have his damages assessed by a jury rather than by a judge sitting alone should he wish to do so, again without reference to the alleged level of damage suffered. Further, the Court of Appeal noted that *"for good or for ill"* the role of the jury in the award of damages is embedded in the common law. While it was accepted that the (new) offer to make amends procedure in Section 22 was intended to encourage parties to settle their disputes quickly and in a cost effective manner, nevertheless Section 23 (1) (c) could be seen as ambiguous and IF it was the intention of the Legislature to dispense with a jury trial it was not clear from the language of the 2009 Act as a whole. One submits that, to avail of Mediation to effect a resolution of a dispute in a timely and cost effective manner, in this instance a determination of damages and costs where an offer to make amends in defamation is made though the parties do not agree the amount to be paid, it is necessary to make provision for such resolution within the statute in clear language providing for it by means other than by litigation before a judge sitting alone or with a jury. I note the intended provision in the current Mediation Bill, that before proceeding to litigation, legal advisers will be under an obligation to advise their clients to consider using mediation to resolve disputes, the intention of the Bill being to promote mediation as a speedier and more cost effective method of dispute resolution and that once proceedings issue the parties will be required to confirm that they have been advised of the mediation option and have considered it before proceeding. This would appear to apply to an action in Defamation as a whole, not just the limited instance where an offer to make amends is made after issue of proceedings but before the delivery of a defence. If the Plaintiff had opted for litigation, then received an offer to make amends, then one needs to pose the question as to whether or not the parties can THEN avail of mediation to save costs and to speedily conclude matters. We await seeing the draft Mediation Bill to further consider this issue.

Notwithstanding any inherent power the Court may have, either at the present time or subject to future provision by way of legislation to compel mediation or adjudication, one submits that, if this subsection were amended to provide for a determination by way of an alternative dispute resolution process without reference to the court (or indeed providing for a stay pending ADR determination of any

proceeding that have been issued) it would effect a speedier and more cost effective final resolution of the matter.

There are several authorities, both in this and in the neighbouring jurisdiction that support Alternative Dispute Resolution. The matter of *Maico -v- European Paint Importers Limited* was one of several instances where Ms. Justice Maureen Clark directed the parties before the Court to Mediation, and in doing so she pointed out that the costs involved in the High Court could be detrimental to the survival of business and could have a negative effect upon an individual, possibly for lifetime. In *Oliver -v- Simons & Others* [2012] EWCA Civ 267, Lord Justice Elias held that the costs of litigation [could well be] wholly out of proportion to the issue and said that " *this is a case which is crying out for mediation, even assuming that it could have been settled more informally.....*[where the value of the claim was a fraction of the costs] *it should never have come to Court"* It was the view that such matters could have been more expeditiously resolved by "*an experienced Mediator who could guide the parties to a fair and sensible compromise/settlement"* In *Egan -v- Motor Services Limited* Lord Justice Ward said that *"mediation can do much more for the parties than negotiation. The cost of such mediation could be paltry by comparison with the* [litigation] *costs that would mount from the moment of the issue of the claim..."*

However with regard to Defamation actions, these are of a type where parties may very well take an entrenched position and "stand firmly upon their rights" without regard to delay and onerous costs. They may see a Court hearing as the only solution. It may be possible to address these concerns by pointing out to them that by participating in mediation they do not lose their right to litigate. The mediation will only work with their consent and they can still litigate as a last resort.

In summary, one submits that, if it were possible to have an offer to make amends, having been made but a failure by the parties to agree the amount determined by way of an ADR process it would further the aim of the offer process in the legislation, that is to save on time and costs. The purpose of this submission is merely to sow a seed of thought as regards the applicability of Mediation or Adjudication. It is not exhaustive on the subject and in light of the forthcoming Bill will require further consideration.

Yours faithfully

Denis J. Daly
Barrister at Law & Accredited Mediator