Tithe an Oireachtais
Houses of the Oireachtas

An Comhchoiste um Dhlí agus Ceart

Tuarascáil maidir leis an nGrinnscrúdú Réamhreachtach ar Scéim Ghinearálta an Bhille um Chlúmhilleadh (Leasú)

Meán Fómhair 2023

Joint Committee on Justice

Report on Pre-Legislative Scrutiny of the General Scheme of the Defamation (Amendment) Bill

33/JC/42

September 2023

Table of Contents

CATHAOIRLEACH'S FOREWORD

The Programme for Government contained a commitment to evaluate and update Ireland's defamation laws and in March 2023, the acting Minister for Justice, Mr. Simon Harris TD, forwarded the General Scheme of the Defamation (Amendment) Bill to the Joint Committee on Justice in accordance with Standing Orders for the purpose of pre-legislative scrutiny.

In evidence presented to it during its engagements, the Committee heard that Ireland ranked second out of 180 countries for press freedom in the recent "World Press Freedom Index" compiled by *Reporters Without Borders*. In welcoming this achievement, the Committee hopes that a reform of the current legislation can ensure that a balance is struck between the right to freedom of expression, the right of an individual or entity to protect their good name and reputation and the right of adequate access to justice.

The Committee also notes the progression of legislation at EU level to tackle Strategic Lawsuits Against Public Participation (SLAPPs) and welcomes the inclusion of measures within the General Scheme to tackle this issue.[1]

In undertaking pre-legislative scrutiny, the Committee has sought to scrutinise the proposed legislation and provide recommendations on areas where it believes change or amendments are warranted. Among the areas identified for further examination within the General Scheme include: the proposed abolition of juries in High Court defamation actions [Head 3]; the measures relating to serious harm tests [Heads 4-6]; measures against abusive litigation to restrict public participation (SLAPPs) [Heads 23-31]; and notice of complaint procedures for online publications [Head 34].

The Committee has made a number of recommendations and a copy of this report and recommendations will be sent to the Minister for Justice. I would like to express my appreciation to all the witnesses for their contributions and to the Members of the Committee for their work on this subject.

Finally, I hope that this report will help to inform the legislative process and make a valuable contribution to the forthcoming legislation.

James Lawless TD (FF) [Cathaoirleach]
September 2023

[1] EUR-Lex - 52022PC0177 - EN - EUR-Lex (europa.eu)

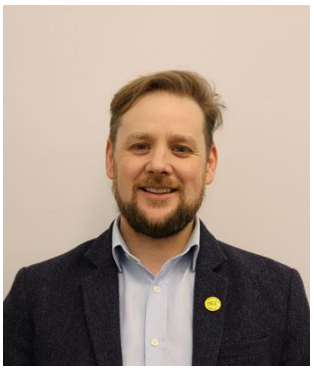
COMMITTEE MEMBERSHIP

Joint Committee on Justice

Deputies

James Lawless TD (FF) [Cathaoirleach]

Colm Brophy TD
(FG)



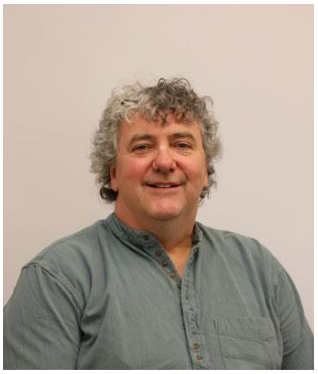
Patrick Costello TD
(GP)

Alan Farrell TD
(FG)

Pa Daly TD
(SF)

Aodhán Ó Ríordáin TD
(LAB)

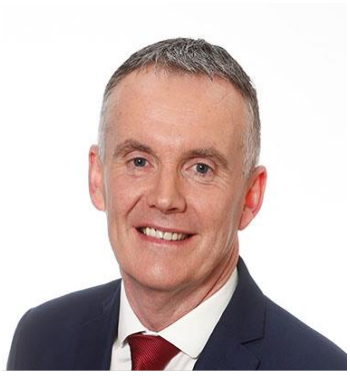
Mark Ward TD
(SF)



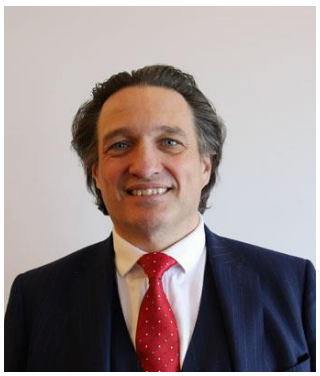
Thomas Pringle TD
(IND)

Niamh Smyth TD
(FF)

Senators



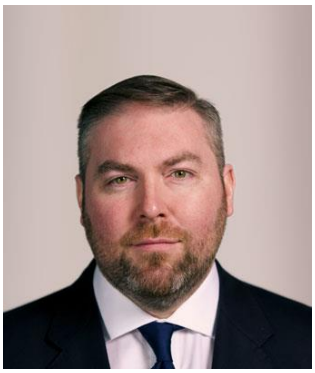
Robbie Gallagher
(FF)



Vincent P. Martin
(GP)

Michael McDowell
(IND)

Lynn Ruane
(IND)



Barry Ward
(FG) [Leaschathaoirleach]

Notes:

1. Deputies nominated by the Dáil Committee of Selection and appointed by Order of the Dáil on 3rd September 2020.
2. Senators nominated by the Seanad Committee of Selection and appointed by Order of the Seanad on 25th September 2020.
3. Deputy Jennifer Carroll MacNeill elected as Leas-Chathaoirleach on 6 October 2020.
4. Deputy James O'Connor discharged and Deputy Niamh Smyth nominated to serve in his stead by the Fifth Report of the Dáil Committee of Selection as agreed by Dáil Éireann on 19th November 2020.
5. Deputy Michael Creed discharged and Deputy Alan Farrell nominated to serve in his stead by the Fifteenth Report of the Dáil Committee of Selection as agreed by Dáil Éireann on 28th June 2022.
6. Deputy Brendan Howlin discharged and Deputy Aodhán Ó Ríordáin nominated to serve in his stead by the Nineteenth Report of the Dáil Committee of Selection as agreed by Dáil Éireann on 8th November 2022.
7. Deputy Jennifer Carroll MacNeill was discharged, pursuant to Standing Order 34, on 21st December 2022.
8. Senator Barry Ward was elected as Leas-Chathaoirleach at the Committee meeting on 15th February 2023.
9. Deputy Colm Brophy nominated to serve on the Committee by the Twenty First Report of the Dáil Committee of Selection as agreed by Dáil Éireann on 7th March 2023.
10. Deputy Martin Kenny discharged and Deputy Mark Ward nominated to serve in his stead by the Twenty-Third Report of the Dáil Committee of Selection as agreed by Dáil Éireann on 26th April 2023.

COMMITTEE RECOMMENDATIONS

The following recommendations were made by the Committee in relation to the topic:

1. The Committee recommends that the proposal under Head 3 to abolish juries in High Court defamation actions should be removed.

2. The Committee recommends that juries should be maintained in High Court defamation actions in order to make findings of fact and to make an indicative finding of an appropriate level of damages, where appropriate.

3. The Committee considers that judges should, however, be the final arbiters of the *quantum* of any award of damages, and that they should not be bound by the indication given by a jury.[2]

4. The Committee recommends that, to help deal with the delays in progressing defamation actions, the potential to empanel juries for more weeks within a court term be examined.

5. The Committee acknowledges the passing into law of the Courts Act 2023 and the consequent increase in judicial numbers and resources. However, the Committee also recommends that the resources allocated to the hearing of defamation actions be kept under review by the Department of Justice and the Courts Service, and varied appropriately to ensure that delays in the disposal of defamation cases are minimised.

6. The Committee recommends that training should be offered to judges in relation to the hallmarks of a SLAPP case, so that they are better able to identify these cases when they present.

[2] The Supreme Court decision in *Higgins v the Irish Aviation Authority* [2022] IESC 13, set guideline amounts for awards of compensation in defamation actions. The Committee believes this will largely address the concerns expressed regarding inconsistencies in awards.

7. The Committee recommends the definition of a SLAPP be more inclusive and not limited to the features listed under Head 24, in order for the legislation to be able to address as broad a range of SLAPPs as possible.

8. The Committee recommends that care is taken to ensure that Part 5 of the General Scheme would align with the anti-SLAPP measures specified within the finalised text of the EU's anti-SLAPP Directive.

9. The Committee recommends that the threshold of 'manifestly unfounded' under Head 26 should be lowered.

10. The Committee recommends that under Head 34 of the legislation, the Court in which any action is taken should be responsible for making an assessment about whether on-line material is potentially defamatory and should be taken down, and that the relevant Court should have the power to make an order accordingly. The Committee does not consider that this is an appropriate role for a social media company.

11. The Committee recommends that consideration be given to introducing a serious harm test for all cases of defamation.

12. The Committee recommends that the legislation would ensure that defamation should only be actionable on proof of special damage.

13. The Committee recommends that consideration be given to the introduction of a system that specifically incentivises the use of mediation and other forms of alternative dispute resolution but does not recommend the creation of a new agency, like the Personal Injuries Assessment Board in this regard.

14. The Committee recommends that the definition of 'online publication' in the legislation should be made clearer, to establish whether publications from RTÉ journalists on the RTÉ website would come under the remit of the Press Council of Ireland or Coimisiún na Meán.

15. The Committee recommends that the statute of limitations be defined under this legislation and that consideration be given to setting the statute of limitations for defamation cases at two years.

16. The Committee recommends that a discoverability test be introduced, that would be applicable for certain defamation actions.

17. The Committee recommends that consideration be given to pausing the statute of limitations for a set amount of time, in instances where individuals engage in an alternative resolution process to resolve defamation actions.

18. The Committee recommends that the public interest defence under Head 16 of the legislation should be simplified.

CHAPTER 1 - Introduction

This is the report on pre-legislative scrutiny of the General Scheme of the Defamation (Amendment) Bill, which intends to reform the Defamation Act 2009.

Report of Review of Defamation Act 2009

The General Scheme of the Defamation (Amendment) Bill is based on recommendations arising from the Report of the Review of the Defamation Act 2009, published by the Department of Justice in March 2022, which set out suggestions for how to reform Ireland's defamation legislation.[3]

Among the objectives of this Report were to review the operation of the Defamation Act 2009 and examine whether this legislation remained appropriate to achieve its original objectives; to review recent reforms to defamation legislation in other jurisdictions; and to explore the evidence in favour or against making amendments to the Defamation Act 2009.[4]

Some of the main recommendations stemming from this Report include:

- That juries would be removed from defamation actions;
- To introduce measures that would reduce legal costs and delays associated with defamation cases, such as proactive judicial case management of defamation actions;
- To introduce measures that would make it easier to grant orders which obligate online service providers to reveal the identity of an anonymous poster of defamatory material;
- That clearer measures be introduced to protect responsible public interest journalism.

[3] gov.ie - Minister Harris publishes draft legislation to reform Ireland's defamation laws (www.gov.ie)
[4] Defamation Act Review Summary Report - b993400b-fb80-4175-aa42-0450a7bae56f.pdf (www.gov.ie)

Purpose of the Bill

Among the reforms contained within the General Scheme include the abolition of juries in High Court defamation actions; the introduction of a new Part 5, introducing measures to tackle strategic lawsuits against public participation (SLAPPs); promoting alternative dispute resolution measures to resolve defamation actions, as alternatives to pursuing litigation; and measures to enhance the ability to tackle online defamation.[5]

Procedural basis for scrutiny

Pre-legislative consideration was conducted in accordance with Standing Order 174A, which provides that the General Scheme of all Bills shall be given to the Committee empowered to consider Bills published by the member of Government.

[5] gov.ie - Minister Harris publishes draft legislation to reform Ireland's defamation laws (www.gov.ie)

Engagement with stakeholders

The Joint Committee on Justice invited submissions from stakeholders on the General Scheme of the Defamation (Amendment) Bill.

On 20th June and 4th July 2023, the Committee held public engagements with several of these stakeholders, as laid out in the table below:

Table 1: List of public engagements with Stakeholders

Organisation	Witnesses	Date of appearance
Dentons Ireland LLP	Ms. Karyn Harty, Global Co-Chair of Disputes at Dentons/ Partner and head of the litigation practice group at Dentons Ireland Ms. Lesley Caplin, Of Counsel at Dentons' Ireland and a member of the litigation practice group	20th June 2023
The Hon. Mr Justice Bernard Barton (retd)	Formally head of the Civil Juries Division of the High Court, 2017-to-2021	20th June 2023
The Bar of Ireland	Mr. Declan Doyle SC Mr. Tom Murphy BL	20th June 2023
Mr. Mark Harty	Senior Counsel	20th June 2023
Department of Justice	Ms. Madeleine Reid, Principal Officer, Civil Justice Legislation Ms. Noreen Walsh, Assistant Principal, Civil Justice Legislation	20th June 2023

Table 2: List of public engagements with Stakeholders

Organisation	Witnesses	Date of appearance
NewsBrands / Local Ireland	Mr. Colm O'Reilly, chairman of NewsBrands Ireland and chief operating officer of the Business Post; Mr. Michael Kealey, solicitor, DMG Media Ireland Mr. Bob Hughes, executive director of Local Ireland	4th July 2023
National Union of Journalists (NUJ)	Dr. Michael Foley, NUJ Ethics Committee Mr. Ian McGuinness, Irish organiser	4th July 2023
Ireland Anti-SLAPPs Network	Mr. Ronan Kennedy, Senior Policy Officer, ICCL Ms. Jessica Ní Mhainín, Index on Censorship	4th July 2023
Dr. Mark Hanna	Assistant Professor in Media Law, Durham Law School, Durham University	4th July 2023
Department of Justice	Ms. Madeleine Reid, Principal Officer, Civil Justice Legislation Ms. Noreen Walsh, Assistant Principal, Civil Justice Legislation	4th July 2023

The primary focus of these meetings was to allow for an engagement between the Members and stakeholders to discuss areas of the General Scheme which may require amending.

This report summarises the engagements and the key points considered by the Committee when drafting the recommendations set out in this report.

A link to the full transcript of the engagements can be found here and here.

CHAPTER 2 - Summary of Evidence

In the course of the public hearing, a number of important points were raised.

A summary of the main areas discussed in evidence to the Committee follows.

1. General discussion on the need to reform Ireland's defamation legislation

While the General Scheme and the intention to reform Ireland's defamation legislation was welcomed by the Committee, some Members disputed statements made that Ireland's defamation legislation is 'long overdue reform', highlighting that the current Defamation Act was only enacted in 2009. They acknowledged the need to amend certain areas within Irish defamation legislation but also pointed to Ireland's high position in the recent *Reporters Without Borders* survey, where Ireland was ranked number two in Europe and second out of 180 countries surveyed for press freedom, as an indication of the robustness of Ireland's current defamation legislation.

In response, witnesses said that the Defamation Act from 2009 does not include any provisions relating to online defamation and highlighted the exponential increase in the use of smartphones and technology in the 14 years since that Act had been put onto statute. The Committee was told that comments around the need to reform Ireland's defamation legislation may therefore be in reference to the significant changes that have occurred in relation to technology since the initial Act was passed.

In relation to the *Reporters without Borders* survey, witnesses responded that the promise and anticipation of Ireland's defamation legislation being reformed, (evidenced by measures such as the publication of the Report of the Review of the Defamation Act 2009 in 2022), is the reason that Ireland ranked so highly in that report. They pointed out that in the previous report Ireland had ranked in sixth place and urged that the reform of Ireland's defamation legislation must be progressed without delay, in order to maintain Ireland's high ranking in these surveys.

2. Abolition of juries in High Court actions [Head 3]

Witnesses expressed varying views in relation to Head 3 of the General Scheme and the proposal to remove juries from defamation actions in the High Court.

Among the arguments outlined *in favour* of Head 3 were:

1. **Jury decisions result in unpredictable outcomes and award excessive damages:** The Committee was told that the use of juries in defamation hearings results in unpredictable outcomes and witnesses highlighted numerous cases where juries awarded significant and excessive damages in defamation actions. Witnesses said that such awards are excessive compared to those given in personal injury cases and that this reflects badly on Ireland's legal system. Witnesses also pointed out that the European Court of Human Rights (ECHR) has criticised the excessive awards given by juries in defamation actions in Ireland and argued that this does not comply with Ireland's obligations under the European Convention on Human Rights.

2. **Juries result in long delays:** The Committee heard of the significant delays associated with defamation actions, as witnesses said jury lists show that cases before the High Court largely centre on issues that were published in 2016 and 2017. It was argued that jury trials in defamation actions take longer than if a judge presided over these cases alone. Witnesses spoke of the detrimental impact these delays have on the party or individual whose reputation may have been damaged. In response to arguments that more juries could be empanelled to deal with these delays, some witnesses disagreed with this suggestion, as they argued that the logistics of implementing this would place too much of a burden on the electorate, when judges could process these cases at a quicker rate.

3. **Juries add complexities to defamation actions:** Some witnesses argued that the facts in defamation cases are often complicated or disputed and that the

inclusion of juries further complicates defamation actions. Witnesses also highlighted that juries are already excluded from other trials of fact.

4. **Juries result in increased costs in defamation actions:** The Committee was told that, as a result of the delays and complexities that juries add to the trial process, juries increase the overall costs associated with defamation actions. Witnesses said that plaintiffs can take advantage of these delays because defendants will continue to incur legal costs during any period of delay. The Committee heard that there is no legal aid granted for defamation cases and that, for a large portion of the population, pursuing a defamation claim is simply unaffordable. Witnesses argued that removing juries from defamation actions would go some way towards decreasing the significant costs associated with these cases.

5. **Lack of transparency in jury decisions:** Some witnesses maintained that jury decisions lack transparency, as juries are not required to outline the factors that influenced their decision, while judges are obliged to provide the reasons behind the judgements they reach.

Among the arguments outlined *against* Head 3 were:

1. **Judgement of the Supreme Court in *Higgins v The Irish Aviation Authority [2022] IESC 13*:** In response to statements that juries in defamation actions award excessive damages, some witnesses agreed that this has occurred in the past. However, several witnesses stressed that the Supreme Court had issued a judgment in the case of *Higgins v The Irish Aviation Authority [2022] IESC 13* in March 2022; the Committee heard that this decision would give clearer guidance and assistance to jurors when deciding on appropriate levels of damages to be awarded in defamation actions. Witnesses argued that this decision would resolve one of the biggest arguments levelled against maintaining juries in defamation actions. It was recommended that more time

should be given to ascertain the impact of this decision on defamation cases, before any measures are introduced to remove juries from defamation trials.

2. **Juries are not the sole cause of delays in defamation cases:** Several witnesses stated that juries should not be blamed for delays in defamation actions being resolved, as other factors impact this, such as the lack of judges available to preside over these cases or the fact that there may not be enough jury weeks in the court year to schedule these trials, which results in backlogs. It was suggested that, if juries were empanelled for more weeks within a court term, this could help deal with backlogs arising in relation to defamation cases. Indeed, the presence of juries at hearing arguably requires the case to move at a faster pace to retain the attention of the jurors.

3. **Juries do not add complexities to defamation actions:** In response to arguments that juries add to the complexity of defamation actions, the Committee was told that there is a misconception that juries make decisions on matters of law and that some jurors may not understand the law well enough, therefore delaying proceedings. Witnesses underlined that a juror's role is to make decisions on facts and therefore, it is not relevant whether they have a good understand of law or not, as matters of the law are left to be decided upon by the judge in a given case.

4. **There is little evidence that juries increase the cost of defamation actions:** The Committee heard that there is little evidence that removing juries from defamation hearings would significantly decrease the costs associated with these actions. Some suggested that removing juries from defamation cases may even increase costs, for example, in the case of complex pre-trial applications that present before a judge sitting on their own. Others pointed out that the costs associated with defamation trials in England and Wales have increased in recent years since juries were removed from defamation actions, rather than decreasing.

5. **The right to trial by jury is a fundamental part of the Irish justice system:** The importance of having ordinary members of the public involved in the administration of justice was highlighted and witnesses argued that having the right to a jury trial is a fundamental element of the Irish justice system. Witnesses also suggested that, rather than the proposal to remove juries, it would be better to focus on decreasing the amount of defamation litigation that reaches the courts, for example, by encouraging the use of alternative dispute resolution measures instead (for further information see Point 6).

6. **The public values decisions reached by juries more than decisions reached by a judge:** Some witnesses said they believe that the public, in general, value a decision reached by a jury more than a decision reached by a judge, as it is easier to suggest that an individual can be biased. Others pointed out that judges in the UK have been subject to more abuse since the removal of jury trials in defamation actions and witnesses suggested that retaining juries in defamation cases could prevent that problem being replicated in Ireland. In response to arguments that jury verdicts are not transparent, it was suggested that, rather than removing juries from defamation actions, the system could be altered to allow juries to be questioned regarding why they made decisions and ensure the decision-making process is more transparent.

7. **Changes to defamation legislation in England and Wales:** Some witnesses pointed out that the Report of the Review of the Defamation Act 2009 did not sufficiently analyse the impact of the changes made to the English and Welsh defamation legislation in 2013. Witnesses underlined that defamation costs in England are now significantly higher than in Ireland, with the costs of a two-day defamation action in London estimated at between £1 million and £2 million. Witnesses questioned whether the decision to remove the right to a jury in England and Wales had resulted in any of the other anticipated benefits set out in the report, for example, whether it now takes a shorter amount of time to hear defamation cases without a jury.

8. **Other common law jurisdictions have retained the right to a trial by jury:** The Committee heard of examples of other common law jurisdictions where the right to a trial by jury remains, including regions in Canada, Australia and New Zealand. Witnesses highlighted that in Canada in 2020, the right to a trial by jury was removed for nearly all torts but was retained for defamation actions, due to the importance they placed on having a jury of one's peers presiding in these cases.

9. **Removing juries from personal injury actions did not achieve its stated aims:** The Committee was told that juries were removed from personal injury actions in 1988 on the premise that it would decrease premiums, shorten the amount of time it would take to hear personal injury cases and decrease the expenses associated with these cases. However, witnesses said that, instead, the awards and costs associated with personal injury cases have increased despite the removal of juries and they cautioned that removing juries from defamation actions could also have the opposite effect.

Several witnesses suggested that, as a compromise position to Head 3 as currently formulated, juries could be maintained to find facts during a defamation trial and that they may be allowed to make an indicative award of damages but that judges could determine the final decision on the awards arising from a defamation action.

Another solution put forward by some stakeholders was to replicate the model adopted by England and Wales in 2013, where the right to a jury trial was removed. Under this approach, parties may apply for a jury trial and the presiding judge decides whether to grant the application considering factors including the potential costs of including a jury and the complexity of the case at hand. Witnesses informed the Committee that, since this change was introduced, juries have rarely been used in defamation trials in England and Wales.

3. New Part 5 of Principal Act: Measures against abusive litigation to restrict public participation (SLAPPs) [Heads 23-31]

Members and witnesses discussed the provisions of Part 5 in the General Scheme, which introduces measures against abusive litigation to restrict public participation (SLAPPs).

Witnesses explained that a 'strategic lawsuit against public participation' (SLAPP) is a legal action that is brought by a powerful or wealthy entity against a public watchdog / figure, in an attempt to dissuade them from publishing critical speech that would be in the public interest. Witnesses told the Committee that a SLAPP can apply to any individual or body that speaks out in the public interest and is threatened with litigation as a result, and can include groups such as journalists, politicians, academics and campaigners.

The Committee heard that, these entities use legal actions as a form of harassment and that SLAPPs pose threats to freedom of expression and the rule of law within democracies. Witnesses pointed out that SLAPPs will also rely on other areas of legislation to support their cases, highlighting that, since the defamation legislation in the UK was reformed in 2013, there has been an increase in the number of SLAPPs that have been brought in the sphere of privacy law, data protection and intellectual property law.

The Committee was told that the legislation includes 'features of concern', under Head 24, which are used to identify SLAPP cases, including any action that is intended to increase the time, energy or cost associated with defending a case. However, witnesses pointed out that it can be difficult to accurately record the incidence and number of SLAPPs, as those who have been affected by them can be afraid to speak openly about them for fear of further legal challenges or due to a lack of support from their employer. In addition, a threat of legal action to silence speech or publication may occur before the speech or publication has happened, making it difficult to record such instances, e.g., if a journalist reaches out to an individual or body to offer a right of reply before publishing an article.

The Committee was told that the threat of a SLAPP has a serious chilling effect on a newsroom and several witnesses welcomed the introduction of Part 5 of the General Scheme to better tackle this issue.

Witnesses made several recommendations on how to improve measures relating to SLAPPs within the General Scheme, including the following:

- The Committee was informed that the anti-SLAPP provisions under Part 5 focus only on SLAPPs relating to defamation and that other examples of SLAPPs, such as privacy actions, breach of confidence actions or economic conspiracy actions may not be covered by this legislation. Witnesses recommended that the definition of a SLAPP under Head 24 should not be limited to defamation cases or to the features listed under this Head, in order for the legislation to be able to address as broad a range of SLAPPs as possible.

- Witnesses recommended that the number of judges should be increased and that these judges should be offered training on recognising the attributes of a SLAPP case, in order to better identify these cases when they present.

- The Committee was informed of the EU's anti-SLAPP Directive which is currently being negotiated. Witnesses welcomed this legislation and cautioned that any section relating to SLAPPs within the General Scheme should align with the anti-SLAPP measures being progressed at a European level.

- Some witnesses suggested that the legislation should be formulated so that it can be applied retrospectively and include cases of defamation that are ongoing.

- In relation to the early dismissal mechanism under Head 26, some witnesses told the Committee that the threshold of 'manifestly unfounded' under this Head is too high and this could prevent some SLAPP cases from being dismissed. Others cautioned that the early dismissal mechanism may result in a small number of cases being dismissed at the outset, before the plaintiff would have

a chance to establish a legitimate cause of action, which might otherwise have become clear if it had not been dismissed.

- The Committee was told that, given the complexity of legal proceedings in defamation actions, Heads 24 and 26 should make allowances for those who receive ineffective legal assistance or those who choose to represent themselves.

4. Notice (online publication) [Head 34]

Several members raised questions as to how the General Scheme addresses defamation that occurs online or on social media platforms and what else could be added into this legislation to tackle this issue. Members also asked how the legislation could capture liability for defamatory content published online, when it may be published by one individual but also liked, shared and retweeted by others.

Witnesses present commented on how quickly the use of social media and technology has changed since the Defamation Act 2009, which they explained is why the 2009 Act did not include measures relating to online defamation. Some witnesses argued that there has been a disparity between the expectations placed on traditional media companies to ensure that there is no defamatory content in their publications and the expectations that apply to social media platforms regarding instances of online defamation. Witnesses told the Committee that online defamation has facilitated the spread of fake news and conspiracy theories and they argued that social media companies must do more to address instances of online defamation, for example, highlighting the potential for these companies to introduce algorithms which determine whether a person hovered over a post before reading it.

In response to questions around how liability in relation to defamatory content online can be determined, witnesses stated that each time a defamatory post is shared or reacted to, it would count as a further instance of defamatory publication. Witnesses underlined the complexity of this issue and some witnesses cautioned that the situations in which internet service providers and platforms could be considered liable or considered as publishers of defamatory material are unclear. It was pointed out that, while internet service providers have a certain immunity against such allegations under several European Directives, when they are put on notice, they are at risk of losing that immunity. Witnesses suggested that there will likely be several court cases brought in future in relation to this issue, irrespective of what legislation results from the General Scheme in this area.

Witnesses pointed out that Head 34 of the General Scheme relates to a notice of complaint process for online publication, which would introduce a template for a notice and take-down regime of defamatory material. Some witnesses argued that the Head,

as currently phrased, imputes actual knowledge on social media platforms, meaning that these companies are responsible for determining whether online content could constitute illegal or defamatory material and whether the complainant has any defence against these allegations. The Committee was told that it would be more appropriate if the courts were responsible for making such determinations. This would also remove a burden from these companies, which are trying to simultaneously handle the enormous volume of complaints that are lodged with them.

To ensure that the court could process these complaints in a prompt manner, it was suggested that a system could be introduced where applications made relating to online defamatory content would be accelerated or pushed ahead, so that these issues could be determined by the court as quickly as possible and social media companies could then apply the court order.

Suggestions were also made that the Norwich Pharmacal Procedure, which orders an online service provider to reveal the identity of an individual or entity that posted defamatory material, should be strengthened under Head 33 of the General Scheme.

Questions were raised in relation to Coimisiún na Meán and its role in dealing with online safety and media regulation. The Committee heard that the Coimisiún would play a positive role in this sphere through its ability to direct social media and online publishers on how they must act regarding complaints received and in dealing with and removing abusive material. It would also help by deciding upon the penalties that apply to companies that breach the rules set. However, the Committee was told that the Coimisiún would not be able to tackle instances of online defamation unless they qualified under particular categories within the definition of online abuse.

Other witnesses also suggested that Head 17A of the General Scheme should be re-evaluated, to determine whether the issue of foreseeability arises for social media platforms and to ensure that this Head would not violate the European e-commerce directive. It was pointed out that similar amendments suggested for the Electoral Reform Act 2022 had been in breach of this Directive and therefore were not included in the final text of the Act.

5. Serious harm tests [Heads 4-6]

Members and witnesses discussed the 'serious harm test' provisions under Heads 4-6. The Committee was told that Heads 4-6 would introduce a serious harm threshold in relation to defamation claims by bodies corporate (Head 4); defamation claims by public authorities (Head 5); and transient retail defamation (Head 6).

Witnesses expressed various opinions on the effectiveness of the serious harm test that was introduced in the UK. Some witnesses told the Committee that introducing this test in the UK had resulted in a significant increase in legal costs, due to the need to test whether a serious harm occurred, in the first instance, and then to proceed onward with the defamation action for certain cases. Others argued that introducing it has allowed the courts in the UK to dismiss defamation cases that do not have a substantial claim more quickly, therefore speeding up the progression of defamation cases through the courts system.

Some witnesses recommended that a more general serious harm test should be introduced, rather than applying this test only to the instances outlined in Heads 4-6. The Committee was informed that a more general test would also help address instances of SLAPPs (see Point 3 for further information). Others recommended that a serious harm test should be applied to all defamation actions, as this would decrease the overall number of defamation claims taken, would decrease the number of vexatious defamation claims filed, and would decrease the likelihood of 'libel tourism' occurring in Ireland.

Some Members raised questions in relation to Head 4 and whether there is any definition of 'serious financial loss' or how this should be defined. Other questions were raised in relation to the serious harm test for transient retail defamation under Head 6. Members asked whether this provision could take into account the manner in which a retailer asked a customer for a receipt for a purchase and whether the retailer asked this in a respectful manner or not.

In relation to Head 6, witnesses told the Committee that there is already a provision for qualified privilege in existing law and that any retailer that is respectful when

engaging with a customer and asking them for proof of purchase should be covered under this privilege.

Witnesses argued that, under Head 4 as it is currently set out, it will be difficult to define serious financial loss. It was pointed out that in Ireland, the courts have ruled that there is no threshold of seriousness for defamation. This compares with England and Wales, where there is already a considerable tort and threshold that must be reached to prove defamation occurred, aside from the introduction of the serious harm threshold in these jurisdictions. Witnesses suggested that defamation should only be actionable on proof of special damage as this would be easier and there is less risk that it would be challenged, than if a serious harm threshold was introduced. Witnesses pointed out that this approach was applied in defamation legislation prior to the Defamation Act 2009, where slander required proof of special damage, except in four specific circumstances.

6. Obligation to consider mediation [Head 8]

Head 8 of the General Scheme introduces an obligation on those involved in a defamation dispute to consider mediation options available to them.

Witnesses welcomed the emphasis Head 8 places on encouraging parties to consider alternatives to litigation to resolve their disputes, as they pointed out that these measures can reduce the costs and inconsistency associated with pursuing defamation actions through the courts.

Some witnesses referred to the Press Council of Ireland and pointed out that its approach had been complimented by the Leveson inquiry. Witnesses underlined that parties should be encouraged to engage with the complaints process offered by the Press Council and to view this as a method of mediation in its own right, rather than simply viewing it as an initial step, before proceeding to engage in defamation litigation in the High Court.

The Committee heard that the General Scheme does not clarify whether publications from RTÉ journalists on the RTÉ website would come under the remit of the Press Council or Coimisiún na Meán. It was suggested that this could be made clearer by changing the definition of 'online publication' in the General Scheme or through introducing an amendment to the Broadcasting Act 2009.

Members asked whether the model used by the Personal Injuries Assessment Board (PIAB) could be introduced as a step to resolve defamation actions without the need to pursue litigation to do so. While it was acknowledged that a PIAB model would not contain a jury, it was suggested that this model could be used as a triage, to help determine which cases are more suitable to be dealt with through other avenues of mediation and which cases may be more complex and should be dealt with through the courts system.

Witnesses welcomed this suggestion, as some individuals may be satisfied with the decision reached by PIAB and will have their case resolved quicker and others may engage with PIAB in the first instance and would still have the option to pursue litigation afterwards, if they felt it was necessary for their case.

7. Statute of Limitations

It was pointed out that a statute of limitations is not specified under the General Scheme. Members pointed out that under the Defamation Act 2009, defamation actions may be brought up to one year after the defamation occurred but they argued that this timeframe is too short. They questioned whether this statute could be extended to two years, similar to the two-year statute of limitations which applies to personal injury cases.

Some witnesses suggested that the current provisions regarding the statute of limitations, as stipulated under the Defamation Act 2009, provides a suitable timeframe, as it sets the statute of limitations at one year but allows this period to be extended for a second year at the discretion of the court. Witnesses argued that, unlike other torts, harm to reputation is apparent soon after it has occurred and does not require as much time to discover. The Committee was told that there must be some limitations around the timeframe within which defamation cases can be brought, otherwise the threat of defamation proceedings being initiated would hang over an organisation and place a chilling effect on them.

Other witnesses disagreed that the current one-year limit is sufficient. They explained that the discretion provided to the Judiciary to extend the statute to two years has resulted in more litigation challenging the circumstances in which this extension is granted and therefore adds to the costs and delays associated with progressing defamation actions. It was suggested that the statute of limitations could be extended to two years.

The Committee also heard that there are instances where it may not become apparent that an individual or organisation has been defamed for a few years. For example, if an incorrect credit report was submitted, which those affected are unaware of until they needed to reference the report for a mortgage application or similar.

It was underlined that there is no discoverability test in the Statute of Limitations under current legislation and witnesses suggested that the introduction of a discoverability test may be appropriate for certain defamation actions.

Witnesses suggested that the potential to pause the statute for a set amount of time if individuals engage in the alternative resolution process should also be considered. They pointed to the model set by the Personal Injuries Assessment Board (PIAB) where, if an individual engages with the PIAB's process, then the period of limitation would be paused for the duration that the individual is taking part in this process.

8. Additional Points

The following additional points were also raised in relation to the General Scheme:

- **Amendment of section 26 of Act of 2009 (Fair and reasonable publication on a matter of public interest) (Head 16)**

Some witnesses recommended to the Committee that the public interest defence under Head 16 of the General Scheme should be simplified.

Witnesses told the Committee that jurors find the corresponding section 26 in the current Defamation Act complex and difficult to understand and the inclusion of too many stages and criteria in this provision has meant that it is difficult to reach the threshold for this defence. The result is that this defence has been under-utilised in practice.

Witnesses also told the Committee that the complexity of section 26 causes greater uncertainty, increases the amount of litigation and raises overall costs.

- **Interaction between non-disparagement clauses and defamation**

A question was raised as to the interaction of non-disparagement clauses and defamation. Witnesses explained that, in some instances, it is alleged that defamation has occurred and that non-disparagement clauses have also been breached and there are different approaches towards resolving each of these issues. In cases of non-disparagement, two private individuals have signed a contract agreeing that one party will not disparage the other and where this is breached, a private action is taken to seek damages; while defamation is codified by legislation and instances of defamation would proceed through the courts or alternative resolution measures to be resolved.

CHAPTER 3 - Summary of Submissions

This note summarises the key issues raised in the submissions received.

The Committee received submissions from the following Stakeholders.

- Mediahuis
- Twitter International Unlimited Company
- The Hon. Mr Justice Bernard Barton (retd)
- NewsBrands Ireland & Local Ireland
- The Press Council of Ireland & the Press Ombudsman
- The Bar of Ireland
- Dr. Mark Hanna
- The Law Society
- Irish Council for Civil Liberties (ICCL)
- National Union of Journalists (NUJ)
- Mr. Mark Harty SC
- Dentons Ireland LLP
- Mr. David Whelan BL
- Retail Ireland, IBEC
- McCann FitzGerald
- Ireland Anti-SLAPPs Network

Stakeholders welcomed the objective of the General Scheme to reform the Defamation Act 2009, on the basis of findings and recommendations arising from the Report of the Review of the Defamation Act 2009.

The submissions provided commentary in relation to several heads of the General Scheme, in particular, the proposal to abolish juries in High Court actions [head 3]; the 'serious harm threshold' [Heads 4-6]; the insertion of a new Part 5 to deal with measures against abusive litigation to restrict public participation (SLAPPs) [heads 24-31]; and proposals relating to online defamation [Head 34].

1. Abolition of juries in High Court actions [Head 3]

- Arguments in favour of Head 3 stated that juries in High Court defamation actions are unpredictable, that they delay defamation actions from concluding and that they award excessive damages.
- Arguments against Head 3 suggested that juries bring valuable real-world experience to defamation proceedings and that there is little evidence that removing juries would result in significant decreases in the costs or delays associated with defamation actions.

Submissions expressed conflicting views in relation to the proposals under Head 3, which provides for the removal of juries from High Court defamation actions and stems from a recommendation contained within the Report of the Review of the Defamation Act 2009.

In *favour* of the abolition of juries in defamation actions

Those who supported Head 3 and the proposal to abolish juries in High Court defamation hearings raised the following points:

1. Submissions argued that use of juries results in unpredictable outcomes, particularly regarding the awarding of damages and that civil jury decisions lack transparency.

2. Stakeholders argued that the use of juries in defamation actions results in significant and excessive damages being awarded. It was argued that the awarding of such significant figures deters ordinary citizens from pursuing cases against defamation, damages the reputation of Ireland's legal system and the entitlement to free speech. Submissions pointed out that the European Court of Human Rights has also criticised some of the inordinate awards that have arisen from defamation hearings.

3. It was argued that the use of juries in defamation actions results in long delays and prevents defamation hearings from being resolved in an adequate timeframe.

Against the abolition of juries in defamation actions

Those who were opposed to the abolition of juries in defamation hearings argued that:

1. Submissions argued that this Head would remove the long-established right of a citizen to a trial by jury, while also removing the public's participation in the administration of justice.
2. Stakeholders argued that, if Head 3 proceeds as intended, then Ireland would be an outlier within common law systems as there has not been a complete removal of juries from defamation hearings in the UK. The UK operates an 'opt-in' system, where a defamation hearing can be heard in front of a jury in certain circumstances and where the presiding judge agrees to allow this.

3. Submissions argued that juries bring advantages to defamation trials in terms of their real-world experience, which jurors can apply when assessing the credibility and attitudes of parties in a defamation claim.

4. Submissions argued that a jury verdict carries greater weight in the mind of the public than the decision of a judge does and that it is more likely that people may believe the verdict of a judge was influenced by bias or prejudice than that of a jury verdict.

5. Stakeholders argued that there is little evidence that removing juries would result in a significant decrease in the costs associated with defamation actions. It was highlighted that several other factors are responsible for the high costs associated with these cases, including the specialist nature of defamation proceedings, and delays in the common law motion list. Submissions underlined that the provision of more resources, including the adequate resourcing of the civil jury list and assigning more judges to hear

defamation cases, would have a greater impact on the costs associated with these trials.

6. It was argued that removing juries would not prevent delays in defamation cases concluding and that the cases mentioned in the Report of the Review of the Defamation Act 2009 were delayed as a result of them progressing through appeals mechanism, rather than as a result of any delays in the initial defamation hearing. Some submissions highlighted that two of the longest running defamation actions in recent times were heard by a judge sitting alone.

7. Submissions acknowledged that there has been criticism levied against the role of juries in deciding upon damages for defamation cases. Stakeholders noted that, until recently, defamation cases were subject to a rule of law, affirmed in Supreme Court in *De Rossa v Independent Newspapers [1999]*, which provided that there could be no mention to the jury of monetary figures to guide them on the range of damages that may be appropriate to the given case. However, several stakeholders emphasised that the judgement of the Supreme Court in *Higgins v The Irish Aviation Authority*, issued in March 2022, set out clear guidance on appropriate levels of damages in defamation actions and should assist juries in awarding appropriate damages. Stakeholders recommended that further time should be given to allow for the impact of this verdict to take place, before any decision to remove juries from defamation actions is considered.

8. Submissions pointed out that other measures could be applied to avoid juries from recommending inordinate awards, for example, the issuing of damages could be designated as the responsibility of the trial judge or the trial judge could be responsible for reviewing and moderating any suggested award prior to the final award being decided.

Some submissions agreed with the removal of the presumption of jury trial but argued that the opportunities to use a jury during defamation proceedings should still be available in certain circumstances, or that it should still be available at the request of either party involved in the defamation proceedings.

Several submissions commented that the review of defamation legislation undertaken by the Department of Justice had not carried out sufficient analysis into the implications of the removal of juries from defamation cases in England and Wales that was introduced in 2013. Stakeholders argued that the cost of defamation cases in England and Wales have not fallen since this change was introduced and some argued that costs associated with defamation proceedings in the UK appear to have increased significantly since the changes were introduced, which further limits the potential for ordinary citizens to pursue defamation actions.

2. ‘Serious harm threshold’ [Heads 4-6]

Heads 4-6 provides for the introduction of a serious harm threshold in relation to defamation claims in three separate categories: defamation claims by bodies corporate (Head 4); defamation claims by public authorities (Head 5); and transient retail defamation (Head 6).

Submissions raised some of the following points in relation to these Heads:

- Submissions argued that the provisions around the ‘serious harm’ criteria under Heads 4-6 should be more general, as the current approach would exclude other valid claims, such as those from individual private plaintiffs. It was suggested that the General Scheme would include a more general provision, such as the standard applied under Head 6(2). More general phrasing would also allow these Heads to cover instances of SLAPPs, which could be dismissed at an early stage on the basis that the applicant’s claim would be ‘not likely to succeed at full hearing’.
- Other stakeholders argued that a serious harm test should be introduced for all defamation cases and pointed out that there should be no legal impediment to extending the serious harm threshold to other organisations, e.g., media organisations, when the standard is already applied to the bodies listed under Heads 4-6. It was argued that a defamation action that cannot meet this threshold, would pose a disproportionate threat to the right to free expression, and that applying this threshold to all defamation cases would deter vexatious claims and deter the potential of ‘libel tourism’ occurring in Ireland.
- Some submissions argued that the introduction of a serious harm test might increase the costs and delays arising from defamation proceedings.
- It was argued that more clarity must be provided around how a Court would determine when the threshold of serious harm has been met and that determining this threshold may prove to be a burdensome exercise.

Submissions made the following comments specific to each Head:

Head 4

- Submissions stated that applying a serious harm threshold to bodies corporate may not have a strong impact, as it may be viewed that any defamation claim could be 'serious' for the business in question. To filter out trivial claims, it was recommended that the General Scheme would amend section 6(5) of the 2009 Act to exclude defamation of bodies corporate from the provision that defamation is 'actionable per se' and requires proof of special damage, to demonstrate losses that occurred as a result of the defamatory statement.
- Other submissions questioned whether bodies corporate should be permitted to bring defamation action, regardless of the seriousness of harm caused. It was suggested that, if allowed, this right should only apply to companies with less than 10 staff, similar to provisions in Australian legislation, or that corporations must prove that they sustained, or are likely to sustain, financial loss as a result of the statement made.

Head 5

- Submissions questioned the entitlement given to public authorities under this Head to bring defamation actions. Some argued that public authorities should not be allowed to bring defamation actions, or that if allowed, private bodies who provide public services must prove there is public interest in them bringing an action, in order to align with the standards applied to public authorities.

Head 6

- Submissions highlighted that this Head may have a disproportionate impact on citizens. It was suggested that, in light of the absence of case law in

respect of these claims, a specific statutory class of qualified privilege could be inserted which would address such claims, as long as the retailer acts in a responsible manner.

3. Choice of jurisdiction [Head 10]

- Provisions under Head 10 may conflict with EU Regulation 1215/2012 (Brussels I (Recast) Regulation), the EU legislation providing for cross-border defamation cases.
- Head 10 may threaten the unenumerated right of access to the courts and therefore be unconstitutional.

Head 10 aims to address the potential for 'defamation tourism' and ensure that Ireland is the most appropriate place for defamation actions to be brought.

Submissions acknowledged that, in comparison with England, Wales and other European jurisdictions, Ireland is an appealing destination in which to bring a defamation case, due to the low threshold for bringing a defamation case in Ireland, alongside numerous civil procedural instruments that can be availed of and attractive damages awards for defamation cases.

Therefore, submissions welcomed the intention of this Head to tackle 'libel tourism'; however, they expressed several concerns in relation to the current formulation of this Head, including:

- Stakeholders highlighted that the main rules around selecting the most appropriate jurisdiction in cross-border defamation cases are contained in EU Regulation 1215/2012 (Brussels I (Recast) Regulation) and argued that there is a conflict between the proposals under Head 10 and the Brussels I Regulation (Recast). Stakeholders urged that this Head and potential conflicts with EU legislation must be evaluated and re-considered.
- Some stakeholders argued that Head 10(1) as currently phrased may prove unconstitutional, as it would threaten the unenumerated right of access to the courts.
- Submissions suggested that Head 10 should make clear that it would also apply to corporate bodies as well as individuals, to allow corporations to dispute jurisdiction of defamation cases, where warranted.

4. New Part 5 of Principal Act: Measures against abusive litigation to restrict public participation (SLAPPs) [Heads 23-31]

- The development of these Heads should take account of the EU's anti-SLAPPSs Directive, COM (2022) 177.
- Part 5 should not limit anti-SLAPP provisions to defamation; anti-SLAPP provisions should address all possible SLAPP threats.

Heads 23 – 31 of the General Scheme provides for a new Part to be created within the General Scheme that would introduce measures against abusive litigation to restrict public participation (SLAPPs). 'Strategic Lawsuit Against Public Participation', known as SLAPPs, are strategic and abusive use of vexatious litigation, by a powerful entity or individual, to weaken and deter public interest discussion.

Submissions broadly welcomed the intention to introduce a measure to counter SLAPPs but expressed concerns with several elements of the new Part 5, including some of the following:

- Some stakeholders argued that, as currently proposed, the new Part 5 may limit anti-SLAPP provisions to defamation, therefore hindering the effectiveness of Ireland's legal framework from challenging SLAPPs. It was recommended anti-SLAPP provisions should address all possible SLAPP threats and that a standalone piece of legislation may be more suited to provide for these.
- Some submissions advised that the Heads as currently phrased may be more wide-ranging in their scope and impact than intended and suggested that these Heads be reviewed.
- Submissions referred to the EU's anti-SLAPPSs Directive, COM (2022) 177 which is currently being progressed. Some stakeholders highlighted that the development of Heads 23-31 should take into account the progression of the anti-SLAPPS measure being discussed at EU level.
- Others suggested that if the development of Part 5 of the General Scheme may cause potential delays to the reform of Ireland's defamation legislation, then it

may be more prudent for this Part to be inserted into future legislation that would transpose the finalised version of the EU's anti-SLAPPSs Directive.

5. Power to make an identification order ('Norwich Pharmacal' Order) [Head 33]

- The provision of information under this Head must be necessary and proportionate.
- Head 33 should specify that the costs of applying for a 'Norwich Pharmacal' Order would be borne by the applicant.

Head 33 is intended to create a statutory power for the High Court and Circuit Court to grant a 'Norwich Pharmacal' Order, which would instruct an intermediary service provider to provide information identifying an anonymous operator of an account or poster of a defamatory statement.

Stakeholders welcomed that the provisions under this Head may reduce the costs involved for all participants and may increase the number of individuals that can obtain this order.

Submissions cautioned that the provision of information under this Head must be necessary and proportionate. It was recommended that Head 33(3) should stipulate that the sharing of such information by the service provider must be necessary in order for the applicant to take action against the publisher and that the applicant must guarantee they will only use information received for the purpose of seeking redress.

Submissions also cautioned against the provisions of this Head placing an undue burden on service providers, for example, the need for Head 33(2) to be more restrictive in the type of data that service providers are required to produce. It was suggested that this Head should stipulate that service providers can only be ordered to produce data which would be available in their standard data production tools.

Submissions recommended that under Head 33(4) the courts should also be obliged to consider the right to freedom of expression and data protection rights of an anonymous publisher, when deciding whether or not to grant a 'Norwich Pharmacal' Order.

It was recommended that Head 33 should specify that the costs of applying for a 'Norwich Pharmacal' Order would be borne by the applicant, as is standard practice.

6. Notice (online publication) [Head 34]

- Hosting platforms must not be responsible for determining if content on their platform is defamatory; this should be the preserve of legal experts or the courts.
- Online platforms must retain the ability to rely on the hosting defence.

Head 34 would introduce a 'Notice of complaints' process, with time limits to encourage parties to make contact at a preliminary stage and resolve defamation disputes without the need for litigation. This Head would also provide for the mechanism in Article 16 of the Digital Services Regulation ((EU) 2022/2065).

In its submission, Twitter acknowledged that requests to remove allegedly defamatory content involve a balance between the rights of freedom of expression against the right to an individuals' good name and reputation.

Twitter expressed concerns that this Head would place a burden on hosting platforms like Twitter to determine whether a statement is defamatory or illegal and argued that it must be the responsibility of the courts and of legal experts to decide whether content is defamatory or not. Twitter argued that, until a legal evaluation finds the content to be defamatory, it should be left on Twitter's platform to prevent against these provisions having a chilling effect on free speech or censoring content unduly.

Twitter also stressed the importance of retaining the ability to rely on the hosting defence, given that Twitter cannot pre-review content that is posted by its users. It was recommended that this be ensured under national legislation, to align with protections afforded under the e-Commerce Directive and the Digital Services Act. Other submissions expressed concerns that the proposed notice and takedown regime does not align sufficiently with the Digital Services Act.

Other concerns highlighted included provisions under Head 34(4), where an author may request the removal of the restriction of their content, without requiring the author to provide any justification for the removal of this restriction. It was argued that Twitter

may be obliged to follow such a request, even if this may result in content being swiftly removed, only to be re-instated soon after.

7. Additional Points

In addition to the above key issues, some stakeholders indicated specific interest in certain areas, as follows:

- **Head 16 - Amendment of section 26 of Act of 2009 (Fair and reasonable publication on a matter of public interest) [Head 16]**

Head 16 proposes to amend section 26 of the Defamation Act 2009 and it would ensure the requirements of this defence are simpler and that the 'responsible journalism' standard is put forward as the condition for utilising this defence.

Submissions welcomed the proposed amending of section 26 under this Head, as it was acknowledged that section 26 had been overly complicated and that its high threshold for defendants meant that it was not used as frequently as desired. Amending section 26 would make the defence simpler and clearer and ensure that it aligns with the standards set out in this area by the European Convention on Human Rights, to guarantee freedom of expression.

However, stakeholders pointed to section 1(c) of the Head and references to 'responsible journalism', arguing that as phrased, this Head would restrict use of this defence to journalists, to the exclusion of other relevant groups whose work would fall within the sphere of public interest and may be targeted with defamation claims, e.g., academics or whistle-blowers. It was suggested that the wording of this Head be re-evaluated to avoid this restriction.

Some stakeholders recommended the removal of Head 16(1)(c) and it was highlighted that this section does not align with equivalent section in English / Welsh, Scottish and Northern Irish defamation legislation, despite the intention to model this section on equivalent sections in defamation legislation in these jurisdictions.

- **Amendment of Section 27 of Act of 2009 (Innocent publication) in relation to website [Head 17A]**

Head 17A would clarify the requirements for proving online publication and extend the defence of 'innocent publication' to operators of websites. This Head intends to address concerns that administrators of 'non-commercial' websites or forums could be liable for a defamatory comment posted by a user, even if they may have no control comments posted by users and may have taken reasonable steps to prevent defamatory comments being posted.

In its submission, Twitter highlighted that the term 'operators of websites' should be more clearly defined so that it is distinguished from online platforms and other online service providers, such as Twitter.

It was also recommended that more detail should be provided under this Head around the appropriate response of a website operator to a notice of complaint of a defamatory statement, e.g., whether an acknowledgement of the notice would be sufficient.

- **Head 24 – Definitions (Part 5)**

Submissions highlighted that the current definition of 'matter of public interest' under Head 24 may be too prescriptive, as it is always necessary to consider the broader context and the specific case at hand, when determining what is considered a 'matter of public interest'. It was recommended that this definition should be more closely aligned with to the definition adopted the European Court of Human Rights, e.g., 'matter which affects the public'.

Submissions stated that the definition of 'features of concern', which refers to a list of several features that are viewed as hallmarks of typical SLAPPs, should be non-exhaustive and broad enough to cover all characteristics that are typical of SLAPPs. Stakeholders cautioned that the current list may be too narrow and may limit the court's interpretation of these features. To achieve this, it was recommended that consultations be carried out with relevant stakeholders, including journalists, media

outlets, whistle-blowers, those from the legal profession and anti-corruption organisations, to accurately capture the techniques used by SLAPP claimants.

It was also pointed out that the definition of 'features of concern' should make allowances for litigants in person, who choose to represent themselves in court and for ineffective legal assistance, to take account of the significant expense of defamation proceedings and the fact that some individuals will choose to represent themselves or may not be able to afford to engage legal representatives experienced in defamation proceedings.

- **Head 26 - Early dismissal**

Submissions cautioned that the early dismissal mechanism as formulated within the General Scheme may prevent a number of valid cases from progressing. Submissions questioned how an applicant could prove that their case is not 'manifestly unfounded' without the ability to progress the case to a full trial. It was pointed out that this appears to introduce a higher threshold than what is presently available for strike out and summary judgment but that this provision may lean too much in the defendant's favour.

Submissions were conflicted over Head 26(2)(c), which provides that the court should not dismiss proceedings if "the plaintiff's claims are likely to succeed if the case proceeds to full hearing". Some argued that this threshold provides a good balance between preventing SLAPP cases from reaching trial, while allowing other cases go to trial if the applicant can prove there is a likelihood their case would be successful at full trial and that there is a greater public interest in the case proceeding to trial than being dismissed. Others argued that, under this provision, there is little clarity as to what might be classified as 'likely to succeed' at full a hearing.

Those opposed to the early dismissal mechanism suggested that introducing the proposed reversal of the presumption of jury trial, introducing the recommended serious harm threshold and amending section 14 and section 34(2) of the 2009 Act to insert 'not likely to be found to have a defamatory meaning' would help address the incidence SLAPPs, without interfering with the right to fair trial and reputation.

APPENDICES

APPENDIX 1- ORDERS OF REFERENCE OF THE COMMITTEE

Standing Orders 94, 95 and 96 – scope of activity and powers of Select Committees and functions of Departmental Select Committees

Scope and context of activities of Select Committees.

94.(1) The Dáil may appoint a Select Committee to consider and, if so permitted, to take evidence upon any Bill, Estimate or matter, and to report its opinion for the information and assistance of the Dáil. Such motion shall specifically state the orders of reference of the Committee, define the powers devolved upon it, fix the number of members to serve on it, state the quorum, and may appoint a date upon which the Committee shall report back to the Dáil.

(2) It shall be an instruction to each Select Committee that—

(*a*)it may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders;

(*b*) such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil;

(*c*) it shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Order 125(1)[6]; and

[6] Retained pending review of the Joint Committee on Public Petitions

(*d*) it shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—

(i) a member of the Government or a Minister of State, or

(ii) the principal office-holder of a State body within the responsibility of a Government Department or

(iii) the principal office-holder of a non-State body which is partly funded by the State,

Provided that the Committee may appeal any such request made to the Ceann Comhairle, whose decision shall be final.

(3) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice to the Business Committee by a Chairman of one of the Select Committees concerned, waives this instruction.

Functions of Departmental Select Committees.

95. (1) The Dáil may appoint a Departmental Select Committee to consider and, unless otherwise provided for in these Standing Orders or by order, to report to the Dáil on any matter relating to—

(*a*) legislation, policy, governance, expenditure and administration of—

(i) a Government Department, and

(ii) State bodies within the responsibility of such Department, and

(*b*) the performance of a non-State body in relation to an agreement for the provision of services that it has entered into with any such Government Department or State body.

(2) A Select Committee appointed pursuant to this Standing Order shall also consider such other matters which—

(a) stand referred to the Committee by virtue of these Standing Orders or statute law, or

(b) shall be referred to the Committee by order of the Dáil.

(3) The principal purpose of Committee consideration of matters of policy, governance, expenditure and administration under paragraph (1) shall be—

(*a*) for the accountability of the relevant Minister or Minister of State, and

(b) to assess the performance of the relevant Government Department or of a State body within the responsibility of the relevant Department, in delivering public services while achieving intended outcomes, including value for money.

(4) A Select Committee appointed pursuant to this Standing Order shall not consider any matter relating to accounts audited by, or reports of, the Comptroller and Auditor General unless the Committee of Public Accounts—

(a) consents to such consideration, or

(b) has reported on such accounts or reports.

(5) A Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann to be and act as a Joint Committee for the purposes of paragraph (1) and such other purposes as may be specified in these Standing Orders or by order of the Dáil: provided that the Joint Committee shall not consider—

(a) the Committee Stage of a Bill,

(b) Estimates for Public Services, or

(c) a proposal contained in a motion for the approval of an international agreement involving a charge upon public funds referred to the Committee by order of the Dáil.

(6) Any report that the Joint Committee proposes to make shall, on adoption by the Joint Committee, be made to both Houses of the Oireachtas.

(7) The Chairman of the Select Committee appointed pursuant to this Standing Order shall also be Chairman of the Joint Committee.

(8) Where a Select Committee proposes to consider—

(a) EU draft legislative acts standing referred to the Select Committee under Standing Order 133, including the compliance of such acts with the principle of subsidiarity,

(b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,

(c) non-legislative documents published by any EU institution in relation to EU policy matters, or

(d) matters listed for consideration on the agenda for meetings of the relevant Council (of Ministers) of the European Union and the outcome of such meetings, the following may be notified accordingly and shall have the right to attend and take part in such consideration without having a right to move motions or amendments or the right to vote:

(i) members of the European Parliament elected from constituencies in Ireland,

(ii) members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and

(iii) at the invitation of the Committee, other members of the European Parliament.

(9) A Select Committee appointed pursuant to this Standing Order may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department consider—

(*a*) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and

(*b*) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select: Provided that the provisions of Standing Order 130 apply where the Select Committee has not considered the Ombudsman report, or a portion or portions thereof, within two months (excluding Christmas, Easter or summer recess periods) of the report being laid before either or both Houses of the Oireachtas.[7]

7 Retained pending review of the Joint Committee on Public Petitions.

Powers of Select Committees.

96. Unless the Dáil shall otherwise order, a Committee appointed pursuant to these Standing Orders shall have the following powers:

(1) power to invite and receive oral and written evidence and to print and publish from time to time—

(a) minutes of such evidence as was heard in public, and

(b) such evidence in writing as the Committee thinks fit;

(2) power to appoint sub-Committees and to refer to such sub-Committees any matter comprehended by its orders of reference and to delegate any of its powers to such sub-Committees, including power to report directly to the Dáil;

(3) power to draft recommendations for legislative change and for new legislation;

(4) in relation to any statutory instrument, including those laid or laid in draft before either or both Houses of the Oireachtas, power to—

(*a*) require any Government Department or other instrument-making authority concerned to—

(i) submit a memorandum to the Select Committee explaining the statutory
Instrument, or

(ii) attend a meeting of the Select Committee to explain any such statutory instrument: Provided that the authority concerned may decline to attend for reasons given in writing to the Select Committee, which may report thereon to the Dáil,
and

(*b*) recommend, where it considers that such action is warranted, that the instrument should be annulled or amended;

(5) power to require that a member of the Government or Minister of State shall attend before the Select Committee to discuss—

(a) policy, or

(*b*) proposed primary or secondary legislation (prior to such legislation being published),

for which he or she is officially responsible: Provided that a member of the Government or Minister of State may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil: and provided further that a member of the Government or Minister of State may request to attend a meeting of the Select Committee to enable him or her to discuss such policy or proposed legislation;

(6) power to require that a member of the Government or Minister of State shall attend before the Select Committee and provide, in private session if so requested by the attendee, oral briefings in advance of meetings of the relevant EC Council (of Ministers) of the European Union to enable the Select Committee to make known its views: Provided that the Committee may also require such attendance following such meetings;

(7) power to require that the Chairperson designate of a body or agency under the aegis of a Department shall, prior to his or her appointment, attend before the Select Committee to discuss his or her strategic priorities for the role;

(8) power to require that a member of the Government or Minister of State who is officially

responsible for the implementation of an Act shall attend before a Select Committee in relation to the consideration of a report under Standing Order 197;

(9) subject to any constraints otherwise prescribed by law, power to require that principal office-holders of a—

(*a*) State body within the responsibility of a Government Department or

(*b*) non-State body which is partly funded by the State,

shall attend meetings of the Select Committee, as appropriate, to discuss issues for which they are officially responsible: Provided that such an office-holder may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil;

and

(10) power to—

(*a*) engage the services of persons with specialist or technical knowledge, to assist it or any of its sub-Committees in considering particular matters; and

(b) undertake travel;

Provided that the powers under this paragraph are subject to such recommendations as may be made by the Working Group of Committee Chairmen under Standing Order 120(4)(*a*).'

APPENDIX 2 - LIST OF STAKEHOLDERS AND SUBMISSIONS

The Committee received submissions from the following stakeholders:

- Mediahuis
- Twitter International Unlimited Company
- The Hon. Mr Justice Bernard Barton (retd)
- NewsBrands Ireland & Local Ireland
- The Press Council of Ireland and the Press Ombudsman
- The Bar of Ireland
- Dr. Mark Hanna
- The Law Society of Ireland
- Irish Council for Civil Liberties (ICCL)
- National Union of Journalists (NUJ)
- Mr. Mark Harty SC
- Dentons Ireland LLP
- Mr. David Whelan BL
- Retail Ireland, IBEC
- McCann FitzGerald
- Ireland Anti-SLAPPs Network

[Submissions are available in the online version of the Committee's Report, which will be accessible at https://www.oireachtas.ie/en/committees/33/justice/].

Submissions of Mediahuis Ireland to the Committee on Justice

Defamation (Amendment) Bill

A. Introduction

1. Mediahuis Ireland (Mediahuis) is Ireland's largest publisher with leading national and local titles. We employ more than 700 people on the island of Ireland and we are a founding member of the Press Council of Ireland.

2. The Mediahuis Group was founded in Belgium 2014 and is one of Europe's most dynamic media companies. It publishes and broadcasts in multiple European languages, including English, Dutch, French, Luxembourgish, Portuguese, German, Frisian and Irish (Seachtain is published weekly in the Irish Independent).

3. Mediahuis believes unconditionally in independent journalism and a strong and relevant media that makes a positive contribution to people and society.

4. Comprehensive reform of Ireland's defamation law is the single most effective way to enhance the ability of Irish media to bring matters of public interest to light. It also has the potential to alleviate some of the financial strains affecting all Irish media. We are grateful for the opportunity to make submissions to the Committee on the Heads of Bill that have been published by the Department of Justice.

B. Executive Summary

5. It is important to remember that under the Defamation Act 2009, the Department of Justice was obliged to commence its review of the Defamation Act no later than 23 July 2014 but did not do so until November 2016, two years outside of the statutory requirement for review. Section 5 (2) of the Act provides that such a review "shall be completed not later than one year after its commencement." Ultimately, the review was not published until 1 March 2022, almost seven years overdue.

6. It is imperative that the Amendment Bill now proceeds promptly and efficiently to enactment. We hope that the Committee will play an important role in this process.

7. Mediahuis Ireland broadly welcomes the Heads of Bill and the legislative timetable referred to Minister Harris that will see legislation passed by the end of this year. While there are still a number of issues that need to be addressed, we are mindful of not compounding previous delays and therefore propose to limit our submission to a number of fundamental points that need to be addressed in the final legislation. This will not fix all of the problems with current state of Ireland's defamation laws but it will be a important step in the right direction.

8. The most fundamental change required is the abolition of juries as provided for in the Heads of Bill. This will reduce both the duration and cost of defamation proceedings and over time it can bring predictability and consistency to the issue of appropriate damages. If there are other aspects of the Bill that the Committee conclude require more careful and lengthy consideration then there is nothing to prevent the abolition of juries by way of a discrete piece of legislation that can be enacted without delay.

9. In terms of necessary amendments to the Heads of Bill, the most important amendment required is the need for a serious harm test that applies to all types of defamation. The Heads of Bill show that significant work has been undertaken to provide for serious harm test in retail defamation, in the context of a body corporate and, effectively, in the draft legislation dealing with SLAPPs. It is extremely difficult to reconcile the concerns of the Review that a general serious harm test cannot be introduced due to potential constitutional issues relating to rights to good name and reputation and access to the courts, with the proposal to limit an individual's right of action in two separate scenarios.

10. In addition to the need for a general serious harm test, a number of other provisions require refinement and clarification to avoid unintended consequences and to ensure the smooth operation of the amended legislation upon its introduction. We set these out below.

C. Head 3 Abolition of juries in High Court cases

11. As per the vast preponderance of submissions received by the Review group and in accordance with the recommendation of the group, Mediahuis Ireland agrees with the abolition of juries for the trial of defamation actions.

12. From the perspective of both plaintiffs and defendants the existing jury system is slow moving and costly. As has been extensively set out in recent years, the jury system has led to an unpredictable process of litigation where it is extremely difficult for either side to calculate the likely outcome. This volatility and uncertainty does nothing to facilitate alternative dispute resolution. Any legal practitioner with regular experience of defamation cases will attest that mediation is effectively unheard of as a means of resolving such disputes.

13. In the absence of certainty of timing, costs and likely outcomes the proposals in the Bill to foster alternatives to litigation (at Heads 8 and 9) are unlikely to find much favour.

14. Through the steady development of precedent, the abolition of juries and therefore, the removal of the need for appellate courts to continue to express a high level of deference to their role in assessing damages, will lead to a more consistent and proportionate approach to the award of damages. This, in turn, will have a moderating effect on the costs and duration of running complicated, unpredictable litigation.

15. Mediahuis Ireland commends the proposed abolition of the role of juries and urges prompt implementation of this provision.

D. Heads 5 to 6 and Heads 23 to 28 - Serious harm

16. As referred to in the Executive Summary, it is difficult to understand how the potential constitutional concerns about a general serious harm test can be reconciled with a proposal, albeit bearing the caveat that it is subject to there being no constitutional concerns, to introduce such a test for retail defamation. In our view, there is no reason in principle why SLAPP provisions set out in Heads 23 to 28 would not also give rise to such concerns.

17. The current Heads of Bill will create an unnecessarily complicated approach to the question of harm and threatens to undo the abolition of the distinction between libel and slander that was introduced by the Act.

18. A person whose reputation has been damaged, whether in a "retail defamation" scenario or by "an act of public participation", is entitled to have access to the courts to vindicate their reputation. Those who exercise their right to freedom of expression are also entitled to have their rights protected. Neither should trump the other and nor should there be a bifurcation of those rights.

19. A single, coherent serious harm test can balance the rights of all concerned and minimise the potential for conflicting jurisprudence under the different provisions currently envisaged in the Heads of Bill. It would also have the benefit of being able to draw on English case law such as Lachaux1 to further refine and define the parameters of the test.

20. Within any serious harm test, the Courts must remain the guardians of the constitutional rights that need to be protected. The bar to entry for plaintiffs should not be a high one but nor should defendants be exposed to defending de minimis claims.

21. By way of example, a single, unified serious harm test could be framed in the following terms:

> *(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant in the eyes of reasonable members of society.*
>
> *(2) In the case of a body corporate a statement is not defamatory unless its publication has caused, or is likely to cause, serious harm to the reputation of the body corporate in the eyes of reasonable members of society.*
>
> *(3). For the purposes of subhead (2), in the case of a body that trades for profit, harm to the reputation of a body is not 'serious harm', unless the body can show that it has incurred, or is likely to incur, serious financial loss as a result of the publication of the statement.*

[1] Lachaux (Respondent) v Independent Print Ltd and another (Appellants), [2019] UKSC 27

(4) The court shall, for the purposes of determining whether a statement has caused or is likely to cause serious harm, have regard to –

i. the words of the published statement,

ii. the nature and extent of publication,

iii. the impact of the published statement, and

iv. the extent of harm done to a person's reputation by previous publications that contain substantially the same allegations as are contained in the statement complained of.

22. Finally, while we welcome the provisions contained in Head 5 we do not believe these should be conflated with the issues of serious harm. As reflected in the language of the head itself, the issue is not one of serious harm but public interest. It is entirely appropriate that such a measure be enacted but the final legislation should be careful not to add further confusion to the question of harm.

E. Head 9 - Formal Offers

23. Mediahuis Ireland welcomes this provision but it should be drafted on a reciprocal basis that would allow both plaintiffs and defendants to initiate such a process.

F. Head 11 – Dismissal

24. Mediahuis Ireland agrees with the comments expressed in the explanatory note to this Head 11. Cases initiated but left in abeyance are voluminous and not only require defendants to bear ongoing costs and uncertainty but also require them to carry ongoing financial provisions that tie up resources that could otherwise be used in furtherance of journalism and / or impact the costs and terms of insurance policies.

25. Our submission on this head is that it should be amended so that it does not only apply to cases where no step has been taken by a plaintiff "within two years of initiation" but where there is a two year hiatus at any stage in the life of the proceedings. The saving provisions of sub-head will still ameliorate any risk of injustice to a plaintiff who satisfies the criteria set out therein.

G. Head 12 - Privilege

26. Mediahuis Ireland agrees with the provisions set out in subhead (1) of Head 12.

27. We think the proposed provisions in subhead (2) as currently drafted are unnecessary and unwise.

28. While noting the recommendations of the Law Reform Commission cited in the Explanatory Note to the Heads, the actual recommendation was that certain "non-exhaustive criteria" (emphasis added) for assessing a fair and accurate report should be incorporated into the Act.

29. In its Report2 the Commission cited the full list of thirteen criteria referred to in the Philpott3 decision, which in turn drew on Gatley on Libel and Slander (12th edition).

30. The current drafting of the Heads risks positing each of the five criteria cited as determinative of the question of fairness and accuracy. At very least it should be made expressly clear that these are only some of the factors to be considered.

31. Furthermore, Head 2(d) must be removed from any list of relevant criteria. It risks being interpreted as requiring the media to cover every day of a trial in order to avail of the protection of Section 17 (2). This, of course, may not be practical or desirable for reasons related to available resources and/or editorial decision making. It also fails to take account of the more detailed comments of the Law Reform Commission on this particular issue:

> *[1.38] In addition, listed by the High Court in Philpott as principle or criterion number 12, the Court noted that Gatley queried whether, 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 the conclusion. The Court in Philpott noted that this point did not arise in the case, but nonetheless expressed the view that:29 "Irish law may well 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?"*
>
> *[1.39] The view expressed in Philpott that such a report would meet the fair and accurate test was, as the Court noted, not a matter that arose in the case and was therefore obiter, so that it remains to be reconsidered in a suitable case. The Commission notes that Gatley suggests that this precise point may, indeed, also remain an open question in UK law. 30*
>
> *[1.40] In Philpott, the High Court added that a person need not necessarily be present in court for the entire case in order for a report of court proceedings to come within section 17 of the 2009 Act.31 The Court also held that a report of court proceedings could be based solely on a written judgment of a court and still constitute a report for the purposes of the absolute privilege defence.*

32. In Irish Times v Ireland [1998] 1 IR 359, the Supreme Court made a number of statements in the course of their decision that laid out the importance of the role of the media in society and in particular the importance of their role in reporting on court proceedings. Mr Justice O'Flaherty stated (at pp394 to 395):

[2] Law Reform Commission, Privilege for Reports of Court Proceedings under the Defamation Act 2009 (LRC 121 – 2019)
[3] [2016] IEHC 62

"I would hold that freedom of the press is guaranteed under Article 40.6.1 and that the protection in the constitutional provision is not confined to mere expressions of convictions and opinions."

"So the press has the right to report and, indeed, comment on proceedings in courts of law."

"The press are entitled to report, and the public to know, that the administration of justice is being conducted fairly and properly. This is not to satisfy any idle curiosity of the public. The public have both a right and a responsibility to be kept informed of what happens in our courts. Since the proper administration of justice is of concern to everyone in the State, the press has a solemn duty to assure the public by fair, truthful and contemporaneous reporting of court proceedings whether or not justice is being administered in such a manner as to command the respect and the informed support of the public. As it was put by Fitzgerald J., in an Irish case of the last century, one of the many securities for the due administration of justice is 'the great security of publicity': R. v. Gray (1865) 10 Cox C.C. 184 at p. 193. (Emphasis added)

33. Of course, it is also true that the reputations of those who find themselves embroiled in proceedings, directly or indirectly, as a result of their own actions or entirely innocently, must be properly safeguarded. This is not however, an issue that has been of great controversy or dispute. Indeed, the Law Reform Commission's Report actually arose out of debate about whether the protection for court reporting should be strengthened.

34. We would urge great caution regarding any steps that could lessen the protection afforded by Section 17 (2) and thus risk a chilling effect on the media's willingness and /or ability to report on court proceedings.

H. Heads 15 and 18 – "Equal prominence"

35. We note the provisions of Heads 15 and 18 which propose to amend Sections 22 and Section 30 of the Act to refer to publication of apologies and/or correction with "equal prominence" to the original offending statement.

36. We also note some of the commentary to the effect that this provision is required to prevent media 'burying' corrections and apologies. This, respectfully, is an antiquated and wholly misrepresentative perspective on what happens in practice.

37. Mediahuis Ireland are not aware of a single case under either Section 22 or Section 30 where the prominence of a correction / apology was an issue that fell to be decided by the Courts.

38. The Press Council of Ireland and the Independent Press Standards Organisation (IPSO) both have the power to require their members publish corrections with due (rather than equal) prominence.

39. Principle 1 of the Press Council of Ireland's Code of Practice states:

*1.2 When a significant inaccuracy, misleading statement or distorted report or picture has been published, it shall be corrected promptly and with **due** prominence.*

40. In the UK, the Editor's Code of IPSO, the press regulator, states at Clause (1):

> *ii) A significant inaccuracy, misleading statement or distortion must be corrected, promptly and with **due** prominence, and — where appropriate — an apology published. In cases involving IPSO, **due** prominence should be as required by the regulator.*

41. Mediahuis Ireland commends to the Committee a standalone publication by IPSO on the question of "due prominence"4.

42. A particularly sensitive issue is the question of front page apologies or correction. In this respect, IPSO offer important context:

> *In the case of a significant inaccuracy being published on the front page or front cover of a newspaper or magazine, it would not always be appropriate for an entire correction or adjudication to be published here. However, reference to this can be made on the front page.*
>
> *Front pages and front covers are of particular importance to newspapers and magazines as they inform readers using limited space, of the main stories contained within that particular issue. Further, front pages and covers generally provide a publication with an opportunity to communicate with potential new readers. They are therefore valuable both commercially and editorially, as a means of expression.*

43. Due prominence does, of course, allow for "equal prominence" when the particular facts of a situation so require such a measure in order to remedy the harm caused by the original publication. However, a blanket insistence on "equal prominence" in all situations has the potential to undermine the possibilities of alternative dispute resolution and / or prompt and mutually agreed compromises.

I. Head 16 – Fair and reasonable publication

44. Mediahuis Ireland welcomes attempts to streamline this important statutory defence.

45. We have two observations to make on the proposed wording. Firstly, we agree that the appropriate standard is that the decision to publish was "in accordance with the standards of responsible journalism". We do not agree with the standalone reference to the defendant having "conducted such enquiries and checks as it is reasonable to expect". One of the criticisms of the original Section 26 defence was that it had created a lengthy 'check list' of factors that greatly complicated and limited the application of the defence. It is not appropriate to retain one standalone check list item alongside the general test of responsible journalism.

[4] https://www.ipso.co.uk/media/2288/due-prominence-journalist-guidance.pdf

46. Enquiries and checks are, of course, a vital part of responsible journalism and will be part of that test in a holistic way. Carving out specific reference risks giving the defence a particular focus or emphasis.

47. Secondly, we have a concern linked to the points we also wish to make about the proposed changes to Section 28 of the Act and which provides for declaratory relief.

48. Sub-head (5) of Head 16 proposes excluding the Section 26 from consideration in applications for declaratory relief. It is not appropriate that a defendant would be prohibited from raising all possible defences that may be available when such declaratory relief is being sought. This is particularly so when it is now proposed to allow for damages to be awarded in an action for declaratory relief, a measure we comment on below in more detail.

J. Head 18 – Declaratory relief

49. It has to be acknowledged that the Section 28 relief is one that has rarely been used and as such amendment is appropriate. It is in the interests of all parties that a cost effective and efficient remedy is available in the relevant circumstances.

50. We acknowledge the proposed change to the test for Section 28 relief to align it with Sections 33 and 34.

51. We do not agree with the proposal to allow for the repeal of sub-section (8) of Section 28. The report of the Review group specifically recommended allowing for a limited award of damages to accompany an application for declaratory relief and proposed a sum of €10,000. If provision is to be made for damages to be awarded as part of declaratory relief then we think this is an appropriate sum of money to accompany what would, on the terms of the amended section that must be met to succeed, be an emphatic vindication of a plaintiff's position.

Mediahuis Ireland
3 May 2023

3 May 2023

Re: General Scheme of the Defamation (Amendment) Bill ('the Bill')
To: Joint Committee on Justice
From: Twitter International Unlimited Company

Introduction

Twitter supports the government's commitment to review and reform defamation laws in Ireland to ensure a balanced approach to the right to freedom of expression, the right to protection of good name and reputation and the right to access to justice. Twitter is an open and public platform, where people from all over the world come together for an open and free exchange of ideas. We strive to support freedom of expression, democratic debate, and healthy discourse. Twitter enables people from around the world to engage in conversations as well as to share and receive information. This includes the sharing of information that may be in the public interest. If Twitter were not able to facilitate the sharing of information of public interest, it would limit or stymie public knowledge and debate of newsworthy events, campaigns and discreditable conduct, amongst other things. There are many examples where the Twitter platform has played and continues to play such a key role, including the #MeToo movement. The hashtag has been used some 20 million times on Twitter since that initial Tweet in October 2017. As with a news website, there is a public interest both in contemporaneous Tweets and in the archive of historic Tweets.

At Twitter, we acknowledge the government's objective to ensure that national legislation strikes the right balance between competing rights and that a particular focus has been on tackling effectively the new and specific problems raised by online defamation. We support the modernisation of national legislation but we also submit that it is important to ensure a proportionate and workable approach, while protecting freedom of expression, other fundamental rights, and the intermediary liability protection of online platforms.

We welcome the opportunity provided to comment on the Bill. We outline our views on a number of the Heads in the Bill, which are informed by our knowledge and experience of the practical implications associated with these issues.

Comments on particular Head of the Bill

Head 10 - Choice of Jurisdiction

Twitter supports the focus in the Bill on attempting to solve the issue of libel tourism given that Ireland has more pro-plaintiff defamation laws than some other jurisdictions, and particularly in the context of the changes made by the Defamation Act 2013 in England and Wales. We submit however, that in its current form the provision may not be workable in the context of European law, in particular the Brussels I Regulation (Recast). In addition, we submit that Head 10 should expressly apply to corporate bodies or entities to make clear that such corporate bodies can avail of this protection from libel tourism in the same way as natural persons, where necessary, and provide such corporations with a clear basis to dispute jurisdiction in appropriate circumstances.

Head 17A - Amendment of Section 27 of Act of 2009 (Innocent publication) in relation to website operators

We understand from the Report on the Review of the Defamation Act 2009 published in 2022 ('the Report') that this amendment to the 'Innocent Publication' defence is proposed in order to implement a similar provision to section 5 of the Defamation Act 2013 in England and Wales. We note that this section makes specific provision for exempting 'operators of websites', in certain circumstances, in respect of a defamatory statement posted on the website and we acknowledge the conclusion in the Report that this would be useful in order to provide a defence for "smaller website operators" who would not be protected by the e-Commerce Directive. We also note that the Explanatory Notes in the Bill state that this Head is intended to be in addition to the rules governing the liability of intermediary services providers, as set out in Articles 4, 5, 6 and 8 of the DSA which replace articles 12-15 of the eCommerce Directive (Directive 2000/31/EC), i.e. the 'Hosting Defence', and that an example was provided of the Head applying to non-commercial community websites or social media forums/accounts, for example those established by parents of a local school, local sports club members, or residents' associations.

We note that "website operators" is not a defined term in the Bill. Taking into account the purpose behind this section as articulated in the Report and the Explanatory Note it appears the proposed amendments apply to smaller website operators as opposed to online platforms, such as Twitter. For clarity we suggest that the term "operators of websites" be defined and/or expressly distinguished from online platforms and/or other online service providers, such as Twitter.

We also submit that the current wording of this Head lacks clarity regarding what is required of the website operator in response to a notice of complaint of a defamatory statement in sub-section 2. For example, it is unclear if the response can be a simple acknowledgement of the notice of complaint or if it must go further and conversely, if an acknowledgement is a sufficient response to ensure the operator of the website is not precluded from availing of Article 27 defence.

Head 33 - Power to make an identification order ('Norwich Pharmacal' Order)

We acknowledge the desire to place the equitable remedy of Norwich Pharmacal relief on statutory footing and to allow such relief to be obtained in both the Circuit Court and High Court, with a view to lowering one of the financial barriers of access to justice.

We submit that the current wording of sub-section 1, which allows the court to require a service provider "*to disclose such information as it or they have in relation to the identity of the anonymous publisher, so*

that they may be identified for the purpose of the plaintiff seeking redress for the wrongs complained of" be amended to exclude the wording providing for identification of the anonymous publisher. The data held by a service provider such as Twitter in relation to the anonymous publisher is not a guarantee of identification - it may or may not allow for identification of the individual(s) who used and/or contributed to the content in question. For example, a service provider may be able to disclose an email address and some IP addresses which may or may not lead to the identification of the anonymous publisher. It is not possible for a service provider, such as Twitter, to ensure the data provided by a third party user will ultimately identify that person and we submit this wording could potentially subject the service provider to an unjust burden.

We respectfully submit that sub-section 2 should contain tighter parameters as to the type of data to be potentially produced, the period data, such as IP logs span, and to take into account the burden on service providers to locate and produce the data in question. We submit that a caveat should be included within this sub-head to provide that the data that can be ordered to be produced is limited to such data which is readily available in the service provider's standard data production tools to ensure the order is proportionate and not overly burdensome on the service provider.

We submit that sub-section 3 be expanded to expressly include a requirement on the part of the applicant that the disclosure of information or documents from the service provider is necessary in order to enable an action against the wrongdoer and that it be necessary and proportionate.

For freedom of expression to be achieved across the globe, maintaining anonymity and pseudonymity online is paramount. We firmly believe in a user's right to anonymity and privacy and data protection. We welcome the inclusion of sub-section 4 of this Head which expressly requires the court to take all the circumstances of the case into account, including the balancing of the rights of the applicant and those of the anonymous publisher in deciding whether or not to make an order under this Head. We suggest that this subsection expressly requires the court to also take into account freedom of expression and privacy and data protection rights of the anonymous publisher.

We submit in general that consideration should be given to more clearly defining the parameters of any such orders to ensure there are guardrails around what data a service provider might be required to produce, to try to narrow the scope of dispute and particularly to provide clearer guidance where such applications can now be made in the Circuit Court, a venue which heretofore has not had the remit of granting Norwich Pharmacal relief.

We finally submit that this Head should also include provisions that an undertaking is required from the applicant to only use any information obtained for the purpose of seeking redress and that the costs of any such orders are to be borne by the applicant, as is standard with Norwich Pharmacal relief. We observe that the Head is silent on this point, save for in the Explanatory Note.

Head 34 – Notice (online publication)

Twitter acknowledges the desire for a clear procedure for notice and take-down of allegedly defamatory content. Twitter can and will take action on content, including geoblocking or removing content from the platform on receipt of a judgment or court order. However, absent a court order or judgment, this is a complex area, involving a difficult and delicate balancing of the freedom of expression of the poster of the

allegedly defamatory content, the right to a good name and reputation of the subject of the allegedly defamatory statement and the clear inability of the hosting provider to be arbiter of the truth.

Twitter and all other similar online platforms benefit from the hosting defence as provided for in the e-Commerce Directive and now the Digital Services Act. We believe it is of paramount importance that national law provides equivalent protection as EU law. In this context we submit that it is imperative that Twitter retains the ability to rely on the hosting defence given it does not and cannot control or pre-review the content posted by Twitter's users. There are thousands of Tweets per second and hundreds of millions of Tweets each day. The Twitter Rules and Policies govern users' use of the platform, and provide various methods through which other users and persons can report behaviour which they consider breaches those Rules or their legal rights. Where Twitter considers that the content violates the Twitter Rules, it takes such action as it deems appropriate. However, absent such a violation or a court order or judgment, we submit it is inappropriate for Twitter to be censoring content. We are concerned that taking action on allegedly defamatory content, without a court order or judgment, could have a real chilling effect on free speech and risks the censorship of meritorious content. Twitter's preference would be to leave content available on the platform until a court process determines if the material should be removed or not (as provided for under Head 32) and/or determines it is defamatory following a full legal evaluation of the evidence from both sides.

As currently drafted, sub-sections of this Head, particularly 4, 5 and 12 cause some concern with regard to the ability to rely on the hosting defence. The hosting defence only envisages liability for a service provider if it obtains 'actual knowledge' of illegal activity or information. Subsection 12 in particular provides cause for concern as it states that 'Notices' under this section shall be considered to give rise to actual knowledge or awareness for the purposes of Article 6 of the Digital Services Regulation, where they allow a diligent provider of hosting services to determine that a statement is illegal/defamatory, and that the defendant has no defence, without a detailed legal examination. A burden is being placed on hosting platforms, such as Twitter, to determine if a statement is illegal/defamatory and if the author of the allegedly defamatory statement has no defence, based on the Notice received. Twitter is not and cannot be the arbiter of the truth. We submit that in most if not all scenarios it would not be possible to determine if defamation has occurred and whether there is any defence - this is a matter for the judiciary. While we appreciate that it may be open to Twitter to argue that we were not able to determine if the content is defamatory without "a detailed legal examination", we risk an adverse interpretation of this subsection in a particular case which could have significant consequences, including financial, for Twitter. We respectfully submit that the only way in which it can be decided if content is defamatory is for a court of law to carry out a detailed legal examination and it is not for hosting platforms to consider making any such determination with or without a detailed legal examination. As such, we have significant concerns about Head 33 of the Bill in its current form.

In addition to the general points made above, we note that sub-section 4 requires the service provider to remove the content or disable access to it, if the author fails to respond to the request for a response to the Notice and sub-section 5 requires the same action if we are unable to forward the Notice to the author. We have a real concern that this proposed regime could result in over-removal of content and the stifling of freedom of expression. In addition, it exposes online service providers to potentially losing the ability to rely on the hosting defence, without the equivalent protection of a Good Samaritan provision, similar to that provided for in the US Communications Decency Act and other similar laws in other countries.

We submit that the procedure outlined in sub-sections 1 - 7 of this Head presents some practical issues and possible operational difficulties:

Sub-section 4 provides that the author can request the removal of the restriction of their content. The sub-section does not require the author to provide any basis for the removal of the restriction and it appears that an online platform such as Twitter will simply be required to remove the restriction on content if we receive a request to do so. This process presents a potentially concerning pattern of hasty removal and subsequent reinstatement of content on the platform.

Sub-section 5 requires the service provider to remove the content or disable access to it, if it is unable to forward the Notice to the author. We submit that clearer language should be used to identify in what scenarios such an inability arises.

Sub-section 6 provides that where the intermediary service provider receives a response from the author, it shall forward the response to the person who submitted the Notice within a period of 5 working days subject to maintaining the anonymity of an anonymous author, where applicable. It is unclear from the wording of this sub-section what is proposed to occur after the response from the author is received and if the service provider is required to remove the content or disable access to it. In the event the author of the allegedly defamatory statement responds to state that they can rely on the defence of truth, for example, it is not clear if the service provider should and can then leave the content on the platform and continue to rely on the hosting defence.

Similarly to the point made above, sub-section 9 provides for a scenario where access to a statement is restricted in accordance with sub-section 6, the intermediary service provider is required to remove the restriction if the author of the statement requests it.

The overall regime presents something that, in its current form, appears to be convoluted, and open to abuse with the potential removal and reinstatement of the same content within a short space of time.

Written Submission to the Joint Committee on Justice concerning the Draft Scheme for a Defamation (Amendment) Bill

Submission by the **Hon. Mr Justice Bernard Barton** (retd) formally head of the Civil Juries Division of the High Court, 2017-to-2021.

Introduction

This submission is concerned with the proposal to abolish jury trial in defamation actions under Head 3 of theDraft Scheme for a Defamation (Amendment) Bill (the Draft Scheme).

It is not intended to comment at this juncture on other proposals contained in the Draft Scheme lest any comments made in relation thereto would distract from the seriousness of the consequences which will flow from the enactment of the proposal in question.

While several other proposals are to be welcomed the proposal to abolish jury trial is objectionable in principle on a number of grounds. The proposal is also based on a false premise. The factual information and state of the law recited in The Report of the Review of the Defamation Act, 2009 (the 2009 Act), upon which the proposal to abolish jury trial is founded, has altered fundamentally in recent times to the point of rendering nugatory the *raison d'etre* for the proposal, a development which clearly requires examination.

Stated Objective of the Proposal

Following an analysis of the submissions made by stakeholders during the Public Consultation Process a number of key themes were identified. The Report states that the review focused on how the law of defamation could be reformed, amongst other objects, to avoid the risk of disproportionate and unpredictable awards and high legal costs exercising " a chilling effect" on the right to freedom of expression, particularly on investigative journalism or public debate on issues of public interest.

This then is the stated mischief which the proposal to abolish jury trial is directed.

In reaching this conclusion the review took into consideration a number of cases where very high awards had been made by juries that had been the subject of appeal the Supreme Court, The European Court of Justice, and after its creation in 2015, the Court of Appeal.

It should be understood that two of these cases arose prior to the coming into force of the 2009 Act and were not therefore governed by its provisions.

Except in the relatively recent case of *Higgins v the Irish Aviation Authority,* tried before a judge and jury in 2019, it is important to appreciate that the trials of the other cases mentioned in the report of the review were subject to a rule of practice, affirmed by the Supreme Court in *De Rossa v Independent Newspapers [*1999] IESC 63, which required that no mention could be made of figures in monetary amounts by counsel in the course of the trial or when addressing the jury at the close of the case.

The rationale for the rule was explained by the Court; the assessment of damages was the exclusive preserve of the jury and should not be trespassed upon. The rule was strictly applied until the trial in *Higgins.*

The consequence of the rule was that while the jury in the cases mentioned in the report had the benefit of instruction on the general principles of law to be applied, no mention could be made in monetary terms by way of guidance as to the range of damages the jury might consider appropriate to the circumstances of the case.

The report of the review notes that in *Higgins* the Court of Appeal dramatically reduced the award of the jury, this notwithstanding that counsel had been free to suggest appropriate figures for damages. What the report does not mention, presumably because the review was complete by then, is that the Supreme Court subsequently allowed the plaintiff's appeal, reversed the decision of the Court of Appeal and substituted its own much higher award. The Court went further and addressed the principle mischief at which the proposal is directed.

Guidelines on Damages

The result is of critical importance to a re-evaluation of the proposal at Head 3 of the Scheme. In this regard the attention of the Committee is drawn to the judgement of MacMenamen J in *Higgins v. The Irish Aviation Authority* [2022] 2 ILRM 121. The Court recognised the desirability of avoiding or minimising the risk of disproportionate and unpredictable awards by setting out guidelines or parameters which hence forth must be given to a jury in a defamation action.

It follows that the premise upon which the proposal is founded has been comprehensively swept away by the decision of the Court. Of concern,

however, is that for whatever reason it is now evident that nothing of this development has been considered or has otherwise informed the Review or the conclusions and recommendations contained in the Report upon which the provisions of Head 3 of the Scheme are based.

Existing Public Policy on Guidelines for Assessment of Damages

The application of guidelines to the assessment of damages in personal injury actions is a policy already adopted by the Oireachtas, with which it is familiar. The guidelines drawn up by the Judicial Council came into effect on the 24th April 2021. The stated purpose of the guidelines is to achieve greater consistency and proportionality of awards in such cases; the same objective as identified by the Review. The decision in *Higgins,* which sets out guidelines / parameters that are henceforth be given to a jury to assist them in carrying out an assessment of damages in all future defamation cases, is directed to achieving the same objectives of proportionality and consistency. The decision is binding on the High Court.

To proceed without due consideration for the momentous development which has occurred in the law as a result of the decision in *Higgins* and the consequences of the application of the guidelines therein would, in my respectful submission, amount not only to an enactment of a superfluous provision, the purpose of which has already been provided for by the Supreme Court, but for no credible reason would also result in a fundamental change to the law through the profoundly antidemocratic consequences that would follow.

Anti-democratic Consequences of Abolition

If enacted the proposal would strip away a legal right which has been enjoyed for hundreds of years by citizens who claim injury a result of a defamation of character. The debate on whether or not to retain jury trial in Defamation High Court actions has already been had prior to the enactment of the 2009 Act. It was retained for a number of reasons (a) its ancient origin as a legal right of the citizen claiming to be wronged (b) the fundamental right to a good name guaranteed by Article 40 of the Constitution and (c) because the wrong is committed by publication to others; the tort occurs in the community. Nothing has changed in this regard since the enactment of the 2009 Act.

While the language of the draft provision refers to the abolition of jury trial what if fact this means is that the legal rights of litigants to elect to have the

facts in the case decided by fellow citizens, rather than by a judge alone, will be taken away.

If follows that, if enacted, the provision would not only deprive the litigant of a legal entitlement to a jury but would also see the public removed from participation in administration of justice as there would be no jury present. These profound consequences are nowhere adequately considered or otherwise addressed in the Review/Report.

Absent such
considerations,
and so that the members of the Committee and the members of the Oireachtas in general are fully informed in relation thereto, I consider it necessary and desirable that same and reasons therefore should be comprehensively addressed in this submission.

In passing I should add that I would have made a submission to the Review and participated in the subsequent symposium but did not feel it appropriate to do so as a sitting judge out of respect for the separation of powers.

Public Policy Considerations underlying Trial by Jury

The proposal, if enacted, represents a radical departure from a long settled public policy that lies behind the legal right of the citizen to trial by jury, namely, that fact finding in serious criminal and civil cases should be determined, where possible, by a jury of fellow citizens.

First and foremost amongst the consequences is, as already stated, the removal of the legal right to trial by jury and secondly. but no less importantly, the removal of the public from involvement in the administration of justice, a concept as old as the Common Law itself. The significance of these consequences is best understood in the context in which the right to jury trial exists in civil proceedings in general.

Right to Trial by Jury

The entitlement to trial by jury as of right is of ancient origin in the Common Law. Considered to be of such importance that it was enshrined in the first forerunner of the modern constitution, the great charter of individual legal rights, Magna Carta 1215; it has been part of the law ever since. Trial by jury evolved as the mode of trial in the Common Law Courts for civil as well as criminal proceedings. The sanctity of the right was reflected in the

constitutional protection afforded thereto in respect of serious criminal cases by the 1937, albeit the protection did not extend to civil causes of action; see *Murphy v Hennessy* I.R. 378. While the right to jury trial has its origins in the common law, the exercise thereof has long since been regulated by statute.

Origins

The concept of jury trial owes its Irish origins to the Vikings and the Normans. Involving individuals, in addition to the parties to the dispute, in the resolution of serious disputes was part and parcel of the Viking/Norse social fabric. This mode of trial was developed by the Anglo-Normans in Medieval times. It became associated as a bulwark against the arbitrary misuse of authority, the exercise of which ultimately led to the inclusion of the right to jury trial in Article 39 of the English Magna Carta 1215. The right was also enshrined in the Irish Magna Carta 1216, for which see F.H Berry, Early Statutes of Ireland Vol.1 (1907).

There were attempts to curtail or circumvent jury trial altogether in the centuries that followed, the most notorious example of which is the **Court of Star Chamber** (1487 to 1641). The court had a wide jurisdiction, which included causes for Libel and Slander. The court was abolished by Act of the Long Parliament in 1641, which also reiterated the right to jury trial as provided for by Magna Carta. Thereafter this mode of trial applied to all cases triable in the **Courts of Common Law: Kings/Queens Bench, Exchequer and Common Pleas.**

Justification

Jury trial had its supporters and detractors then as it does now, co-incidentally for many of the same reasons, which led to considerable political and legal debate. In Vol 3 Ch 23 of his Commentaries on the Common Law p 379-382 the great 18th century jurist, **Blackstone**, defended and justified the concept of jury trial in civil matters as the best preservative of English Liberty for it had the distinct advantage of protecting the citizen against the risk of judicial caprice and *"… it preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachment of more powerful and wealthy citizens*", a justification which remains as valid today as it was when made.

Evolution of Right to Trial by Jury in Civil Proceedings

In Ireland the common law entitlement to a jury in civil proceedings was ultimately put on a statutory footing by s. 48 of the Judiciture (Ireland) Act 1877, which provided that nothing contained in the Act or the Rules of Court made thereunder

"… shall take away or prejudice the right of any party to any action to have questions of fact tried by a jury in such cases as he might heretofore of right so required…"

And so the law remained until independence. Although the Common Law was carried forward by the Free State Constitution, a new system of courts to administer the law was established by the Courts Act 1924. The right to trial by jury in civil matters as declared by s.48 of the 1877 Act was continued, with minor modification, by s.94 of the 1924 Act and s.20 of the Courts Act 1928. See *McDonald v Galvin* [1976-1977] I.L.R.M. 41,at 43, *Lennon v HSE*[2015] IECA 92 and *Higgins v. Irish Aviation Authority* [2018] IESC 29

Abolition / Restriction of Right to Jury Trial

The entitlement to jury trial in civil proceedings remained undisturbed until the Courts Act 1971, s.6 of which abolished the right to civil jury trial in Circuit Court proceedings. The law remained otherwise unchanged until the passing of the Courts Act 1988, s. 1 of which removed the entitlement in all personal injury actions, excepting those for Trespass to the Person and False Imprisonment.

Subsisting Extent of Entitlement to Jury Trial

While there has been a significant restriction on the exercise of the right in civil mattes over the last 160 years, commencing with the Civil Bill Courts (Ireland Act) 1851, the Common Law Procedure Acts 1852 to 1856 and ending with the Courts Act 1988, there appears to be a perception common to the judiciary, the profession and academics alike that the cumulative effect of these statutory interventions has been to restrict the entitlement to jury trial as of right to *a 'few causes of action'*. See *Lennon v HSE* [2015] IECA 92 and *Higgins v The Irish Aviation Authority* [2018] IESC 29,at para 43. However, this perception does not withstand careful scrutiny.

Although by far and away the most common causes of action tried by jury today are those concerned with the vindication of the fundamental rights of the citizen guaranteed by **Article 40 of the Constitution**, the rights to liberty,

bodily integrity, free speech and the right to a good name through suits for **False Imprisonment, Assault and Battery, Malicious Prosecution and Defamation,** the entitlement to jury trial is far broader than appears to be generally appreciated.

While the restrictions on the right to jury trial in claims for damages for personal injuries(excepting **False Imprisonment and Trespass to the Person**) brought about by the 1988 Act may have added to the misconception that the right only survived in a few types of case, the position in law is altogether different. No cause of action was abolished by the Act. Consequently, the right to trial by jury in all ***Nisi Prius*** actions (i.e. actions triable by judge and jury) other than in actions for personal injury (excepting **Trespass to the Person and False Imprisonment**) remains unaffected.

Subsisting Extent of Entitlement

Accordingly, except where captured by s.1 of the 1988 Act, the entitlement to jury trial in all common law causes of action declared and preserved by s. 48 of the 1877 Act, continued, with minor modification, by s. 94 of the Courts Act 1924 and s. 20 of the Courts Act 1928, subsists for all such actions commenced in the High Court.

Particular Significance of Right to Jury Trial in Defamation.

The entitlement to jury trial in Defamation derives a particular significance from the nature of the tort, which is only committed when a defamatory statement concerning a person is published to a person or persons other than the person concerned (the person to whom it is understood the statement refers) ; see s. 6 Defamation Act 2009. A statement is defamatory if it tends to injure a person's reputation in the eyes of reasonable members of society; see s.2 Defamation Act 2009.

It is hardly a surprise therefore that in defamation proceedings the Supreme Court has observed the jury are in a unique position with regard to making findings of fact and the assessment of damages; who better than the representatives of society, the jury, to determine whether the plaintiff's reputation has been injured in the eyes of reasonable members of society and, if so found, to assess the amount of the compensation to which the plaintiff should be entitled.

Conclusion

It is not just the ancient legal right of the citizen to trial by jury but also the concept of the participation of the public in the administration of justice at which the proposed abolition strikes. These considerations aside, at the very least, if only out of respect for the Supreme Court, the implementation of the parameters / guidelines on quantum to assist juries as set out in *Higgins* ought firstly to be facilitated over a reasonable period in practice before the drastic step of abolition is contemplated.

In the meantime if further reform beyond the parameters / guidelines set out in *Higgins* is considered necessary to the achievement of proportionality and consistency in awards this objective could easily be secured by the simple device of an indicative award. While the jury would assess the damages with the benefit of the parameters / guidelines, the final determination of the amount would left to the trial judge, on the application of either party to the proceedings.

Ancillary Matters

In the interest of completeness it is necessary to make some observations concerning court delays and legal costs associated with defamation actions, identified by the review as grounds for recommending abolition.

No examination or consideration appears to have been given to the consequences of the abolition of the presumptive right to jury trial in England and Wales in 2013. While the changes in these and other jurisdictions are recognised there is a paucity of information regarding the impact of abolition on legal costs. There is no evidential basis advanced for the assertion that abolition will result in a significant reduction in the legal costs associated with defamation actions. Without wishing to engage in speculation this may well be due to the fact that costs in such cases in England and Wales have, if anything, increased. The recent case in Englant of *Vardy v. Rooney,* trial by judge alone defamation case, neatly illustrates the point; legal costs ran into millions of pounds.

The suggestion that such cases would be far shorter if tried by a judge alone is not evidentially supported. On the contrary there have been defamation cases tried by judge alone which lasted for weeks on end, *Cullen v Sheehy; Nevin v Sheehy* [2017]IEHC 459 being a relatively recent example in ireland. It does not

follow that because the case is a bench trial (judge only) the length and or cost of a defamation action is going to be appreciably less.

Finally, having presided over the High Court Jury list for several years until retirement in 2021, I can state categorically that the reason for the unacceptable delays in getting cases to trial during my tenure and the tenure of my predecessor had absolutely nothing to do with the fact that these were civil jury actions. There is no foundation to any such suggestion, rather the sole reason was the absence of adequate resources and a sufficient number of judges, a state of affairs recently acknowledged by the decision of the Government to appoint significant number of additional judges in the short to medium term.

I would welcome an opportunity to discuss the Draft Scheme and the submission with the Committee in person.

Bernard Barton

3rd May 2023.

NewsBrands Ireland and Local Ireland

Submission to the Joint Committee on Justice

on the General Scheme of the Defamation (Amendment) Bill

Introduction

NewsBrands Ireland and Local Ireland are pleased to accept the invitation by the Joint Committee on Justice to make a written submission on the General Scheme of the Defamation (Amendment) Bill ("the General Scheme"). We would also be happy to appear before the Committee to discuss our submission and answer questions.

NewsBrands Ireland is the representative body for national newspapers, print and online. Its remit is to promote the vital contribution made by its members' trusted journalism to society and democracy, to convey the commercial power of news brands' audiences to advertisers, and to work towards a fair and balanced legislative framework that supports public service journalism.

Local Ireland is the promotional brand of the Regional Newspapers and Printers Association of Ireland, formerly the Provincial Newspaper Association, founded in 1919, and the oldest newspaper association in Ireland. Regional news publishers in print and online are vital to the communities they serve. No other media can consistently deliver high quality, professional content at such a hyperlocal level.

While we welcome the publication of the General Scheme, reform is long overdue. The Defamation Act 2009 provided for a review of its operation to be completed by January 2015. That statutory review was more than five years late. It is crucial that the reforms, now prioritised by Government, be implemented as quickly as possible and, certainly, within the likely limited legislative timeframe of the current Dáil.

Minister Simon Harris has said that the amendments in the General Scheme "will have a positive overall impact on protection of fundamental rights, access to justice, reduction of courts backlogs and reduction in legal costs." A failure to implement these changes speedily would continue to undermine the work of the independent media in Ireland, which further erodes the proper functioning of democracy in this country.

NewsBrands Ireland and Local Ireland both made detailed submissions on the review of the Defamation Act 2009 in January 2017, in which recommendations for reform were made. Some have been accepted by Government, but many have not. While this is disappointing, that disappointment will be as nothing should even the limited reforms in the General Scheme be rendered moot by further delay.

In commenting on specific items, this submission will adopt the headings in the General Scheme published on 28 March 2023. We will only comment where it seems appropriate or useful to do so.

Executive Summary

As outlined above, the gestation of the General Scheme has been long and occasionally difficult. It is crucial that the birth of even the limited proposed reforms proceeds without delay. The pursuit of perfection should not lead to the loss of the good. Thus, the Amendment Bill must proceed promptly and efficiently to enactment, and we trust that the Committee will play an important role in this process.

Consequently, if there are aspects of the Amendment Bill that the Committee concludes would require more careful and lengthy consideration - and the proposed anti-SLAPP provisions might fall within this category – other proposed reforms should nonetheless be enacted. By way of example, should it become necessary, there is nothing to prevent the abolition of juries, which is the single most important and effective change, by way of a discrete piece of legislation that can be enacted without delay.

As outlined in more detail below, NewsBrands and Local Ireland would urge the following:

1. Juries in defamation cases should be abolished without further delay.
2. A serious harm test should be introduced in all defamation cases.
3. An initial formal offer to resolve proceedings should be open to both parties.
4. Section 17 of the Act of 2009 should remain in its current form.
5. As proposed in Head 15 of the General Scheme, the defence of fair and reasonable publication on a matter of public interest should be simplified.
6. Sub-head (iv) of Head 20 allowing for an intrusion into a claimant's life to be an aggravating factor when determining damages should be deleted.
7. The measures to restrict SLAPPs should not be allowed to delay the introduction of simpler, but no less important, reforms.

Head 3 – Abolition of juries in High Court actions

NewsBrands has been calling for the abolition of jury trials in defamation actions for almost 40 years. They are unpredictable, time consuming and costly. Civil jury decisions lack transparency. A number of jury awards, giving damages greatly in excess of those available in severe personal injury actions, have served to bring the legal system into disrepute. The supposed safeguards against excessive and unpredictable jury awards by appellate courts are both financially onerous and have been criticised by the European Court of Human Rights. Both separately and taken together, these factors have served to damage the constitutional entitlement of freedom of speech and have wrongly undermined one of the pillars of a democratic society, namely a free and independent press.

This is the most important change in the General Scheme. It must be introduced without delay.

Heads 4, 5 and 6 – Serious Harm Test – bodies corporate, public authorities and transient retail defamation.

We welcome both the introduction of a serious harm test in cases involving bodies corporate, public authorities and retailers and the acceptance of the need for such a test. It is a mystery, however, why it is not being introduced in all defamation cases.

The Defamation Act 2013 in the U.K. introduced provisions to prevent both libel tourism and unwarranted, but nonetheless expensive, claims. These are major issues for Irish publications, especially those with an online presence.

If, as is anticipated by several lawyers and as advocated by others, the Republic of Ireland becomes a 'hub' for defamation tourism, the damage to the country's reputation as a liberal democracy and as a place in which technology companies and websites can carry on business relatively freely will be under threat.

Further, as is the case with retail outlets, the Irish media faces, on an almost daily basis, unwarranted and exaggerated claims for defamation. The costs of defending these claims to trial are significant and these costs are often unrecoverable even where the defence succeeds.

A serious harm test for all defamation proceedings would act as a deterrent to vexatious claims and alleviate the risks to Ireland associated with 'libel tourism'. It would be more wide-ranging than, but could operate in parallel with, the Choice of Jurisdiction proposals in Head 10 of the General Scheme.

Section 1 of the U.K's 2013 Act provides:

> ***Serious harm***
>
> *(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.*
>
> *(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.*

These are not onerous requirements for plaintiffs. Quite properly, they insist upon a connection by the plaintiff with the jurisdiction such as would justify putting the parties to the expense of a defamation action there. They serve to filter out unmeritorious actions, where, under the present legal costs' regime, defendants may feel forced economically to settle a claim as the prospects of recouping some or any of its costs from an impecunious plaintiff are slight to none. They rebalance the outer reaches of the defamation spectrum, eliminating the very wealthy plaintiff with little connection to Ireland and the poor plaintiff, who has little financial risk when launching a 'nuisance' claim.

There is no constitutional impediment to the introduction of a serious harm test in all defamation cases. The Government has accepted in the General Scheme that the test can apply equally to individuals and to corporate and public bodies. No logical case can be made for the application of a serious harm test in defamation cases for retailers but not for the media**.**

Further, the wording of section 1 of the 2013 Act, which we would urge the Joint Committee to adopt, not only has the advantage of succinctness and flexibility but would serve to capture many SLAPPs without the difficulties involved in such cases (see below).

We would, therefore, urge the Joint Committee to recommend that the General Scheme be amended to introduce a serious harm test in all defamation cases.

Head 9 – Formal offers

Unlike personal injury actions, formal offers in defamation cases can include matters that go beyond the purely financial. These include, most obviously, apologies, corrections and their proposed wordings. Given this, a defendant in a defamation claim should be entitled to make such an offer, which would later be considered by the court when determining costs, without (as presently set out in the General Scheme) having to do so in response to an offer by the plaintiff. Both sides should be allowed to make the first move in this regard after the issuing of proceedings.

Head 12 – Amendment of section 17 of Act of 2009 (Defence of absolute privilege)

We have considerable concerns about the terms, and potential operation of section 2 of this Head, including, by way of example section 2 (d), which provides:

"*2. [I]n determining whether a report is 'fair and accurate' for the purposes of … section 17, all the circumstances of the case shall be considered, and that:…*

> *(d) it is not sufficient to report correctly part of the proceedings, if by leaving out other parts, a false impression is created.*"

On its face, this provision goes considerably further than the law as presently understood and would impose a much greater burden on the media than currently, when reporting on matters before the courts.

Head 12, as currently constituted, could, by way of example, render defamatory a fair and accurate summary of proceedings because the media did not report upon a later hearing before, and/or the determination of, an appellate court. It would also likely oblige the press to cover every day of a lengthy trial to offset the possibility of inadvertently missing evidence that was contrary to that which had been given earlier in the proceedings.

At a time of enormous financial pressure, when the media already struggles to fulfill its role as the eyes and ears of the public in the courts, such a (presumably unintended) imposition of additional obligations on court reporters could lead to a lack of coverage, especially of local courts, because journalists could only be spared to cover the entirety of a small number of very high-profile proceedings. This could lead to an erosion of the public's faith in the legal system.

Section 17 of the Act of 2009 has worked well. The common law cases that preceded, and underpinned, the defence of absolute privilege have laid down clear criteria for what

constitutes a ‘fair and accurate’ report of court proceedings. The changes proposed in section 2 of Head 12 would serve to introduce greater complexity and difficulties for a defence that has no need for it. In just five sub-sections, several undefined terms are introduced, such as ‘abridged’, ‘correct and just’, ‘the report as a whole’, ‘a substantial inaccuracy’, ‘a false impression’ and ‘assuming a verdict’. There will be questions, for example, as to how the overriding test of ‘fair and accurate’ interacts with that of ‘correct and just’ and whether this newly introduced criteria amends the existing, well-established criteria.

Section 2 should be deleted.

Head 15 – Amendment of sections 22 (Offer of amends) and section 23 (Effect of offer of amends) of Act of 2009

Section 1 of this Head provides that “unless the plaintiff requires otherwise, the correction [and apology] shall be published with equal prominence to the original defamatory statement”.

The members of both NewsBrands Ireland and Local Ireland have no issue with, or objection to, apologies and corrections being appropriately placed or prominent.

However, while the concept of equal prominence is relatively straightforward in the case of the traditional print media, that is not the case for online publications. The concept of equal prominence does not reflect the fluidity of 'prominence' online, where an article may, for example, briefly appear on the home page of a news website and then fall back into the section landing page. There is no fixed in position as would be the case with a print article; rather, there is constant and often rapid change.

In such circumstances, a court might, in trying to achieve ‘equal’ prominence, have to determine if, and how, an online correction or apology should follow an article's trajectory in appearing for a certain time on the homepage and an additional time on the section landing page. This is likely to prove both extremely difficult and ultimately unsatisfactory.

Further, given the rapid, continuing development of online news and the manner in which it is presented and consumed, the concept of equal prominence may not, during the lifetime of the proposed legislation, survive technological advances.

Given this, we would suggest that the legislation adopt the more flexible language of ‘due prominence’. This would allow for direct equivalence in the case of the print media and flexibility for online publications by, for example, separate online apologies and corrections and/or the appending of an apology or correction to the article complained of and/or any archived version of that report.

Head 16 – Amendment of section 26 of the Act of 2009 (fair and reasonable publication on a matter of public interest)

We welcome the simplification of section 26.

Even before the passing of the 2009 Act, considerable concern was expressed that placing the defence of fair and reasonable publication on a detailed statutory basis would hinder both its effectiveness and its future development. Those concerns have been fully borne out in practice. The criteria set out in the sub-sections of section 26 of the 2009 Act have had the effect of "fossilising" the defence so that is does not have the freedom to grow with technological and legal advances or to be flexible enough to meet Ireland's obligations under the European Convention on Human Rights. The changes outlined in Head 16 go a considerable way towards meeting these concerns.

Head 18 – Amendment of sections 28 (Declaratory order), 30 (Correction Order), 33 (Order prohibiting the publication of a defamatory statement) and 34 (Summary disposal of action) of Act of 2009

The proposed amendment to allow for damages to be awarded by the Circuit Court under section 34 (Summary disposal of action) appears to be based upon the recommendation ('Option 4') at page 222 of the Report of the Review of the Defamation Act 2009. The arguments in favour of, and against, Option 4 are set out on pages 220 and 221 of the Report.

In the Report the recommendation was phrased as "Option 4: consider whether to allow for the award of limited damages (e.g. up to €10,000) where summary relief is granted under section 34". The relevant sections of the Report (e.g., 6.3.4. Comparative Perspectives and 6.3.5. Options for Reform) are all predicated on the basis that there would be a limit on the damages that could be awarded where summary relief is granted.

As presently prescribed, however, the General Scheme does not reference, or impose, an upper limit on damages (other than perhaps, by default, the jurisdiction of the Circuit Court of €75,000). This would fly in the face of the recommendation in the Report and the thinking behind it. It would be especially concerning that damages of this magnitude could be awarded in summary proceedings. Any change should be limited to that recommended in the Report i.e. only damages up to €10,000 can be awarded under the amended section 34.

In section 2 of Head 18, the General Scheme recommends that an order prohibiting the publication of a defamatory statement could be made in addition to declaratory relief. We have no objection in principle to this. However, there could well be cases where evidence later comes to light proving the accuracy of a statement previously ruled, on summary disposal, to have been defamatory and where re-publication of a truthful statement would be a breach of a court order. This would obviously be unsatisfactory. Given this, the legislation should provide a mechanism in such circumstances whereby either subsequent publication would not represent a breach of the court order or the media could make an application for permission to publish in light of the new evidence.

Head 20 – Amendment of section 31 of the Act of 2009 (Damages)

We have concerns about the proposal that, under sub-head (iv), a court would, when awarding damages, take into account: "the extent of the intrusion into one's personal, business, professional or social life, or any combination thereof, [including invasion of one's privacy]".

There is a considerable body of case law, much of it involving the media, about when, and in what circumstances, the right to privacy is outweighed by a conflicting right, such as freedom of expression. The balance between these conflicting rights, and the dividing line between what is permissible and what constitutes a breach of privacy, can be difficult to find.

Further, breach of privacy is a compensatable tort, and an aggrieved party can always bring proceedings for both defamation and breach of privacy. The abolition of juries in High Court defamation cases will make that even easier than at present, where currently there can be separate modes of trial for these claims.

In these circumstances, it is unnecessary for an alleged intrusion into a claimant's life to be a, presumably aggravating, factor when awarding damages for defamation. A claimant has an alternative remedy for such a breach for which damages can be awarded in an appropriate case. However, that will only happen after a court has heard the evidence in full, as well the arguments of both sides, has considered the relevant case law and reached a determination. Where a remedy for such wrongdoing already exists, it is wholly inappropriate that an alleged intrusion should be one of, what would become, seventeen criteria to be considered when determining damages in another tort.

Sub-head (iv) should be deleted.

Heads 23 to 31 - New Part 5 of Principal Act: Measures against abusive litigation to restrict public participation (SLAPPs)

Any measures to restrict Strategic Lawsuits Against Public Participation ('SLAPPs') are welcome. SLAPPs have caused major problems in the U.K. and in several European countries, hence the European Commission's proposal for an anti-SLAPP directive.

That said, determining what is a SLAPP rather than a legitimate, if overstated, cause of action can be difficult. This is reflected in the breadth of, and seeming contradictions in, the criteria set out in section 2 of Head 25. No criticism is levelled at these criteria. However, there are real concerns both that the difficulties of definition and the deliberations of the European Commission will lead to a significant delay in finalising the statutory text. As has already been pointed out, reform of the 2009 Act has already been bedevilled by delays.

We are, therefore, concerned that agreed, necessary and urgent reforms – such as the abolition of juries – will be lost because of delays in seeking a remedy for an issue which, while not unknown in Ireland, is less pressing than in other jurisdictions. The good cannot be allowed to become a casualty of the perfect or of efforts to achieve perfection.

Further, if, as urged upon the Joint Committee earlier in this submission, a serious harm test was to be introduced for all defamation cases, many SLAPPs would be caught and disposed of early in proceedings. The serious harm provisions also have the benefit of ease of drafting as well as pre-existing, persuasive caselaw from the U.K.

In short, if the drafting and preparation of the proposed new Part 5 of the Principal Act could lead to delays, which would risk taking the proposed legislation beyond the term of the current Dáil, the anti-SLAPP provisions should be delayed and reconsidered for inclusion in a future Bill, probably after the European Commission has completed its proposals for an anti-SLAPP directive.

2 May 2023

Ann Marie Lenihan
CEO
NewsBrands Ireland

Bob Hughes
Director
Local Ireland

Submission on the General Scheme of the Defamation (Amendment) Bill by the Chair of the Press Council of Ireland, Rory Montgomery and the Press Ombudsman, Susan McKay

Introduction

The Press Council of Ireland and the Press Ombudsman welcome the General Scheme of the Defamation (Amendment) Bill published on 28 March by the Minister for Justice, which is closely based on the report of the Review of the Defamation Act 2009. We are pleased that the Bill is on schedule to go before the Oireachtas by the end of this year, and we are also pleased to have this opportunity to make a submission to the Joint Committee on Justice as part of its pre-legislative process.

The Press Council and the Office of the Ombudsman

The Press Council and the Office of the Press Ombudsman were established in 2008 as an independent self-regulatory system for the print media sector in Ireland, and recognised in the 2009 Defamation Act. Our members include the large majority of the newspapers, magazines and online-only news publications published in this country, along with British newspapers published in Ireland.

A free press that operates according to ethical principles and in the public interest is essential to the functioning of a democratic society. We believe that the freedom of the press is vital to the right of the people to be informed. This freedom includes the right of the press to publish what it considers to be news, and the right to comment on it. The Press Council's Code of Practice commits its members to maintaining the highest professional and legal standards. Through the Office of the Press Ombudsman, we offer a free and independent service to members of the public who believe any Principle in the Code of Practice has been breached.

It should be noted that our complaints process is separate from any legal process – we ensure before considering a complaint that no legal proceedings in relation to the subject matter of the complaint are ongoing. We can consider complaints before any such proceedings are embarked upon, or after they are complete.

Detailed Comments

Our submission to the Review of the 2009 Act is attached. Following the publication of the Review, we engaged with officials at the Department of Justice while they were drafting the Scheme. We are

satisfied that our arguments have been given serious consideration and have largely been reflected in the Scheme.

We will confine our remarks here to the Heads of the Bill which are of direct relevance to our work in the Press Council of Ireland and the Office of the Press Ombudsman.

Head 2 *- Amendment of Section 2 of the Act provides for the amendment of the definition of 'periodical' to include:*

1.

(a) An online-only newspaper, magazine, journal, or other similar publication that is published on the internet of by other electronic means at regular or substantially regular intervals by a publisher who is established in the State, or where the publication is specifically targeted at the general public, in the State; and
(b) [online publications by a broadcaster within the meaning of the Broadcasting Act 2009 (as amended); or by a broadcaster established in the State (or where the publication is specifically targeted at the general public, or a section of the general public, in the State.]

We are pleased that our *de facto* role as the regulator for online news sites is recognised.

Online publication by broadcasters, which in addition to news includes blogs and other opinion pieces, is currently anomalous in that it is unregulated, despite its strong similarity to material published by our members. For this to continue would leave a considerable, and growing, gap. It would appear that there are three possible approaches:

(i) broadening the remit of Coimisiún na Meán, which has responsibility for broadcasting, in this regard; or
(ii) allowing for broadcasters to become members of the Press Council of Ireland and avail of its services; or
(iii) the establishment of some new self-regulatory arrangement specifically to deal with online publication by broadcasters.

The Press Council is the recognised regulatory body for print and online publications and as it already has online-only publications as members, the online publications of broadcasters could readily be accommodated.

We would not take into account the broadcast version of an item in our consideration of the online publication so we would not stray into regulatory territory beyond our remit.

It is important, however, to note that membership of the Press Council is voluntary. If sub-heading 1 (b) were included in the definition of publication, broadcasters could choose to apply to join the Press Council, adopt the Code of Principles and be subject to the decision-making authority of the Press Ombudsman and the process of appeal to the Press Council. But they would not be obliged to do so.

Working out how broadcasters, in particular RTE, would fit into our structures would pose a number of practical questions, including the calculation of their membership fees and their possible representation on the Board of the Press Council. We would be in a position to consider such applications for membership on a case-by-case basis. We would also be in a position to negotiate an appropriate fee on a case-by-case basis.

Overall, and following consultation with the Board of the Press Council, we confirm our openness to the inclusion of material published online by broadcasters in our remit, while recognising that in practice much would depend on the willingness of broadcasters to apply to join the Press Council. The views of Coimisiún na Meán and broadcasters would be of critical importance and we would welcome the opportunity to discuss this matter with them. It is important that the current lacuna be addressed.

Head 7 -*Obligation on solicitors (alternatives to legal proceedings)*

This head is in line with our submission to the Review of the Defamation Act and we are pleased to see that it is included in the Scheme. We understand and accept the decision to reject a more directive proposal on the grounds that it might be subject to constitutional challenge. It is important to us that our members voluntarily choose to sign up to the Press Council's Code of Practice, and that those who make complaints do so because they choose to do so, whether or not they may also at some stage use the legal route to seek resolution.

Rory Montgomery | Chair | Press Council of Ireland

Susan McKay | Press Ombudsman

4 May 2023

Submission by the Press Council of Ireland to the Department of Justice and Equality Review of the Defamation Act 2009

Submission by the Press Council of Ireland to the Department of Justice and Equality Review of the Defamation Act 2009

The Press Council of Ireland welcomes the invitation from the Minister for Justice and Equality, Frances Fitzgerald TD, dated 7 November 2016, to make a submission to the Review of the Defamation Act 2009. The current defamation process has been subject to criticism for its costs, its delays and its excessive awards. The Press Council of Ireland sees its primary functions as two-fold, to provide a means of redress for members of the public dissatisfied with something published in the press and to promote the right of people to be informed through the promotion of freedom of expression and, in particular, the right of the press to publish what it considers to be news, without fear or favour, and the right to comment on it.

The complaints handling procedures of the Office of the Press Ombudsman and the Press Council of Ireland offer members of the public access to a means of redress which is independent, free, fast and does not involve settlement awards. The Press Council believes that the review of the Defamation Act should include provision to encourage members of the public to use its complaints handling process as an alternative to defamation proceedings. The Press Council also believes that any measure to reduce the costs involved in defamation proceedings is in the public interest as it increases access to redress to the wider public and reduces the chilling effect of legal costs on the freedom of the press.

The Office of the Press Ombudsman and the Press Council have been operation for nine years. In that period there have been:

3210 complaints received by the Office of the Press Ombudsman

330 formal decisions made by the Press Ombudsman

114 complaints upheld by the Press Ombudsman

In her letter requesting submissions the Minister provides an indicative list of specific issues which those making a review might consider. This submission follows the order of the Minister's indicative points.

1. The experience regarding the jurisdiction of the Circuit Court in defamation cases

As a means of reducing legal costs the Press Council believes consideration should be given to hearing defamation actions in the Circuit Court where plaintiffs have indicated a limit on the damages they are expecting. The Press Council also believes consideration should be given to hearing defamation actions where large amounts of damages are being sought in the Commercial Court division of the High Court (see next response).

2. Whether any changes should be made to the respective roles of the judge and the jury in High Court defamation cases

As the current levels of awards are threatening the financial viability of publishers and potentially contributing to the reduction in the range and diversity of news and commentary in the media the Press Council believes that consideration should be given to limiting the function of juries in defamation actions to determine if a defamation has taken place with the judge determining the level of awards or introducing a system whereby judges inform juries of appropriate levels of awards (similar to the practice for personal injury awards). See 3 below. If some defamation actions were moved to the Commercial Court there would, of course, be no jury involved in these cases.

3. Whether any change should be made to the level or type of damages which may be awarded in defamation cases, or to the factors to be taken into account in making that determination.

Section 26 (2)(f) of the Defamation Act 2009 requires the court, in determining whether it was fair and reasonable to publish the subject matter of the defamation action, the extent to which the publication adhered to the Code of Practice of the Press Council. This provision was included in the Act, it is presumed, to encourage participation by publishers in the Press Council's complaints handling processes and to encourage members of the public to considering engaging in Press Council's processes as an alternative to litigation. There is no evidence to date that this section has been effective. The Press Council would welcome any amendment to section 26 which would encourage members of the public to engage in its complaints handling processes and encourage publishers to sign up to the Code of Practice by becoming a member of the Press Council. This is particularly important as more and more journalism is moving from print to digital publication. The Press Council recommends an amendment to the Act to include the requirement that in considering the scale of damages for defamation account must be taken in mitigation, where the defendant is a member of the Press Council, of the record of the publisher's adherence to the Code of Practice of the Press Council and the decisions of the Press Ombudsman. Account should also be taken of whether the plaintiff sought redress through the Press Council before initiating legal proceedings.

The Press Council would also like consideration be given to imposing a cap on the maximum amount of awards which can be given in defamation actions or alternatively a "book of quantum" outlining appropriate levels of awards based on the degree of defamation that has occurred.

4. Whether any change should be made to the defences of truth, absolute privilege, qualified privilege, honest opinion, fair and reasonable publication on a matter of public interest, and innocent publication, as defined in the Act.

The Press Council believes all these considerations are important in allowing for the right of freedom of expression and the right to publish news and commentary in the media. The Council acknowledges that a balance must be maintained between the right to publish and the right to a person's reputation. The Council expresses its concern that the media's confidence in publishing robust commentary is being limited by fear of unreasonable threats of defamation action and the anticipation of disproportionate awards when plaintiffs are successful in defamation actions.

5. Whether the Act's provisions are adequate and appropriate in the context of defamatory digital or online communications

The Press Council has a particular concern regarding the hosting of comments from members of the public in online publications of Press Council members. Most online comments appear prior to consideration by editorial intervention. If alerted to an issue member publications address the issue and accept responsibility at this point. The facility to comment contributes to freedom of expression and encourages public debate. It would assist publishers if the amended Act recognised that responsibility for opinion hosted online starts at the point moderation occurs rather than earlier. If this suggestion is incorporated into the amended Act it might allow the Office of the Press Ombudsman with the agreement of the press industry to establish a means of consideration of complaints about comments hosted by member publications. Currently the Office of the Press Ombudsman is unable to accept complaints about online comments hosted by member publications.

6. The experience in practice regarding the Act's provisions for an offer of amends, an apology, or lodgement of money in settlement.

A frequent outcome of complaints to the Office of the Press Ombudsman is the publication of a correction, clarification or apology. On some occasions when a complainant does not take up such an offer and the Press Ombudsman has to make a decision on the complaint, the Press Ombudsman can, in his decision, determine that the publication offered to take action which was sufficient to resolve the complaint. The Press Council would welcome formal recognition in the amended Act of adherence to such action on the part of publications. If a plaintiff were to persist in proceeding with a defamation action where the publisher had already published a correction, clarification or apology, or had offered to take sufficient action to address the complaint to the satisfaction of the Press Ombudsman, account should be taken of this in determining the outcome of the court action.

7. The experience regarding the operation of the Press Council (recognised under section 44 of the Act) and Press Ombudsman.

In the last 7 years since the implementation of the Defamation Act 2009 the number of online-only publications has grown considerably. If the Press Council is to remain relevant and to fulfil its remit it is important that it recruits as member publications of the Press Council new online-only publications. The Press Council is concerned that the Defamation Act should reflect such changes in the media landscape by unambiguously recognising the rights of online-only publications to join the Press Council and, in so doing, offering them such protections as are provided by the Act to media outlets in defending defamation suits. This recognition would also serve the public as it would allow any grievances about something published in online-only publications to be addressed if the online-only publisher is a member of the Press Council of Ireland.

Section 44 (4) of the Defamation Act 2009 provides that

The owner of any periodical in circulation in the State or part of the State shall be entitled to be a member of the Press Council.

Part 1, section 2 of the Act defines "periodical" as meaning

Any newspaper, magazine, journal or other publication that is printed, published or issued, or that circulates, in the State at regular or substantially regular intervals and includes any version thereof of published on the internet or by other electronic means …

It is unclear if the definition of "periodical" in the Act includes in its scope online- only news publications (some of which are currently members of the Press Council) or the online news sites of print newspapers. The definition should be amended to address any possible anomaly in what type of publications can be members of the Press Council.

It is the view of the Press Council that in its nine years of operation the complaints handling process of the Office of the Press Ombudsman has provided many opportunities for members of

the public to have their grievances addressed in a free, speedy and fair manner. This has provided access to justice to many people who could not or would not contemplate initiating defamation actions. It has also saved publishers the very considerable legal costs which they would have incurred in defending defamation actions if complainants to the Office of the Press Ombudsman had not had their grievances addressed. It is manifestly in the public interest for there to be access to justice which is not dependant on the ability to contemplate potentially large legal costs and lengthy delays in protecting reputations. The Press Council believes section 44 of the Act has served well both the public and publishers and hopes that any amendment to the Act contributes to efficient functioning of the Press Council. As an increasing amount of journalism migrates from print and broadcasting to online it is important that the relevance of the Press Council be protected and enhanced. The particular challenges presented by the multinational and worldwide nature of much online publication is widely recognised and needs to be addressed though multinational action, for example though bilateral agreements between countries and through European Union, Council of Europe and international courts. It is acknowledged that this requirement is largely outside of the scope of this review of the Defamation Act.

December 2016

THE BAR OF IRELAND
The Law Library
BARRA NA hÉIREANN
An Leabharlann Dlí

Distillery Building
145-151 Church Street
Dublin 7 D07 WDX8

Tel: +353 (0)1 817 5000
Fax: +353 (0)1 817 5150

info@lawlibrary.ie
www.lawlibrary.ie

DAB_06

Mr. Alan Guidon
Clerk to the Committee
Joint Committee on Justice
Leinster House
Dublin 2

By email: justice@oireachtas.ie

4th May 2023

Re: Written Submission on the General Scheme of the Defamation (Amendment) Bill

Dear Mr. Guidon

Please find enclosed a written submission by the Council of The Bar of Ireland to the Joint Committee on Justice in relation to the General Scheme of the Defamation (Amendment) Bill.

The Council thanks the Justice Committee for the opportunity to contribute its views on the General Scheme and remains available to discuss and answer any questions members of the Committee might have in respect of the submission.

Yours sincerely

Ciara Murphy
CHIEF EXECUTIVE

THE BAR
OF IRELAND
The Law Library
BARRA NA hÉIREANN
An Leabharlann Dlí

SUBMISSION TO JOINT COMMITTEE ON JUSTICE

General Scheme of the Defamation (Amendment) Bill

May 2023

Contents

Introduction

1. The Council of The Bar of Ireland ("the Council") is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,159 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

Scope of Submission

2. The within submission is made on behalf of the Council arising from an invitation to make such submission to the Joint Committee on Justice in relation to the General Scheme of the Defamation (Amendment) Bill (hereafter "the General Scheme").

3. The General Scheme includes a significant number of important proposed reforms of the laws of defamation. It arises from the review conducted by the Department of Justice ("the Department"). That statutory review was mandated pursuant to the provisions of the Defamation Act, 2009.

4. The Council previously made submissions to the Department ahead of that review and are pleased to be given the opportunity once again to make submissions on what it considers to be an important area of the law in Ireland.

5. Any reform of the law of defamation is a matter of wide importance. This is so, not least, because of the vitally important competing rights engaged by the tort of defamation. Two important rights explicitly protected by the Constitution are the right to a good name and the right to freedom of expression.

6. Given the nature of practice as a member of The Bar of Ireland, barristers who practice in the area of the law of defamation tend to act both for Plaintiffs and Defendants. In making the within submissions, the Council is not articulating any definitive, fixed view in favour of one side or the other. Instead, it is hoped that this submission contains observations which may be considered to be of assistance.

7. Inevitably where reform of defamation law is contemplated, the media will prominently contribute (and rightly so) in the context of making proposals for reform. However, one important practical point that is often lost sight of is that the majority of defamation claims are made in proceedings which do not involve any media Defendant.

8. It is submitted that, in overall terms, the General Scheme of the Defamation (Amendment) Bill can be seen as quite far-reaching in terms of the extent to which - were it enacted in its current form - it would involve a significant re-calibration in the laws of defamation. That re-calibration generally improves the position of Defendants and is therefore broadly speaking to the disadvantage of Plaintiffs in defamation actions.

Proposed abolition of juries in High Court defamation actions

9. The most significant proposal contained in the General Scheme is a proposal to abolish juries in civil actions. This proposal runs contrary to the longstanding jurisprudence regarding the importance and value of members of the public being called upon to determine issues with regard to damage to reputation and free speech. Further it would mark a significant departure for the Oireachtas to remove public participation in defamation actions. It is important not to lose sight of the important role that juries have in society and the balance that they provide to the judicial arm of the State.

10. Were the Oireachtas to abolish juries in defamation cases, it would arguably place Ireland as somewhat of an outlier in common law jurisdictions.

11. In the United Kingdom the removal of juries from defamation cases is not an absolute. Rather, the position remains that in certain cases, where parties and the Courts agree, a defamation case can be heard in front of a jury where the circumstances provide for it. It is an "opt-in" type scheme with the agreement of the judge. The review carried out by the Department before the publication of the General Scheme does not contain any analysis of the impact of those reforms in England and Wales. Anecdotally however, the impact has been significantly to increase the costs to bring a defamation action in England and Wales, thus restricting the avenues for people of ordinary means in seeking to vindicate their good name, and significantly increasing the price which defendants have to pay if found liable.

12. Whilst a great number of submissions were received by the Department of Justice, it should be noted that the majority of those did not complain about the role of the jury as an arbiter of liability. Rather, they involved complaints as to the high levels of damages by juries in certain cases and a lack of predictability in those awards.

13. Most jury actions have proceeded as efficiently as would have been the case had they been tried before a Judge sitting alone. There are also numerous examples of damages awards made by juries arguably being more modest than the monetary sum that may have been awarded by a Judge. It is true that there have been excessive jury awards, but these are subject to appellate control and wildly excessive jury awards were not typical. Furthermore, for the first time, as a result of the recent decision of the Supreme Court in *Higgins v Irish Aviation Authority* [2022] IESC 13, it is now possible to provide a jury with clear bands indicating the appropriate amount of damages in defamation actions.

14. There is undoubtedly merit in questions of fact in a High Court defamation action being determined by a jury. Owing to the unique features and purposes of the law of defamation, a jury verdict confers a legitimacy upon the outcome which (given the unique features of the tort of defamation) arguably transcends what can be achieved by a judge sitting alone. By definition, a jury of twelve members of society brings an insight and life experience singularly appropriate to determine, for example, whether a statement is defamatory or whether a Plaintiff was identifiable from a publication.

15. The removal of juries may also have the unintended consequence of increasing the level of interlocutory or pre-trial applications being taken by parties. An increase in such applications would necessarily lead to an increase in the costs associated with defamation cases, particularly where rulings in such cases are subject to appeal.

16. Arguably, the widest level of concern (whether well-founded or not) relating to the role of juries in defamation actions in this jurisdiction concerns their function in assessing damages. The Oireachtas may therefore wish to consider the merit in retaining the jury in respect of questions of fact and to examine alternative methods of controlling the issues regarding excessive awards. These steps could include for instance requiring that clearer guidance be given by the trial judge in accordance with the decision in *Higgins v IAA,* permitting the trial judge to consider and moderate any award in damages prior to the making of the final award or indeed leaving the issue of damages exclusively to the trial judge.

17. The position of the Council is that care should be taken with any decision to remove juries in their entirety without (a) considering the impact that steps to restrict the role of juries in England and Wales have had in that jurisdiction and (b) considering alternative methods to address the difficulties in relation to excessive and unpredictable awards of damages.

Serious Harm Test

18. In the General Scheme, "transient retail defamation" (Head 6) and corporate defamation claims are both proposed to be subject to a serious harm test. The necessity and desirability of this change should perhaps be reviewed. [Less questionable is Head 5, as it is arguable that public authorities ought not lightly be free to sue for defamation].

19. The introduction of a serious harm test for corporate defamation and transient retail claims carries with it a variety of potential problems. It will almost inevitably give rise to a substantial number of interlocutory disputes regarding whether or not serious harm can be shown. First instance decisions regarding same might well be appealed.

20. An unintended consequence of the proposals regarding serious harm may therefore be to prolong proceedings and increase their costliness and the extent to which Court time is taken up.

21. The General Scheme does not define "serious harm" insofar as individual (i.e. personal) Plaintiffs are concerned. This is likely to create uncertainty, which is undesirable.

22. Head 6 (2) would, it is respectfully submitted, require careful thought about precisely what is envisaged by the current wording "…*may not bring an action*". If it is contemplated that this would prevent a person from instituting proceedings, clarity is needed around what exactly is required (including practical matters as to whether an application to Court is necessary) in order for it to be established that a person "…*can demonstrate that they have suffered, or are likely to suffer, serious harm…*".

23. The General Scheme is silent as to how a Court is to determine whether a serious harm threshold has been met. For example, would this be by way of *viva voce* evidence? It is submitted that this would be necessary but that conducting such a hearing could be almost as substantial an endeavour as conducting a full trial itself.

24. Determining whether or not the serious harm threshold is met may itself be an onerous exercise, as is perhaps apparent from the following passage in *Gatley on Libel and Slander*, 13th Edition, 2022) at paragraph 4-013. Under the heading "Relevant Factors in assessing whether serious harm has been caused" it is stated that:

> *"In any particular case, the question whether serious harm to the Claimant's reputation has been caused or is likely to be caused depends upon a careful consideration of all the facts including the meaning of the words and the gravity of any imputation, the extent of publication, the standing of the Defendant, the identity of the [publishees], the relationship (if any) of the publishees to the claimant, the circumstances of the claimant, and the reaction of the publishees. As the Supreme Court made clear in Lachaux (Lachaux v Independent Print Ltd [2019] UKSC 27) inferences of fact as to the seriousness of harm may be drawn from such considerations. No single factor is likely to be determinative and absent some error of principle, the evaluative decision of a trial judge is unlikely to be disturbed on appeal".* (footnotes omitted).

25. Arguably, if a Plaintiff does meet the "*serious harm test*" howsoever defined, any Court will have to then assess damages at a level consistent with "*serious harm*" having been caused to the Plaintiff. The decision in the Supreme Court in *Higgins v IAA [2022] IESC 13 (MacMenamin J)* would suggest that damages in such circumstances might well be significant.

Head 8: Obligation to consider mediation

26. It is respectfully submitted that the wording of this Head requires further scrutiny and thought. It could potentially result, for example, in every "defamation dispute"- even one in which, e.g., the claim is not actionable - carrying an obligation to *consider* mediation and for example an outright refusal to engage in mediation could potentially have adverse costs consequences. The term "defamation dispute" arguably needs to be defined or changed.

Fair and Accurate report of Court proceedings

27. Head 12(2) introduces new wording regarding the defence of absolute privilege for a fair and accurate report of Court proceedings. It is submitted that there is a danger in introducing the proposed wording. Section 17 as it stands and the common law arguably gives sufficiently broad protection to this, and an unintended consequence of the proposed reform might be that it *narrows* the scope of the defence. For example, it could be argued that the wording of Head 12 (2) (c) could possibly narrow the extent to which privilege is provided by case law.

Head 16: Proposed amendment of Section 26 Defence

28. This proposes quite far-reaching amendments to the section 26 defence of fair and reasonable publication upon a matter of public interest. It is often said that section 26 has never been successfully pleaded. However, the occasions on which the defence has been run, i.e. fully ventilated in Court, are relatively rare.

29. There is probably merit in significantly reforming the existing section 26 of the Defamation Act 2009.

30. However, it must be appreciated that the wording in Head 16 would represent a relatively substantial change to the current position. One consequence of the wording in Head 16 would arguably be to pre-dominantly make the section 26 defence to be one for journalists. (This is notwithstanding the wording of Head 16 (1) (4)). It is submitted that it is worth considering the desirability - or otherwise - of having different statutory tests for media and non-media Defendants, in the context of the section 26 defence. It is further submitted that, in its current wording, the contours of Head 16 are not sufficiently clear as to what a non-media Defendant would have to demonstrate to escape liability.

Head 17: Innocent publication- live broadcasts

31. The proposed amendment to innocent publication as regards live broadcasts (at Head 17) is arguably quite far-reaching. Potentially, this could give rise to situations where a citizen is grossly defamed, but could have no real redress. . On that basis it is arguable that the

proposed wording may be unconstitutional by reason of the State's failure to provide adequate protection of the citizen's good name.

32. The proposal in Head 17 is a complete departure from the common law position. It could possibly have anomalous consequences e.g. discouraging pre-recording of programmes.

33. It is very unclear how the wording at Head 17 relates to an employee of the broadcaster making a defamatory statement. *Prima facie*, the wording as is might enable a broadcaster to escape liability for defamatory statements made by one of its own employees. This might be considered anomalous and, perhaps, undesirable.

Head 18 (5): Publishing a correction with equal prominence to the publication of the defamatory statement

34. It is submitted that the desirability and indeed lawfulness of this is questionable. It is likely to give rise to acute practical problems where it arises. For example, it is arguably unworkable that a front-page apology in a newspaper, or part of a news broadcast, would have to be published, in a form that is of equal prominence to the defamatory publication. This is likely to require the Courts to police whether or not the correction is or has been published with equal prominence. It is submitted that there is also a question mark about whether this is compatible with Article 10 ECHR or consistent with the constitutional protection of freedom of expression.

Head 20

35. It is respectfully submitted that the use of the word "source" at (ii) is unfortunate and ought to be deleted. It creates the risk of confusion that for example the identity of a journalist's source is a mandatory consideration a Court must have regard to in assessing damages. It must be remembered that a number of decisions from the European Court of Human Rights have emphasised the importance of the protection of Journalistic sources and the protections afforded by Article 10 of the European Convention of Human Rights, in that regard.

36. With regard to Head 20 (iv), it is submitted that it is undesirable to provide in legislation that assessing damages in defamation must have regard to invasion of privacy. Defamation generally protects reputation, while the modern law of privacy protects privacy. They have different features, and one should be careful about mixing them up.

Head 21 (2)

37. It is submitted that it would be preferable if the wording after "robust defence" was deleted. The wording after "robust defence" arguably unduly encroaches upon a Defendant's right to robustly defend proceedings.

Head 23 - 31: Strategic lawsuits against public participation (SLAPPs)

38. This is a far-reaching proposal. It is respectfully submitted that very close and careful scrutiny is needed prior to the enactment of any legislation in the form of the wording of Heads 24-31 inclusive of the General Scheme, at least prior to a uniform measure being adopted at EU wide level in relation to SLAPPs.

39. There is a danger that the wording in the General Scheme relating to SLAPPs, if enacted, could be held to have much broader application, scope and effect than might be intended. Whilst the Council supports the motivation behind the matters contained in this part of the act it is submitted that careful consideration is essential.

THE BAR
OF IRELAND
The Law Library
BARRA NA hÉIREANN
An Leabharlann Dlí

Distillery Building
145-151 Church Street
Dublin 7 D07 WDX8

Tel: +353 1 817 5000
Email: thebarofireland@lawlibrary.ie
Twitter: @TheBarofIreland
www.lawlibrary.ie

Dr Mark Hanna
Assistant Professor in Media Law
Durham Law School
Durham University
Stockton Rd
Durham DH1 3LE
England
e: mark.p.hanna@durham.ac.uk

04/05/2023

Joint Committee on Justice
Houses of the Oireachtas
Leinster House
Dublin 2

Re: Submission on the General Scheme of the Defamation (Amendment) Bill

Dear Chair and Members of the Committee,

Thank you for the opportunity to comment on the General Scheme of the Defamation (Amendment) Bill.

I welcome many of the proposed amendments in the Bill as a necessary modernisation of defamation law. I reserve comments below to seven aspects of the General Scheme of the Bill: (i) recommendation of the reversal of the presumption of jury trial in defamation claims; (ii) recommendation of a more general serious harm threshold which applies to individual private plaintiffs; (iii) commendation of the obligation to consider mediation under Head 8 and the costs provision under Head 22; (iv) a recommendation to simplify the public interest defence under Head 16 in the interest of the balance of rights between the parties; (v) a recommendation to amend the definition of 'matters of public interest' under Head 24; (vi) a recommendation to make allowance for litigants in person and ineffective assistance in litigation in the 'features of concern' under Head 24; and (vii) a recommendation for some amendment of the early dismissal mechanism under Head 26.

(i) The reversal of the presumption of jury trials

I recognise the authority of juries as the proper trier of facts in the judicial system. However, my research into the effect of juries in defamation claims in Northern Ireland and England and Wales showed they are ineffective for dispute resolution of defamation claims.[1] That is why both of those jurisdictions have reversed the presumption of jury trials in defamation claims.[2] From what I understand, juries suffer the same issues here.

The reason for this is that juries only add to the complexity and costs of defamation proceedings. Under the current law, the only bar a plaintiff will face in advancing a claim is the relatively low threshold that, in the opinion of the Court, it would be *perverse* to consider

[1] See Mark Patrick Hanna, 'The Chilling Effect of Defamation Law in Northern Ireland: A comparison with England and Wales in relation to the presumption of jury trial, the threshold of seriousness and the public interest defence' (2021) 72 *Northern Ireland Legal Quarterly* 1.
[2] See s 11 of the Defamation Act 2013 and s 7 of the Defamation Act (Northern Ireland) 2022 respectively.

the statement in question to be defamatory.[3] The higher threshold of whether the statement is, as a matter of fact, 'defamatory' can only be determined once the jury is empanelled and ready for trial. Proceedings rarely reach this advanced stage, however, as most defendants get spooked by costs and settle.

The prospect of a jury trial, therefore, can be, and often is, used strategically by plaintiffs to put the defendant on the back foot and at the mercy of months of expensive proceedings before the claim can be properly tested. It's true that sometimes a defendant may want a jury trial.[4] However, most defendants want to have defamatory meaning tried early by the court, rather than spending time and money waiting for a proper test of the claim.

There should still be some provision for jury trial under special circumstances, but with the default for trial by judge alone. Therefore, I recommend reversal of the presumption, rather than complete abolition of jury trials in defamation proceedings (Head 3 seems to recommend abolition).

Obviously, the early dismissal mechanism under Head 26 may change this, were it to be enacted. But, as I have some reservations about the early dismissal mechanism under Head 26 (see below), I recommend the reversal of the presumption of jury trial as a pragmatic and flexible way to strike the balance of rights in defamation proceedings.

(ii) A more general serious harm threshold

I welcome the provision of a serious harm threshold under Heads 4 to 6, but note that only applies to bodies corporate, public authorities, and transient retail defamation. There is no provision for a serious harm threshold against private individual plaintiffs. Thus, under the General Scheme of the Bill, a corporation, for example, will need to prove they have suffered, or are likely to suffer, serious harm in order to advance a claim, but a private plaintiff (for example, the owner of a corporation) would not.

I would recommend the inclusion of a more general provision, e.g., 'A person may not bring an action for defamation unless they can demonstrate that they have suffered, or are likely to suffer, serious harm as a result of the alleged defamation.' (i.e., the standard applied to transient retail defamation at Head 6(2)).

Reputation is a most *personal* right. By limiting the serious harm test to the plaintiffs listed at Heads 4 to 6, the Amendment would miss a whole swathe of claims. Moreover, the gap could be exploited by plaintiffs. For example, the owner of a business could bring a claim for their own personal reputation, where the business could not. This would miss the balancing exercise which the General Scheme otherwise aims to achieve.

---

[3] In *Ganley* v *Raidió Teilifís Éireann* [2019] IECA 18, the Court of Appeal held that, with the provision of jury trial, the bar for judicial intervention at the early stage was set 'relatively high', and should be 'sparingly invoked', at [50] and [52]. The Court also cited with approval the principle from the English case of *Jameel* v *Wall Street Journal Europe* [2003] EWCA Civ 1694 that the judge's function in a jury trial is 'no more and no less than to pre-empt perversity'.

[4] For example, Van Morrison wanted a jury trial for his defence to a defamation action by the Health Minister in Northern Ireland recently. But that was unique to that defendant and the facts of that case, see *Swann* v *Morrison* [2023] NICA 19.

I would also point out that, if there was provision of a more general serious harm test, it would help address the issue of SLAPPs which is taken up in Part 5 of the General Scheme. That is, the defendant could apply at an early stage for dismissal on the grounds that the plaintiff is 'not likely to succeed at full hearing' in a frivolous and vexatious claim (see below recommendation re s 14 and 34(2) of the 2009 Act).

(iii) The obligation to consider mediation

I welcome the provision of an obligation to consider mediation under Head 8. The key problem which the Bill seeks to address is the chilling effect of the complexity and costs of legal proceedings. Increased mediation of claims, in observance of the balance of rights involved, should help to avoid that. However, it is not clear from the General Scheme what form the 'obligation' would take, and how it may be implemented.

The explanatory note to Head 8 states: 'This Head is intended to give effect to the following recommendation in the Report of the Review: *Impose an obligation on parties to a dispute to consider mediation.*' I note the Report of the Review recommends 'a statutory obligation for parties to a defamation dispute to consider mediation (as under the Online Safety and Media Regulation Bill 2022)'. I further note, however, that the latest version of the Online Safety and Media Regulation Bill 2022 provides that the Commission shall 'take whatever steps it considers appropriate to *encourage* the use of mediation … by an independent mediator' (clause 45).

In order to deal with the issue of SLAPPs, the obligation should be on lawyers in particular to encourage plaintiffs to consider mediation. But I think that the provision under Head 22 for courts to take into consideration any unreasonable refusal or failure to attend mediation for costs purposes should be effective in encouraging plaintiffs to consider mediation. My only suggestion in relation to Head 22 would be to place an obligation on the court to consider any such unreasonable refusal in awarding costs, e.g., 'a court *must*', rather than 'a court may'.

(iv) A simplification of the public interest defence under Head 16

The amendment of the defence under s 26 of the 2009 Act is welcomed. The existing provision is overly cumbersome for defendants, and this is reflected in the limited recognition of the defence in practice. A robust and functioning public interest defence is vital to any modern democracy.

However, I question the necessity of subhead 1(c) referring to 'enquiries and checks as it is reasonable to expect of a responsible journalist'. The language there is reminiscent of the *Reynolds* decision in the House of Lords.[5] The explanatory notes refer also directly to that case.

It should be noted that s 4 of the Defamation Act 2013, s 6 of the Defamation and Malicious Publication (Scotland) Act 2021, and s 3 of the Defamation Act (Northern Ireland) 2022, all of which Head 16 appears to be based on, were intended to simplify the defence, and

[5] *Reynolds* v *Times Newspapers* [2001] 2 AC 127.

specifically omitted for that reason any reference to 'responsible journalism'. This is because after *Reynolds*, courts were relying formulaically on the standard of 'responsible journalism', in exclusion of broader circumstances relevant to the defence.[6] Therefore, the reference to 'responsible journalism' was excised from s 4 of the 2013 Act, and Scotland and Northern Ireland followed that approach. Since the enactment of s 4, the United Kingdom Supreme Court has held that any reference to 'responsible journalism' should be avoided by the court when determining whether the statutory defence applies.[7]

By inserting subhead 1(c), the General Scheme forgoes the simplicity of those provisions and introduces an extra hurdle for the defendant, which may lead to a disproportionate and unnecessary interference with freedom of expression on matters of public interest.

The mischief which subhead 1(c) seeks to address is, in my opinion, adequately addressed by subheads 1(b), 2 and 3, namely the assessment of whether, in all the circumstances and making allowance for editorial judgment, the defendant reasonably believed that publishing the statement complained of was in the public interest.

If the intention of the general provision is to simplify the defence and strike a more equal balance of rights between the parties, my advice is to jettison subhead 1(c).

(v) The definition of 'matters of public interest' under Head 24

Part 5 addresses SLAPPs and Head 24 sets out some definitions for that Part. The declared intention is to help courts identify such claims at the outset of proceedings. However, I would draw the Committee's attention to the definition of 'matters of public interest' there. Determining what is in the public interest requires sensitivity to the specific facts of each case. It can only be defined on a case-by-case basis. At best, this provision under Head 24 will not add much to what is essentially a contextual, fact-sensitive exercise. At worst, it will be relied on formalistically to exclude expression which, on proper factual analysis, would be in the public interest.

Admittedly, the 'definition' of matters of public interest under Head 24 appears to be more a list of examples, rather than a limited definition, referring as it does to 'in areas such as …'. If the provision merely aims to provide a list of examples, this should be emphasised in the provision itself, with e.g., 'this is not an exhaustive list'. However, even with such a qualification, the definition will not be very helpful to the judicial exercise of determining whether the statement complained of is on a matter of public interest.

The explanatory notes refer to Article 3.3 of the European Commission's proposal for an anti-SLAPP Directive. It should be noted that the European Court of Human Rights adopts a *broad* definition of public interest as 'matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community.'[8]

---

[6] The higher courts in England and Wales repeatedly tried to address this, see above n.1 at 22-30.
[7] *Serafin* v *Malkiewicz* [2020] UKSC 23 at [75].
[8] *Satakunnan Markkinapörssi Oy and Satamedia Oy* v *Finland* (2018) 66 EHRR 8 at §171.

However, that broad definition serves only as an abstract principle. The European Court of Human Rights has repeatedly held that the question of whether something is a matter of public interest will ultimately 'depend on a broader assessment of the subject matter' in question and the '*context* of the publication'.[9] The Court considers it 'necessary to assess the publication as a whole and to examine whether, having regard to the context in which it appears', it relates to a matter of public interest.[10]

The explanatory notes to Head 24 also refer to the UK Ministry of Justice response to its consultation on SLAPPs. However, the Committee should also note that the Courts in England Wales take a similar approach. In *Jameel*, the House of Lords emphasised that the public interest test must be applied in a 'practical and flexible manner', with regard to 'practical realities'.[11] In *Flood*, the Supreme Court pointed out that the question of public interest is 'not a black and white test' and that it is necessary to consider 'the *extent to which* the subject matter is a matter of public concern'.[12] In *R (Calver)* v *Adjudication Panel for Wales and another*, the High Court pointed out that the 'fact-sensitive approach means that there is no rigid typology' for determining matters of public interest.[13] In *Sicri* v *Associated Newspapers Ltd*, the head of the Media and Communications List, Justice Warby, warned that 'context is always important' to this question, and that a 'broad brush' approach would be at odds with the well-established requirement for an 'intense focus' on the specific facts of the case.[14]

The definition of 'matter of public interest' under Head 24 is therefore at once too narrow and too broad. My recommendation is, in anything, to adopt a broad definition of 'matter of public interest' under Head 24, such as that adopted the European Court of Human Rights (e.g., 'matter which affects the public').

Head 16(1)(b), and subheads 2 and 3 thereof, already provide for the necessary contextual and fact-sensitive approach which, on the balance of rights, must always attend this exercise. There is no reason why this same standard should not be applied to determining whether something relates to a matter of public interest for privileged protection under the measures against SLAPPs in Part 5.

(vi) The definition of 'features of concern' under Head 24

A similar problem may arise in relation to the definition of 'features of concern' under Head 24. For example, determining whether claims are 'disproportionate, excessive or unreasonable' may require some trial of fact, with representation from both parties. Although this may not be as problematic as determining public interest, it may nonetheless be an issue considering that, under Head 26(2)(b), the court can dismiss a claim at an early stage if they are satisfied it exhibits just *one* feature of concern.

---

[9] *Tønsbergs Blad A.S. and Haukom v Norway* (2008) 46 EHRR, § 87, my emphasis. See also, *Björk Eiðsdóttir v Iceland* (2012) ECHR, § 67; and *Erla Hlynsdóttir v Iceland* (2012) ECHR, § 64.
[10] *Couderc and Hachette Filipacchi Associés* v *France* (2016) EMLR 19 at §102.
[11] [2006] UKHL 44 at [56].
[12] [2012] UKSC 11 at [30].
[13] [2012] EWHC 1172 at [57].
[14] [2020] EWHC 3541 (QB) at [65], [66].

However, the point I wish to emphasis here is the need at least for some allowance for litigants in person and for infective assistance in litigation in relation to any 'features of concern' under Head 24.

Defamation proceedings are expensive. That indeed is why SLAPPs are a problem. However, not everyone who is defamed will be able to afford the services of experienced lawyers who are well-versed in those proceedings. Moreover, many of those who feel the sting of slander or libel for the first time may not even realise how complex proceedings can become, and that they will need a lawyer who is experienced in the complexity of those proceedings. Some will even feel compelled to represent themselves—even if the old adage that 'the lawyer who represents himself has a fool for a client' was never as true as it is in relation to defamation proceedings. Considering also how defamation proceedings can often be highly personal and emotive for the parties, it is not unlikely that procedural mistakes will often be made by plaintiff and defendants alike.

There is no recognition of this in the 'features of concern' under Head 24. Of particular concern are parts (e) and (f) thereof. One can imagine that litigants in person, and in some cases even lawyers, may inadvertently make procedural mistakes which 'generate disproportionate, excessive or unreasonable costs or delays', or through inexperience apply for 'remedies that are disproportionate, excessive or unreasonable'.[15] It is not uncommon for such procedural mistakes to happen in cases where the plaintiff has been subject to defamatory imputations of the most serious kind and is engaged in a legitimate attempt at vindication.[16]

My recommendation, therefore, is that, if a 'features of concern' list must be used, some allowance is made there *and* under Head 26 (see below), for litigants in person and ineffective legal assistance (e.g., 'the Court must consider whether any features of concern are due to the plaintiff acting as litigant in person, or due to ineffective assistance in litigation, and make allowance for such cases in this Part of the Act.').

(vii) The early dismissal mechanism under Head 26

The early dismissal mechanism should deal effectively with SLAPPs, which is great. However, it will also be likely to deny a small, but not insignificant, number of claims which, on full trial may have substantial merit.

To begin with, it is not clear what 'manifestly unfounded' in subhead 2(a) means. How will it be determined simply on application by the defendant and without some trial of fact? How can a plaintiff satisfy the court that the claim is *not* manifestly unfounded? Obviously, it is envisaged as a higher standard than what is presently available for strike out and summary judgment, but there is danger that, as it is framed, it simply gives too much favour to defendants.

[15] The Supreme Court has recognised the general problem of litigants in person bringing proceedings 'wholly outside legal norms', *Klohn* v *An Bórd Pleanála and another* [2021] IESC 30, at 4.3.
[16] See for a recent example in defamation proceedings in England and Wales, *Hodges* v *Naish* [2021] EWHC 1805 (QB), where the Court addresses mistakes made by the claimant which generated unreasonable delays and costs at [4]-[8].

I offer the following hypothetical example: Deirdre, a journalist, hears rumours of mismanagement and fraud in relation to a government project ('Project X'). The project was overseen in the relevant period by a senior civil servant, Pauline. After some investigation, Deirdre finds minutes of a meeting of a Public Accounts Committee which reported on the management of Project X, and discovers that one member of the Committee said at the meeting: 'There are serious allegations of fraud and mismanagement of Project X under Pauline's watch.' Deidre then publishes an article in the newspaper under the heading 'Top civil servant involved in fraud', naming Pauline in the body of the article.

Let's suppose that it is not altogether clear what Deirdre did to verify the allegation (it rarely is). Let's also suppose that, as a matter of fact, there was no fraud (the Committee member knew they would be able to rely on privilege), but that this can only be discovered on proper analysis of a volume of documentary evidence and testimony. On its face, it may appear that there was some fraud in the management of Project X in the period when Pauline was overseeing it, even though there was in fact none.

With the proposed early dismissal mechanism, if Pauline sues Deirdre for defamation (and one would think that she should in these circumstances), all Deirdre needs to do is apply for an early dismissal under subhead 2(a). It will be on Pauline to satisfy the court that the claim is *not* manifestly unfounded. But how could she do this on a preliminary basis? Presumably, she cannot call witnesses, rely on full discovery, or have a proper chance to identify the evidence she needs in the complex details of Project X. Under other provisions in this General Scheme, this would be properly tried at full hearing as relating, amongst other things, to complex issues of privilege and public interest defence. But under the early dismissal mechanism in subhead 2(a), Pauline's claim may be barred from the outset, and she would be therefore denied a fair hearing.

Pauline would not even have the advantage of the 'balancing considerations' under 2(c) in this scenario (they apparently apply only to a dismissal under subhead 2(b)). But even if she did, I am not sure it would help her much. It is not clear what 'likely to succeed' at full hearing means under that provision. If it means 'more likely than not', then it is not clear that Pauline could even satisfy this under the given facts. Moreover, Pauline would have to satisfy the court that, 'the public interest in allowing the proceedings to continue outweighs the public interest in dismissing the case before a full hearing'. However, on the face of it, this relates to a serious matter of public interest, and an example of the vital role of the press as a public watchdog. Pauline would be hard pressed to satisfy either element of 2(c).[17]

In summary, I recommend more careful deliberation on the provision for an early dismissal mechanism under Head 26. Depending on the meaning of 'manifestly unfounded', subhead 2(a) may be inappropriate to the balancing exercise. Subheads 2(b) and (c) appear problematic in that regard also.

It is worth noting that, while the European Court of Human Rights has not, to my knowledge, ruled on such early dismissal mechanisms in defamation claims, it has ruled on interim injunctions in such claims and found them permissible only on the basis of their 'temporary nature', that they do 'not prejudge the outcome of the subsequent dispute between the parties'

[17] The explanatory notes refer in this regard to 'the Canadian (Ontario) anti-SLAPP legislation'. Pauline may prefer the Ontario statute, as it a little less restrictive in application, and as it may be slightly easier for Pauline to show under the given facts that there are 'grounds to believe' the claim has substantial merit, that Deidre has 'no defence', and that the harm suffered is 'sufficiently serious'.

on the substantive merits, and therefore that they constitute a 'proportionate' interference with the rights of the parties under the Convention.[18]

An alternative to such an early dismissal mechanism may be achieved through (i) the proposed reversal of the presumption of jury trial, (ii) the recommended general serious harm threshold and (iii) a relatively simple amendment of s 14 of the 2009 Act to insert 'not likely to be found to have a defamatory meaning' (instead of, 'not reasonably capable of being found to have a defamatory meaning'), and the same of s 34(2) of the 2009 Act. I think this, taken together with the established common law jurisdiction for striking out frivolous and vexatious claims,[19] would go some way at least in addressing the problem of SLAPPs, without disproportionately interfering with the right to fair trial and reputation.

Furthermore, in relation to subhead1(b) ('the court [shall/may] … if it is satisfied that they exhibit one or more features of concern'), my recommendation is that, in exercising this discretion, the court should pay particular regard to whether the plaintiff is a litigant in person, or if the claim is marked by ineffective assistance in litigation. If it were not for the danger that it would be exploited by plaintiffs, I would recommend that litigants in person be excluded from this provision entirely.

Conclusion

In general, I welcome the Amendment Bill. The current law disproportionately favours plaintiffs and clearly has some chilling effect on freedom of expression on matters of public interest. However, as outlined above, some of the provisions of the General Scheme of the Bill (specifically those in Part 5) may go too far in the other direction and disproportionately favour defendants. This is by no means an easy balance to get right.

I hope these comments, taken together with the broad range of responses the Committee will no doubt receive, may contribute in some way to amendment of the law to ensure a balanced approach to the rights to freedom of expression, the protection of reputation, and access to justice.

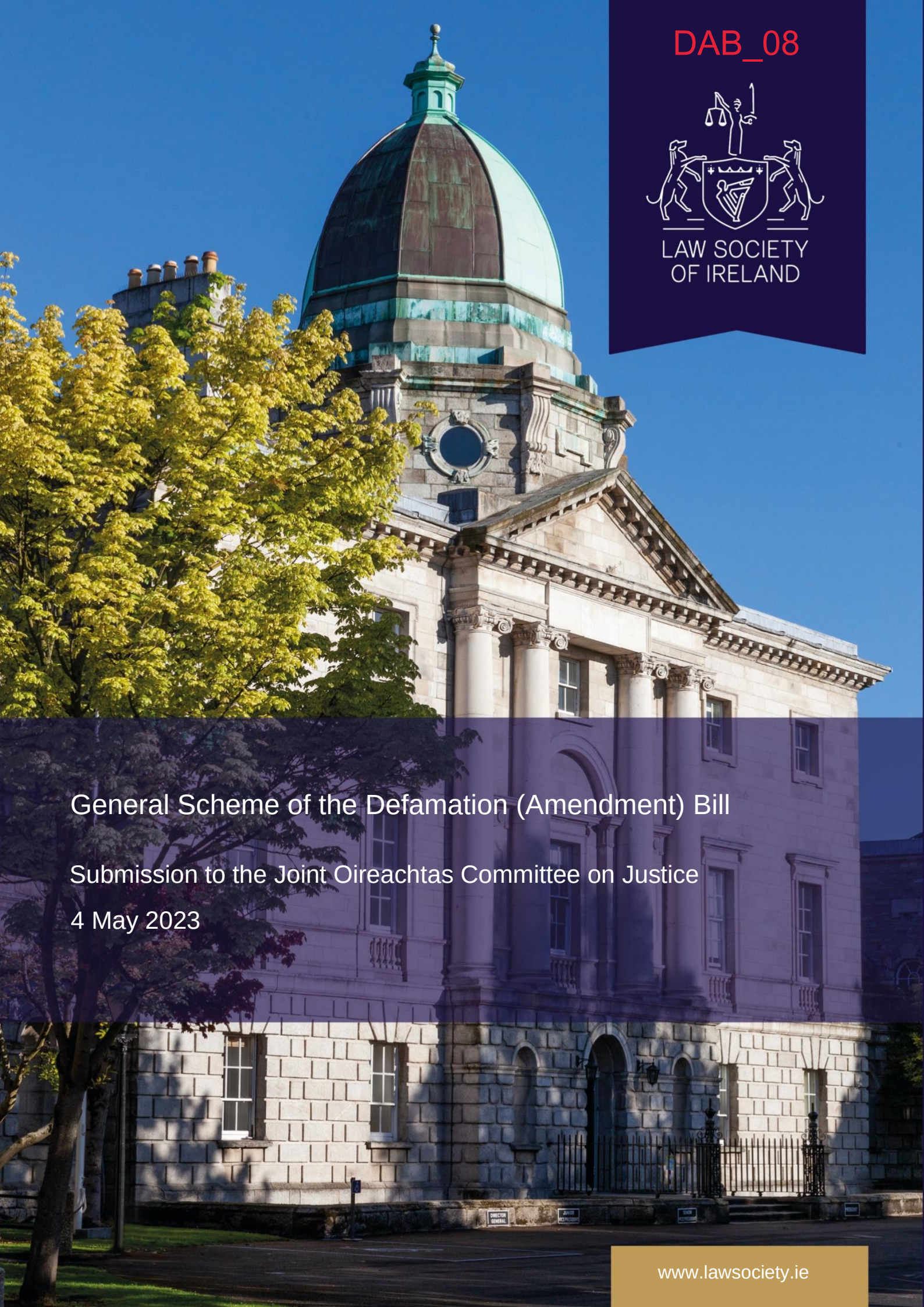
Please let me know if I can be of any further assistance.

Sincerely,

Dr Mark Hanna

[18] *Editions Plon* v *France* (2004) ECHR, § 47.
[19] *Gilchrist* v *Sunday Newspapers Ltd and others* [2017] IECA 191.

DAB_08



LAW SOCIETY OF IRELAND

General Scheme of the Defamation (Amendment) Bill

Submission to the Joint Oireachtas Committee on Justice

4 May 2023

www.lawsociety.ie

Introduction

1. The Law Society of Ireland ("the **Society**") appreciates the opportunity to respond to an invitation from the Joint Committee on Justice ("the **Committee**") to make a submission on the General Scheme of the Defamation (Amendment) Bill.

2. The Society is the educational, representative, and co-regulatory body of the solicitors' profession in Ireland.

3. This submission has been prepared by the Society's Litigation Committee, various members of which are experienced practitioners who provide expert legal advice in matters related to defamation law. We have focussed only on areas where we disagree with the legislative proposals or where we have specific comments/concerns in relation to same.

Head 3 - Abolition of juries in High Court actions

4. We disagree with this proposal and maintain that juries should be retained in defamation actions.

5. It is notable that, a week following publication of the *Report of the Review of the Defamation Act 2009* (on 1 March 2022), the Supreme Court delivered judgment in ***Higgins -v- Irish Aviation Authority***. The judgment is of significant relevance on both the assessment of damages and on directions to jurors on damages. As such, the judgment removes many of the concerns raised in the context of arguments in favour of the abolition of juries in defamation actions.

6. The judgment also highlights how jurors had the opportunity to assess the demeanour of witnesses, bringing their life experience and judgement to the task of adjudication, and applying values as members of the community.

7. In the same judgment, Judge McMenamin stated that:

> *"When the 12 Jurors, as members of the community, came to deal with the issues in this Defamation action, they had before them material which showed the evidence emerged, as well as what it proved. The Jurors had the opportunity to assess the demeanour of the witnesses, and the myriad of other ways in which each Juror could bring their life experience and judgement to bear in the task of adjudication, and public accountability. The Jury could also discern not only how both parties sought to address the issues to be determined, but what was not addressed. The task of the Jury was to apply its values as members of the community".*

8. The pros and cons of *Jury -v- Judge* hearings have been considered in many jurisdictions and are worthy of note as part of this reform of defamation laws.

Trial by Jury – Pros	Trial by Judge – Pros
Jurors too compassionate	Judges are unbiased
Jurors easier audience	Judges are experts
Defamed to community at large/vindication by community at large	Quicker and more efficient
Juries fair to Defendants upholding right to free speech or not	Court of Appeal Est. 2014
Combined wisdom of 12 -v- 1	Circuit Court – no Jury – Damages €75k
Trial by Jury – Cons	**Trial by Judge – Cons**
Jurors too emotional	Only a Judge decides
Jurors unpredictable	Judge sees all evidence (including inadmissible evidence)
Jurors lack expertise	Judge cannot carry the same weight as a 12 member Jury
Defamation – excessive awards	Judges "live in rarefied atmosphere"
Inefficiencies, failure to understand legal proof of probabilities	Generous/conservative Judges

9. Most common law jurisdictions allow for Jury Trials by right for Civil Defamation cases. Notably, in criminal matters the Supreme Court has held that a Criminal Trial must involve a Jury that is representative across a section of the community – ***De Burca & Anderson -v- Attorney General***[1]**.** Similar considerations arise in the context of an assessment as to whether a person's reputation has been defamed in the eyes of reasonable members of society.

[1] [1976] IR 38

Head 4 - Serious harm test – bodies corporate

10. We disagree with this proposal.

11. It will be difficult to prove a causal link between the alleged defamation and the serious harm/financial loss where any number of external factors could be responsible for that financial loss. It will also increase the costs incurred in prosecuting/defending such claims where 'serious harm' is a requirement.

12. There may be a delay in evidencing financial loss for a corporate entity which (given the one year limitation period to bring such claims) may create difficulties for litigants to the extent that it may create a new barrier to justice.

Head 4 - Serious harm test – public authorities

13. We do not support the proposal for either a serious harm or a public interest test in relation to public authorities being able to bring defamation proceedings.

14. Public policy may favour a position where public bodies could not use State resources to issue defamation proceedings.

15. A defamatory statement can impact the reputation of, and undermine public confidence in, a public authority. In that regard, defamation actions provide such bodies with a mechanism to restore public confidence – particularly in respect of malicious, irresponsible or scandalous comments.

16. A number of defences are already available under the Defamation Act 2009 ("the **2009 Act**") - e.g. fair and reasonable publication on a matter of public interest at section 26 - which should provide sufficient defences for the media in respect of investigative journalism into public authorities. It can be argued that the 2009 Act already strikes the correct balance between the right to freedom of expression and the right to a reputation/good name.

17. In practice, defamation proceedings by public bodies are rare, and it is difficult to argue that the press or public in this jurisdiction are reluctant to enter into robust criticism and debate on the actions/policies of public bodies.

18. Rights to legal remedies should be available to all bodies, including public bodies.

19. Access to justice for all bodies must be ensured.

Head 4 – Serious harm test – transient retail defamation

20. In the event that the legislature decides to proceed with this proposal, it will be essential to ensure that specific and prescriptive guidance is provided in order that the test has proper effect in practice.

Head 7 – Obligation on Solicitors (alternatives to legal proceedings) and Head 8 – Obligation to consider mediation

21. These proposals are wholly unnecessary given that existing statutory obligations require that solicitors advise clients on alternative dispute resolution mechanisms prior to the institution of legal proceedings.

Head 10 – Choice of Jurisdiction

22. We do not support this proposal which essentially amounts to a threshold provision, requiring a court to consider the appropriateness of Ireland as a forum for a defamation action, where the plaintiff has more substantial links with another jurisdiction.

23. There appears to be no clear data on whether there has been an increase in the number of defamation cases brought in Ireland by plaintiffs based in other jurisdictions.

24. Any changes to the requirements of the *Brussels I Recast Regulation* appear to be a matter for EU (as opposed to domestic) law.

25. *Ireland for Law* is actively encouraging the bringing of legitimate cases in this jurisdiction.

26. There is a risk that this would result in increasing costs and delays as it may require preliminary applications to establish jurisdiction.

Head 16 - Amendment of section 26 of Act of 2009 (Fair and reasonable publication on a matter of public interest)

27. Defining what is reasonably responsible by a Defendant in verifying a relevant fact or issue could prove difficult, or impossible.

28. We agree that this area requires simplification to ensure that this defence is available in the course of proceedings however, we do not consider that the UK model is necessarily the correct example to adopt.

Head 20 - Damages

29. We agree with these proposals.

30. Section 31 of the 2009 Act should be amended to keep pace with common law principles and should include factors set out in Head 20 which are not already captured in section 31.

31. In assessing whether or not awards for damages in defamation cases are excessive, appellate courts currently consider the following:

- the gravity of the defamation;
- the effect on the plaintiff;
- the extent of the publication;
- the conduct of the defendant; and
- the conduct of the plaintiff (where relevant).

32. In the 2014 case of Leech v Independent Newspapers, McKechnie J. stated:

> *"The following are some of the factors which will require consideration in any assessment of damages in this type of case, to be viewed in the context in which such matters have arisen:-*
>
> - *The extent of the wrong, of the harm inflicted and of the injury done;*
> - *The damage to one's reputation and standing in the eyes of reasonably minded members of the community;*
> - *The restoration of that reputation and standing to a degree that will withstand any future challenge by any random member of the public who suspects that there is "no smoke without fire";*
> - *The degree of hurt, distress and humiliation suffered and any other aspect of one's feelings that has been affected;*
> - *The extent of the intrusion into one's personal, business, professional or social life, or any combination thereof, to include the invasion of one's privacy;*
> - *Any other harmful effect, causatively resulting from the wrongdoing, not above mentioned;*
> - *The gravity of the libel;*
> - *The extent of the circulated publication;*
> - *The response and reaction to the allegations as made; retraction and apology; reaffirmation of truth and justification – even with different meanings to those as pleaded;*
> - *The overall conduct of the defendant, including those examples identified in Conway as constituting aggravation and even extending to matters of exemplary condemnation on occasions; and*
> - *Any other factor specific to the individual case which falls within the parameters of the principles as outlined."*

33. In McDonagh v Sunday Newspapers, Denham C.J. noted that "*it is helpful to keep in mind factors such as, including but not limited to, the value of money, the average wage, and the cost of a car*". She also suggested that while the awards in personal injury cases have some relevance, the fact that high special damages can be awarded in cases of serious injury may cloud the comparison. She further noted that, in assessing the issues of proportionality and reasonableness of damages in the future, the 2009 Act is relevant.

34. Other potential paths of reform were considered to address the issue of damages which were ultimately not recommended. We agree with the exclusion of these items which include:

    - Providing for a cap on damages (likely to be dealt with by the bands set out by the Court in *Higgins*);
    - Drawing up a book of quantum or guidelines (also likely to be dealt with by the bands set out by the Court in *Higgins*);
    - Setting out rules in relation to closing instructions to a Jury; and
    - Requiring the plaintiff to explicitly set out the quantum of the damage caused (already dealt with in the Plaintiff's evidence by their legal representative making submission to the Court on damages).

Conclusion

35. We appreciate the extensive process which has been undertaken in order to bring about much needed reform to this area of law and practice and will further appreciate the Committee's consideration of these submissions in advance of next stage of the legislative process.

36. In that regard, we remain available to assist the Committee in any way we can.

For further information - contact:

Fiona Cullen
Head of Policy and Government Affairs

f.cullen@lawsociety.ie

Blackhall Place, Dublin 7
t. 01 672 4800
e. general@lawsociety.ie

DAB_09

Irish Council for Civil Liberties

1st Floor
34 Usher's Quay
Dublin 8
T: +353 1 912 1640
E: info@iccl.ie
w: www.iccl.ie

Oireachtas Joint Committee on Justice
Houses of the Oireachtas
Dublin 2

4 May 2023

Defamation (Amendment) Bill 2023

Dear Committee Secretariat,

1. The Irish Council for Civil Liberties, (ICCL), endorses the submission on the above Bill as sent to the Committee on behalf of the Ireland Anti-Slapps Network.
2. However, we would like to note our view on Head 3 is that our first position is that juries should be maintained for questions of liability in Defamation Cases, as per our submission to the Department of Justice in 2020, as enclosed.
3. The position outlined in the Anti-Slapps Network's submission on Head 3 is endorsed by ICCL as an alternative position, in the event that the presumption of juries is removed as is proposed by the current draft Bill.

Yours sincerely,

Liam Herrick
Executive Director
ICCL

Enc. ICCL Submission to consultation process on the Review of the Defamation Act 2020.

DAB_09(1)

Irish Council for Civil Liberties | An Chomhairle um Chearta Daonna

Submission to the Department of Justice and Equality on review of the Defamation Act 2009

03 April 2020

Written by:
Doireann Ansbro, Senior Research and Policy Officer

The Irish Council for Civil Liberties, (ICCL) welcomes the opportunity to make a submission to the Department of Justice and Equality on the review of the Defamation Act 2009.

ICCL attaches fundamental importance to the promotion and protection of the right to freedom of expression and information. These rights are protected in Ireland under the Irish Constitution in article 40.6.1.i (freedom of expression) and article 40.3.1 (right to communicate); article 10 of the European Convention on Human Rights, (ECHR); article 11 of the EU Charter on Fundamental Rights and Freedom and article 19 of the UN International Covenant on Civil and Political Rights[1] (ICCPR).

From our establishment in 1976, ICCL has consistently campaigned for Irish law to respect and protect the right to freedom of expression, including campaigns to repeal censorship of political speech, in defence of artistic expression and to remove the criminalisation of blasphemy. We welcome the Department of Justice and Equality's stated intention to remove the section on blasphemy within the Defamation Act 2009, in line with the outcome of the 2018 referendum on this issue.

The Irish State has a clear duty to create an enabling environment for free expression. The freedom to freely exchange ideas, views and experiences without fear of disproportionate legal responses is fundamental for a flourishing democracy, the protection of human dignity and full participation in public life.

Legal actions for defamatory statements interfere with the right to freedom of expression. Under the Irish constitutional right to a good name and within the framework of the ECHR, this interference can be justified where the interference is proportionate. This means it must meet the tripartite test of being provided for by law, meeting a legitimate aim and responding proportionately to a pressing social need. Proving that it is necessary means proving that any interference with the right to freedom of expression must be as limited as possible to achieve the legitimate aim.

The first two elements are clearly met in this case. The Defamation Act 2009 provides for the interference in law and the legitimate aim is protecting the good name or reputation of others. This aim is provided for as a separate right by the Irish Constitution in article 40.3.2 and within article 10 of ECHR and article 19 of ICCPR as a legitimate aim for interfering with freedom of expression.

The key here is to ensure that the interference is strictly necessary and as limited as possible. ICCL believes that legal actions provided for under the Defamation Act 2009, (the Act) do not represent a proportionate interference with the right to freedom of expression because it does not provide for the most limited form of interference possible to achieve its aim. The Act has a number of flaws that ICCL believes together constitute a disproportionate impact on the right to freedom of expression and have a chilling effect on expression, public debate and the right to participate in public life.

The flaws in the Defamation Act that together pose a threat to the right to freedom of expression and the right to receive and impart information and ideas are summarised as follows and explored in more detail below.

I. **Legal Aid Exclusion**-The exclusion of defamatory legal actions from the civil legal aid scheme is a disincentive to defend defamatory actions. A person is more likely to withdraw a statement than defend it, creating a chilling effect on speech.
II. **Defences** - The defences of honest opinion and fair and reasonable comment in the public interest are too limited and, therefore, have an overly restrictive impact on freedom of expression.
III. **Burden of Proof** - The burden of proof on the defendant to prove an alleged defamatory statement is true should be shifted to the plaintiff to prove the statement is false.
IV. **Damages** - The uncertainty and unpredictability around the amount of damages that can be awarded is a disincentive to defend defamatory actions and permit disproportionate awards.

These issues together provide a disincentive to bring or, particularly, to defend a claim. This can create a chilling effect on speech by preventing media, citizen journalists and others from expressing their views, disseminating ideas, and calling out statements that might constitute hate speech. People must have the right to categorise racist or hateful speech as such and not risk being threatened with defamatory actions

[1] Ratified by Ireland in 1989

they either don't have the resources to defend or because a proper public interest defence is not available to them.

Disproportionate interferences represent a violation of the right to freedom of expression, which the Irish state is obliged to remedy. ICCL therefore urges the government to ensure that reform of the Act prioritises the promotion and protection of freedom of expression. Limits to this right provided for in statute must be proportionate. In particular, they must be as minimal as possible to allow for the proper balance between the protection of an individual's good name or reputation while allowing public debate to flourish.

I. **Legal Aid**

Irish law currently excludes defamation actions from legal aid. S.28 of the Civil Legal Aid Act 1995 assigns 'defamation' as a "designated matter" that is excluded from legal aid with a limited exception in 28(9)(b). The exclusion of defamatory legal actions from the civil legal aid scheme is a disincentive to defend defamatory actions. A person is more likely to withdraw a statement rather than defend it without proper legal representation, creating a chilling effect on speech.

When it comes to an individual defending his right to freedom of expression against a claim of defamation, there may be a significant imbalance of power if the person alleging the defamation has deep pockets. The same can be said of wealthy individuals who threaten others with actions for defamation. Without legal aid, action or defence under the Defamation Act is safe only for those who can financially afford to risk legal costs. This threatens the constitutional right of everyone to equality before the law.

It is also contrary to article 6 of the ECHR, which provides that everyone is entitled to "a fair and public hearing" in the "determination of his civil rights and obligations". The European Court of Human Rights held in Steel and Morris v UK[2] that the lack of legal aid in a defamatory case can constitute a breach of article 6 where there is significant 'inequality of arms', meaning where the other side has significantly deeper pockets to bring or defend a claim. To ensure proper compliance with the ECHR, ICCL urges the removal of 'defamatory actions' as an 'designated matter' excluded under the Civil Legal Aid Act.

II. ***Defences of Honest Opinion and Fair and Reasonable Comment in the public interest***[3]

The defences available to an individual accused of defamation of 'fair and reasonable comment in the public interest' and 'honest opinion' are too limited and provide a second obstacle to defending claims. The withdrawal of important statements, ideas and analysis from the public domain has a significant impact on freedom of expression. ICCL is aware of at least one occasion where a person publicly defined a particular approach to an issue as racist framing. When the person who had authored the approach threatened him with a defamatory action, he withdrew the analysis from the public domain because he was not confident that the defences available to him were strong enough to ensure he would win his case. As such, the law as it stands may have a chilling effect on an individual's ability to call out racism and hate speech.

Honest Opinion on a Matter of Public Interest

S.20 of the Act provides for a defence of honest opinion but requires a defendant to prove that he believed in the "truth of the opinion"[4]. The Irish Constitution and the ECHR protect the right of individuals to hold and express an opinion, as part of the right to freedom of expression. The European Court of Human Rights has stated that a distinction needs to be made between "facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof" … "as regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention".[5]

The Irish courts have addressed the scope of such a defence to some extent. For example, in *Hunter v Duckworth*[6], O Caoimh J stated that the defence of fair comment (a common law defence preceding the Act

---

2 Application no. 68416/01, [2005] ECHR 103 (15 February 2005).

3 For a full analysis of the constitutionality or otherwise of the defences within the Defamation Act 2009, see Eoin O'Dell "The Defamation Act, 2009: The Constitution Dimension", presented at Trinity College Dublin, 2009.

4 S.20(2)(a).

5 Lingens v Austria Application no 9815/82, (1986) 8 EHRR 103, [1986] ECHR 7 (8 July 1986) [46].

6 [2003] IEHC 81 (31 July 2003).

but the same in essence as honest opinion) should be "construed liberally to afford a proportionate right to freedom of expression of opinion, even when such expressions may give offence".

While a belief in the underlying facts relating to the opinion may need to be proven, the truth of an opinion itself can't be proven and therefore should not be required. This defence does not appear to conform to article 10 ECHR and should be amended to remove the requirement that the defendant prove the 'truth' of the opinion.

Fair and Reasonable Comment in the Public Interest

The defence provided for in s.26 of the Act: "Fair and reasonable comment in the public interest" is overly complex, lacks clarity and provides too high a threshold for a defendant to meet. It also may not meet the standard required by article 10 of the ECHR.

Potential defences to defamatory actions that would comply with article 10 of the ECHR were explored by English and Irish Courts prior to the Defamation Act coming into force. A clear test was laid down in the English case of *Reynolds v Times Newspapers*, now known as the 'Reynolds defence', which was 'defence of publication in the public interest'. In *Hunter v Duckworth*,[7] the Irish High Court regarded *Reynolds* as a persuasive authority and concluded that article 10 of the ECHR had informed the development of this defence, implying that publication in the public interest is a defence that is compatible with, if not required by the ECHR. If so this defence should not have been abolished by statute, which 15(1) of the Act sets out to do.[8]

By comparison, the equivalent English Defamation Act does abolish the 'Reynolds Defence' but arguably it can do so because s.4(1) of that Act provides for an equivalent defence. It therefore, more clearly meets the requirements of article 10, ECHR. S.4(1) provides that:

> (1) It is a defence to an action for defamation for the defendant to show that -
> (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
> (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

ICCL recommends that the public interest defence in Irish law is simplified along the lines of s.4 of the English Defamation Act 2013. This would mean providing for the defence of publication on a matter of public interest without having to prove that publication was "fair and reasonable in all of the circumstances"[9].

III. **Burden of Proof**

Normally in civil cases, it is for the plaintiff to prove his claim. In cases alleging defamation in Ireland, the burden of proof shifts to the defendant to prove that his statement was true. The plaintiff merely has to prove that a defamatory statement of fact has been published referring to him and there is an automatic presumption that this statement is false. The defendant can defend his statement by proving that the statement was true.[10] Significantly, the Law Reform Commission had previously recommended the removal of the presumption of falsity from Irish law.[11] This presumption was removed from the applicable law in the United States in 1986.[12] The European Court of Human Rights has found that the presumption of falsity can infringe on the right to freedom of expression, in particular where a statement is made in order to contribute to public debate and where there is already significant imbalance in the equality of arms.[13]

ICCL believes the burden of proof, which is currently on the defendant to prove the alleged defamatory statement is true, should be shifted to the plaintiff to prove the statement is false.

---

7 [2003] IEHC 81 (31 July 2003)

8 See further O'Dell "The Defamation Act, 2009: The Constitution Dimension", presented at Trinity College Dublin, 2009.

9 S.26(1)c

10 s.16(1) of Defamation Act 2009.

11 Law Reform Commission, Report on the Civil Law of Defamation (Dublin 1991), 55-58, [7.28]-[7.36].

12 Philadelphia Newspapers v Hepps, 475 US 767 (1986).

13 Steel and Morris v UK, Application no. 68416/01, [2005] ECHR 103 (15 February 2005). See also Wall Street Journal Europe v United Kingdom, Application no 28577/05 [2009] ECHR 471 (10 February 2009).

IV. **Damages**
The uncertainty and unpredictability around the amount of damages that can be awarded in a defamation case is a clear disincentive to defend defamatory actions and permits disproportionate awards. ICCL recommends that better guidance is given on appropriate damages which would take into account the factors of fairness and proportionality. We also agree with the many commentators who have suggested that jury decisions should be restricted to a decision on whether a defamation has taken place rather than what precise damages should be awarded.

ICCL supports the submission by the Press Ombudsman which suggests that solicitors should be obliged to inform their clients of the services of the Press Ombudsman and Press Council in resolving disputes. We also support the suggestion that an amendment to S.26 of the Act could be made to include a provision whereby courts would be required to take into account whether the plaintiff had availed of the services of the Press Ombudsman and Press Council when determining damages.

Finally, ICCL supports the submission to this consultation by Tarlach McGonagal, in particular his recommendation to remove corporate bodies from the Defamation Act. Defamation is an injury to a person's right to dignity and respect and should therefore be restricted to natural persons. The risks to equality of arms, already inherent in defamation actions in the absence of legal aid and as a result of the presumption of falsity, are significantly heightened when it comes to corporate plaintiffs or defendants.

ICCL Key Recommendations on Reform of the Defamation Act 2009:

1. Remove defamation from the list of 'designated matters' exempted from legal aid in the Civil Legal Aid Act 1995.
2. Clarify and simplify the available defences to defamation. Create a defence of 'in the public interest' without the additional threshold of 'fair and reasonable in all of the circumstances'.
3. Shift the burden of proof to the plaintiff, in line with other civil actions.
4. Issue clearer guidance on damages to ensure awards are reduced, including by removing this decision from the remit of juries.
5. Remove corporate bodies from the Defamation Act.

Unit 11, First Floor, 34 Usher's Quay, The Liberties,
Dublin 8, Ireland D08 CV6X

+353-1-9121640

info@iccl.ie

www.iccl.ie

Irish Council for
Civil Liberties

2nd Floor, Spencer House, Spencer Row, off Store Street, Dublin 1
Phone: 3531 8170340 Email: info@nuj.ie
Irish Secretary: Seamus Dooley

Mr Alan Guidon
Clerk
Joint Committee on Justice,
Leinster House
Dublin 2

3rd May 2023

By email

Dear Mr Guidon,

The NUJ welcomes publication of the Draft General Scheme of the Defamation (Amendment) Bill and is grateful for the opportunity to make observations to the Joint Committee on Justice.

Please find enclosed our submission for the consideration of the Committee.

Séamus Dooley.

Séamus Dooley
Irish Secretary

Draft General Scheme
(Defamation Amendment Bill)

Introduction: The National Union of Journalist, UK & Ireland, is the trade union for professional journalists in Ireland.

The union represents journalists, staff and freelances, engaged across all platforms; print, broadcasting, online and digital.

The slow pace of reform of defamation law has long been a matter of grave concern for the NUJ. The fact that the Report of the Defamation Act 2009 was only published in March 2020, and the subsequent delay in publishing the draft legislation recommend by the Report is illustrative of the low priority given to the subject. It is also in sharp contrast to the pace and complexity of changes in the Irish media landscape.

The NUJ is broadly supportive of the Bill and believes that some of the reforms set out in the draft scheme have the capacity to enhance media freedom by addressing long standing concerns of journalists, media practitioners, publishers, lawyers, and academics.

The NUJ recognises the rights of all citizens to the protection of their reputation and acknowledges that the exercising of the right to freedom of expression brings with it responsibility to behave in an ethical manner.

In this context NUJ members are expected to adhere to the Code of Professional Conduct of the union, the cornerstone of our profession since 1936. https://www.nuj.org.uk/about-us/rules-and-guidance/code-of-conduct.html

The NUJ is a founder member of the Press Council of Ireland and the principles of the PCI Code of Practice mirror the provisions of the NUJ Code of Conduct.
https://www.presscouncil.ie/press-council-of-ireland/code-of-practice

Observations

Head two: **Subhead 1 (a) Amendment of section 2 of Act of 2009 (Definitions):**
The clarification that online only news sites fall within the definition of periodical is welcome.
Online only news sites are a developing and significant addition to the media landscape. Affording readers, the opportunity to seek redress through the PCI presents a significant alternative to litigation. Online only sites are already eligible to join the PCI.

Subhead 1 (b): It is noted that this subhead is subject to consultation with the Department of Tourism, Culture, Arts, Gaeltacht, Sports and Media, Press Council, Coimisiún na Méan, broadcasters and other stakeholders.

The definition of "online publications" will need to be made clear. Many journalists work across platforms – e.g., radio, television and online. An RTE Current Affairs journalist may present a report on Prime Time, for instance, and write a detailed analysis as an online blog. Are online blogs "publications?

The principle of online publications being covered by the PCI is to be welcomed but there needs to be clarity around broadcasters whose activities are regulated by Coimisiún n Méan (previously by BAI) and are governed by the provisions of the Broadcasting Act.

It is recognised that online content generated by RTÉ journalists and published on the RTE website, such as long form journalism, background analysis or opinion pieces are not covered by the current broadcasting complains procedure.

The NUJ would have concerns about the potential for double jeopardy if both the PCI and, Coimisiún n Méan were effectively adjudicating on complaints on the same programme or subject against the same publisher and journalists.

It may be that it is broadcasting legislation rather than the Defamation Act which requires amendment.

(2) **Summary relief:** The proposal to give the power to make both a correction order and an order prohibiting further publication rather than an "either/or" option is sensible.

Head Three: Abolition of juries in High Court Actions: The NUJ had traditionally supported the retention of juries but shares the consensus reflected in submissions to the Review that defamation cases should be tried by a judge sitting alone rather than with a jury.

Head Four - Serious harm test – bodies corporate:
The NUJ notes the provisions for a serious harm test for bodies corporate, public authorities and retailers.

We regret that a serious harm test is not provided for all defamation cases.
The NUJ supports the introduction of a 'serious harm' threshold that a plaintiff should be required to establish in a defamation action. Such a test would be similar to that as introduced by the UK in its Defamation Act 2013. This Act specifically introduced an obligation for a claimant to show that the publication resulted in *serious harm* in order to succeed in a defamation action.

In 2015 Thompson Reuters published a review of Defamation claims taken in 2014 in the UK which demonstrated a significant decline in the number of claims taken which it attributes to this provision (27%)[1].

[1] https://inforrm.files.wordpress.com/2015/09/thomson-reuters-press-release.pdf

A serious harm test would not be onerous on a genuine claimant and would provide protection against; (a) the issue of defamation actions with little merit but issued on an *in terrorem* basis (i.e., to intimidate a publisher in an attempt to prevent future publication about an individual or a particular topic) and (b) the use of this jurisdiction as a haven for libel tourism.

Head Seven: Obligations on solicitors (alternatives to legal proceedings):
Given the prohibitive cost of litigation, the NUJ welcomes the provisions aimed at highlighting alternative dispute resolutions and complaints mechanisms. The Press Council of Ireland is not a legal forum, and many complaints are dealt with through the informal mediation system.

PCI is funded by the press industry and the NUJ has always stressed the need for adequate resourcing of the council by the industry. The potential for increased complaints and demands for services of the PCI and Press Ombudsman underlines the need for a solid and sustainable funding model in the context of a voluntary council underpinned by statutory recognition.

Head Eight:
The NUJ likewise welcomes the obligation in respect to mediation.

Head Nine: Formal Offers:
The NUJ welcomes the provision which is intended to give effect to the Report of the Review in respect to the making of a tender by a defendant following receipt of a tender by a plaintiff which would be taken into account when determining cost. This model currently applies in personal injuries cases and there is merit in a consistent approach in respect to defamation.

The prohibitive cost of defamation imposes an enormous burden on the parties.

Head 10: Choice of jurisdiction:
The issue of defamation shopping and the exercise of international forum shopping has long concerned the NUJ and sister unions affiliated to the European Federation of Journalists and the International Federation of Journalists. The provisions proposed are to be welcomed.

Head 11: Dismissal Discontinuation of Case:
This is a welcome provision. The threat of legal proceedings can have a chilling effect on journalism and can be used as a shield against coverage by powerful interests. Stagnant claims function as a potential sword of Damocles and may inhibit legitimate journalistic investigations, as well as the build up of exceptionally high costs for defendants.

Head 12: Amendment of section 17 of Act of 2009 (Defence of absolute privilege):
This brings welcome clarity around what is protected in respect of "fair and accurate" reporting.

Head 13: Amendment of section 18 and Schedule 1 of Act 2009 (Defence of qualified privilege):
The NUJ welcomes clarity around fair and accurate reports of court proceedings in Ireland and the clarity around what is deemed appropriate to justify a claim of fairness and accuracy.

Head 14: Defence of Honest Opinion:
The existing statutory definition of honest opinion is confusing and unhelpful.

It is queried, for example, how a defendant is supposed to "believe in the truth of an opinion" at the time of publication (see section 20 (2)(a) of the 2009 Act).
An opinion is just that and is not susceptible to factual assertion as 'true' or 'untrue'.

Section 20 effectively reversed the common law position that prevailed prior to the introduction of the 2009 Act in the context of the former 'fair comment' defence, whereby the good faith of the publisher in publishing a statement was presumed and it was a matter for a plaintiff to bring evidence to prove malice on the part of a publisher in attempting to defeat the defence.

Section 20 (1) requires a defendant publisher to *"prove that, in the case of a statement consisting of an opinion, the opinion was honestly held".*

In our submission to the Review, the NUJ favoured a redrafting of Section 20 (1) to the pre-2009 position whereby good faith on the part of a publisher is presumed and it is a matter for the plaintiff, not the defendant publisher, to prove otherwise.

The suggested wording "that the defendant genuinely held the opinion or believed that the author genuinely held the opinion" remains problematic.

The inclusion of the term "genuinely" does not bring sufficient clarity and we believe that the onus should be on the plaintiff to prove the absence of good faith.

Head 15: Amendment of Section 22 (Offer to make amends) and 22a (Effect of offer to make amends) of Act of 2009):
(1) The NUJ supports the principle of equal prominence for corrections and apologies. It has been a long-standing policy of the union. Agreement may be reached with a plaintiff on a less prominent apology.
(2) We also agree with the proposal in respect of an offer of amends.

Head 16: Amendment of section 26 of Act of 2009 (Fair and reasonable publication on a matter of public interest):
The NUJ accepts that Section 26 has not had a significant impact and there is a need for simpler, clearer defence.
The wording as proposed is consistent with the standards of the European Convention on Human Rights.

Head 17: Amendment of Section 27 of Act of 2009 (Innocent Publication in relation to live broadcasts):
The NUJ welcomes the amendment. Live broadcasting is demanding and there are circumstances where broadcasters cannot exercise control over interviewees. The provision does not exonerate broadcasters from the responsibilities to put in place appropriate measurers to minimise risk, including use of technology and appropriate staffing levels.

Head 17 (A) Amendment of Section 27 Act of 2009 (Innocent publication in relation to website operators)
The NUJ accepts the principle but notes the complexities involved and the need for detailed discussions in the context of the Digital Services Regulation (EU) 2022.2065,

Head 18: Amendment of section 28 (Declaratory order), 30 (Correction order), 33 (Order prohibiting the publication of defamatory statement) and 34 (Summary disposal of action) of Act 2009:
As noted, the NUJ has a long-standing policy that corrections should be given due prominence. And therefore, welcomes the clarity which is intended by these measures.

For many plaintiffs non-financial redress is of importance and the prominent display of a correction is of vital importance.

Head 19 – Amendment of section 29 of Act of 2009 (Lodgement of money in settlement of action)
Head 20 – Amendment of Section 31 of Act of 2009 (Damages)
The NUJ notes these changes.

Head 21 -Amendment of section 32 of Act of 2009 (Aggravated and punitive damages)
Head 20 – Amendment of section 31 of Act of 2009 (Damages)
Head 21 – Amendment of section 31 of Act of 2009 (Aggravated and punitive damages)
The NUJ welcomes clarity brought in respect of the issue of aggravated damages and the greater detail required when determining damages. The lack of clarity in this area has long been a concern.

Head 22 – Factors to be considered by court in awarding costs:
The NUJ welcomes the provision in respect of unreasonable failure to consider using mediation. The requirement will place a particular onus on the Press Council of Ireland and the statutory regulatory body to ensure that there are properly resourced and funded mechanism for alternatives to legal action.

Head 23 New Part 5 of Principle Act; Measures against abusive litigation to restrict public participation (SLAPPs)
Head 24 – Definitions (Part 5))
Head 25: Proceedings Under Part 5
Head 26 – Early Dismissal
Head 27 – Strategic lawsuits against public participation
Head 28 – Security for Costs
Head 29 – Amicus curiae appearance
Head 30 – Damages
Head 31 – Costs
The NUJ has welcomed the legislative proposals by the EU anti-SLAPPS's Directive (COM (2022) 177) published by the European Commission in April 2022.

The union welcomes the concept of new anti-SLAPP mechanism in the context of the widespread abuse of defamation law as an attempt to inhibit journalism.

The NUJ notes the submission co-ordinated by the ICCL and is in broad agreement and it is therefore not proposed to duplicate observations.

Head 37: Removal or cesser of distribution, by intermediatory of third-party statement:
The NUJ welcomes this provision.
The issue of a prompt, efficient take down mechanism for user generated content from social media content has long been highlighted by the union.

Head 31: Costs:
The NUJ welcomes this provision. The high cost of litigation is a major inhibiting factor and the use of threats of legal action to halt public interest journalism is central to the concerns over SLAPPS.

3rd May 2023

Submission to the Joint Committee on Justice

On the General Scheme of the Defamation Amendment (Bill)

By

Mark Harty SC

INTRODUCTION

I firstly wish to thank the Chairman and the Committee for this opportunity to make a submission in respect of the proposed bill. I am a native of Cork City, I graduated from TCD in 1994 with a Law Degree following which I graduated from the Kings Inns and was called to the Bar in 1996. As a junior counsel I had a broad practice in both civil and criminal law but had a particular interest in media law and defamation. I became Senior Counsel in 2012 and since then I have specialised to a greater extent in the area of civil jury trials and defamation in particular. I have acted for international media defendants on a number of occasions as well as acting on behalf of plaintiffs. I hope to be able to assist this committee by bringing what I believe to be a balanced view in respect of the matter. In that regard and in light of the critical importance of the issue above all others this submission will focus on the proposal to abolish jury actions in defamation. With regard to the other proposed amendments I would simply observe that the committee should be cautious to ensure that the rights of the citizen are protected along with those of potential defendants and that the reforms do not make the protection of the right to a good name the preserve of the wealthy as appears to have occurred in the England and Wales. Further I would suggest from the defendant's point of view that many of the proposed reforms have over complicated defences which in their common law form are perhaps easier to establish. Finally in this regard I would entirely support the proposed introduction of Anti-Slapp rules.

MEDIA RESPRESENTATION IN IRELAND

As stated above I have tended throughout my career to act for both plaintiff and defendant in defamation actions. This would be true of many members of the Irish Bar but would not

necessarily be true solicitors for and legal advisors to media organisations. It is important when considering the report of the Department of Justice and the General Scheme that the majority of the "stakeholders" referred to were either media organisations or legal advisors to such organisations. It is a feature of litigation reform that there is always a lobbying advantage to the defence side and as a result I am mindful of the obligation on my part to clearly advocate on behalf of under-represented, namely the citizen who is most likely to be plaintiff in any such action.

GENERAL COMMENT ON THE REPORT OF THE DEPARTMENT

In 2003 a working group was put together by the then Minister for Justice to consider reforms of defamation law. That group made a number of recommendations which informed to a greater or lesser extent the 2009 act. The members of the working group were clearly identified and as such the Minister at the time and indeed the members of the Oireachtas were in a position to clearly measure the expertise of the group and any risk of bias on its part and thereby to accurately weigh and assess its recommendations.

The author of the report of the department is not identified and as such it is not possible to identify what legal expertise in general or expertise in the field of defamation law and constitutional law in particular informed the drafting of the report. I do not wish to criticise the efforts of the anonymous author but I am obliged to observe that report displays what I believe to a somewhat limited understanding of the law of defamation and the operation of that law in practice.

One significant feature of the report appears to be a desire to implement and follow "reforms" in other jurisdictions and in particular in England and Wales. Those reforms are now in existence for approximately a decade and it is unfortunate that the report did not take any steps to analyse the impact that those reforms have had on access to justice in that jurisdiction. It is worth noting that legal costs in that jurisdiction are now many times greater than costs in this jurisdiction. Geoffrey Robertson KC one of the most prominent media defence lawyers in the High Court in London estimates that the costs of a 2 day defamation action in London are now between £1-2 million whilst the costs of the notorious *Vardy v*

Rooney case heard last year were in excess of £4 million for a trial that took place over 8 days. These figures are significantly in excess of the amounts which were incurred pre reform and dwarf and are many multiples of equivalent figures in this jurisdiction. The effect of those reforms and the ensuing costs increases has been to ensure that only the very rich can now pursue an action for defamation in England and Wales.

DEVELOPMENTS SINCE PUBLICATION OF DEPARTMENT REVIEW

In March of 2022, almost simultaneously with the publication of the Department review, Supreme Court delivered judgment in the case of *Higgins v Irish Aviation Authority [2022] IESC 13*. In that decision the supreme court reinforced the importance of considering defamation litigation form the perspective of both Plaintiff and Defendant. In addition the court reinforced the traditional view of the value and importance of Jury verdicts and awards. Finally, and perhaps most critically, the court for the first time set out clear guidelines as to the appropriate levels of damages in defamation actions.

A second matter which I believe is of some importance when considering defamation reform is to consider the true nature and extent of the impact of the current defamation laws on freedom of expression in this jurisdiction. It is commonplace for advocates and lobbyists to suggest that defamation laws have a chilling effect on journalism and free speech. The question must therefore be asked as to whether this is in fact the case. In that regard it is perhaps fortuitous that the Reporters Without Borders has on 3rd of May published its "World Press Freedom Index" for 2023 which ranks Ireland as second only to Norway out of 180 countries. This index is complied by international experts in the fields of journalism and free speech. It defines Press Freedom as "*as the ability of journalists as individuals and collectives to select, produce, and disseminate news in the public interest independent of political, economic, legal and social interference and in the absence of threats to their physical and mental safety*". In its analysis of the legal framework in which Irish Journalism is required to operate the report of the index states as follows: "*A long-overdue review of Ireland's Defamation Act 2009 was finally published. The review, which recommended providing clearer protection for public interest journalism and introducing anti- SLAPP (Strategic Lawsuit*

Against Public Participation) mechanism, was largely welcomed though there were some concerns about the abolition of juries in defamation cases".

CURRENT POSTION REGARDING THE HEARING OF DEFAMATION ACTIONS

A number of statements are made or repeated in the report of the Department concerning the alleged delays, costs and complexities of defamation proceedings. In those circumstances it may be of some assistance to the committee to briefly outline the procedures involved in bringing defamation proceedings and the opportunities for having such cases heard. I appreciate that the some members of the committee may be intimately aware of these matters and that others may well have more than a passing knowledge, however in light of the assertions made by some "stakeholders" and in light of the views expressed on behalf of the Department feel it is necessary to highlight some of these matters when considering the those assertions and views.

Under the 2009 Act a plaintiff has only one year in which to bring defamation proceedings. This time limit applies whether the plaintiff was aware of the defamatory statement being made at the time it was made. There is a provision permitting the court to extend the time but the courts have interpreted this provision narrowly and for the most part to exclude the bringing of proceedings outside the one year time limit. As such a plaintiff in a defamation action is required to move quickly from the very outset.

In the High Court proceedings are brought by Plenary Summons which is then followed by a Statement of Claim. A defendant will then deliver a defence. The defence is to a large extent the document which determines the length of time a defamation action will take to be given a date for hearing and the length of time that hearing will take. In this regard Defamation actions are significantly different to most other kinds of litigation. This emphasis on the defence is because in defamation the plaintiff has to prove that the defamatory statement was made and that it held a defamatory meaning. Once those matters are proven the onus shifts to the defendant to establish that the statement (in its natural meaning) was true or in the alternative that the defendant is entitled to rely on one of the statutory defences open to

it. The necessity for pretrial procedures such as discovery is very much determined by the nature and variety of defences relied upon.

Once pre-trial matters have been completed the action is certified as ready for hearing and set down in a list to fix dates. The arrangements in place with the court service mean that jury actions may only be fixed for hearing over short fortnight or three week period in each legal term. In effect the time allocated for the potential hearing of defamation actions by the Court Service is in total eleven to twelve weeks per annum.

In practice in recent years only one judge has been assigned to hear all jury actions. This has an enormous impact on jury actions being given a hearing date as one long case having priority will mean that no other case will be able to be heard during that term. The fact of a judge and jury being potentially available to hear the case has an enormous impact on the parties willingness to consider settling a case and thus where there is more there one judge available the number of cases which are resolved (either by hearing or settlement) is more significantly more than doubled.

I don't propose to go into detail as to the mechanics of the trial itself in detail but in order for the committee to fully understand the issues it is perhaps helpful to give a broad outline of the roles of the parties, the judge and indeed the jury. In the ordinary course once a jury of twelve has been empanelled the judge will first address the jury and indicate the respective roles of the parties. The judge will then clearly indicate that it is his function to decide on matters of law and that of the jury to determine issues of fact. During the course of the trial and often at the close of the evidence the Judge will be asked to rule on certain legal issues and in particular whether certain defences or issues properly remain in the case. At the close of the evidence lawyers for both parties will address the jury on the evidence they have heard, in effect summing up their case. More importantly the counsel will address the jury on the issue paper which is the series of questions of fact which the jury will be asked to determine. Finally the judge will deliver a charge to the jury summarising the evidence, explaining the extent to which the jury must be satisfied with the evidence in order to reach a verdict and in certain instances explaining the legal import of certain terms or phrases.

Where party appeals the decision that is to the court of appeal. In the ordinary course such appeals take nine months to a year to be heard and currently decisions of that court are taking up to twelve months to be delivered.

COMMENTS ON THE PROPOSAL TO ABOLISH JURIES IN DEFAMATION ACTIONS

The most fundamental change proposed in the act is the proposal to abolish juries. This proposal is one which is radical and one which would make this jurisdiction an outlier in the common law world. As already noted it is a proposal which Reporters Without Borders has seen fit to observe as causing concerns. Ostensibly the proposal has been made on the basis that the majority of "stakeholders" (i.e. media organisations and their legal advisors) have sought this change. It should be noted that entirely neutral bodies such as the Press Ombudsman did not consider this appropriate and did not seek this change.

At page 139 of the report a number of points arguments in favour of abolishing juries are as follows:

- *" Jury trials are costly, result in delays in the hearing of cases and longer cases: civil juries are only empanelled for a portion of each court term; it is necessary to explain the law to juries in order to enable them to determine questions of fact; many defamation cases take years before they reach a final conclusion (see for example the McDonagh case referred to above). While some of the delay in reaching court may be caused by the parties, it is fair to assume that much of it is caused by the need for a jury trial*"

The department's justification for removing jury actions on this basis is extraordinary. In effect the department is stating that jury should be removed from defamation actions because the Courts Service has failed to provide adequate time and resources for the hearing of jury actions. The initial reason for abolishing jury actions offered by the Department could easily and readily be resolved by extending the time in which civil jury panels are established and more judges assigned to the hearing of such cases. As the

department itself admits much of "*the delay….is caused by the need for a jury trial".* The only thing stopping the parties getting such a jury trial is the under-resourcing of the civil jury list. The department does not suggest that there is any factor inherent in jury actions causing this delay. Finally in respect of "*many defamation cases take years before they reach a final conclusion*" delays in the cases relied on in the report were as a result of appeals not as a result of the actual hearing itself.

To my knowledge and experience there is no saving in time in a defamation action being heard by a judge alone. Certainly at least two of the longest running defamation actions in the recent past were heard not by a judge and jury but by a judge sitting alone. The complexity of the legal issues and the matters of called in evidence meant that both of those case took around 30 days. The only time difference which could be identified was the length of time the parties had to wait for a decision. In the case of a jury action the parties know the decision almost immediately, in the case of a trial by judge alone the parties have had to wait months and in some cases more than a year.

In respect of the other matters raised in support I would suggest the following. The assertion that "*jury trials are costly"* is not supported by any evidence or analysis in the report and is simply a bald assertion. High Court actions are costly and some defamation specialists command large fees. These matters are not affected by the presence or absence of the jury. Experience in England and Wales as referred to above would suggest that non-jury trials of Defamation proceedings are significantly more costly. There is nothing to suggest that that abolition of the right to a jury would in any way reduce the costs. Similarly the argument that "*it is necessary to explain the law to juries in order to enable them to determine questions of fact*" as a reason to abolish juries would apply to all areas of law including criminal law. The lawyers and judges in this area are experts in this field and explaining the necessary legal principals. Furthermore the job of the jury is to determine questions of fact there are only a limited number of legal issues which need to be explained to them in any depth.

- *Jury trials result in lack of transparency and unpredictability about outcomes: the lack of reasoned judgments in jury trials results in lack of transparency in relation to the jury's reasoning for adopting their decision, the factors they took into account, etc.*

While the outcome of a legal dispute can never be predicted, the lack of reasoned judgments in jury cases makes it more difficult for legal practitioners to advise their clients in relation to the possible outcome of their case which may militate against settlement of disputes without recourse to the courts. A consequence of jury trials in the High Court is that "it remains difficult to predict the outcome of defamation cases, both on questions of liability and on questions of quantum".[400] *An appeal against a verdict is highly likely where the verdict is not explained and falls outside the expected outcome of the parties.*

The suggestion that jury trials result in a lack of transparency evidences a critical misunderstanding of how a jury trial operates. In respect of any legal issue the judge will give a clear reasoned ruling and in some cases will provide written decision setting out that reasoning. As such the parties (and an appellate court) are in a position to fully analyse the decision. In respect of the questions of fact which the jury must determine these have already been clearly set out by the court in the issue paper as to the necessary matters to be determined. It is the practice in this jurisdiction to clearly separate the necessary questions of fact on the issue paper. In England and Wales historically general questions have been asked rather than questions establishing clear delineated facts but that practice has not be adopted in this jurisdiction. As such yet again not only do the parties know what facts must be proven to establish liability but also they clearly know the answers to those facts. In effect the parties know the reason for the decision before the decision is given. It is worth noting that whilst there are appeals on rulings of law made by judges and on excessive damages there are, to my knowledge, no appeals on the basis of the jury's findings of fact or liability.

- *Moreover, the unpredictability of outcomes and high level of damages and costs associated with jury trials mean that publishers often cannot take the risk to publish, resulting in a "chilling effect" on the media's role as the watchdog for a democratic society. These factors may also inflate the settlement value of defamation cases as defendants may consider paying an excessive settlement in order to avoid "the lottery of a jury award".*[401]

As can be seen from the report of Reporters Without Borders Index above the "chilling effect" is more imagined than real. As already stated above the findings of a jury on liability are not in the ordinary course the subject of appeal. It is accepted that the "*lottery of a jury award*" in respect of quantum is unsatisfactory but excessive awards are in fact relatively rare and it is suggested that the decision of the Supreme Court in *Higgins* has gone a long way to curing that evil. It is noteworthy that whilst the report states that factors "*may inflate the settlement value"* it does not rely on evidence or statements that from practitioners or media organisations to say that it has in fact done so.

- *Removing questions of damages from juries should therefore result in greater consistency, prevent excessive awards and alleviate any negative implications of excessive damages for discussion of matters of public interest by the media and others.*

As already stated above the question of excessive damages has now been resolved by the guidance which can be provided to the jury following the decision in *Higgins.*

- *Defamation law is complex and juries are not best placed to balance conflicting constitutional rights i.e. the right to the protection of one's good name and the right to freedom of expression.*

This assertion flies in the face of the many decisions of the appellate courts asserting that juries are best placed to balance those conflicting rights. The fact that the law is complex is not relevant to the jury because as I have stated a number of times already the jury is not required to determine the law – simply the facts as set out for them in the issue paper provided for them by the court.

- *The removal of juries might result in early applications for the determination of the actual meaning of the words complained of becoming commonplace[403] and thus obviate the need for a full hearing. For example, in a case involving Denis O'Brien and Post Publications Ltd, (relating to an article published in the Sunday Business Post in 2015), the jury, after a 17 day hearing in early 2019, found that the newspaper's reports of the plaintiff's borrowing did not have the defamatory meaning contended by the plaintiff.[404] it has been suggested that this conclusion could have been reached in a preliminary trial on meaning[405] which is provided for in section 14 of the Act*

This assertion is unfortunately simply not correct. Whilst preliminary applications should be encouraged where appropriate in the circumstances set out above a section 14 application (meanings application) would not have removed the need for a trial. In a meanings application the court determines whether the words published could reasonably bear the meanings set out in the pleadings. It does not and cannot determine that the words themselves do in fact carry those meanings as that is a matter entirely for the jury. Put differently, if the court finds that the words could never mean what the plaintiff suggests then the court must not let the jury determine whether the words do in fact bear that meaning. Whilst I was not present at the case referred to one would assume that experienced counsel and judge would not have let the jury decide whether the words bore the defamatory meaning if no reasonable person could have taken that meaning.

- *The right to a jury trial is not guaranteed by the Constitution, but rather a right conferred by statute.[406] While the courts have consistently acknowledged that under the current legal framework, the role of juries in defamation actions is sacrosanct, they have also acknowledged that "(t)here may be other ways of resolving the right to a good name and the right to inform the public, ..., such as entrusting the task solely to a judge in the High Court.....*"

I would agree with the observation that the right to a jury trial is not guaranteed by the constitution but I would submit that is not a good reason to abolish the right to a jury trial or indeed any other right established by the statute of the common law. It is submitted that the right to a jury trial has long proceeded any statute and in so far as it is referred to the in the Judicature Act it was simply confirming the position with regard to all common law cases prior to that act.

- *It has therefore been argued that guidance given to the jury on other awards – a reform introduced by the Defamation Act 2009 – did not work in this case*

This point contained in the report was made relating to the decision of the Court of Appeal in *Higgins* and prior to the decision of the Supreme Court. The decision of the latter court sets out why the guidance did not work and then sets out precisely how the guidance can properly be given.

- *Retention of jury trials in High Court defamation cases is inconsistent with the abolition of juries for all other High Court civil cases, except for civil assaults. One of the reasons why the Courts Act 1988 removed the jury from most tort actions was because of the unsustainably high level of damages awarded by juries in such actions.*

This point is inaccurate. The 1988 Act only removed juries from personal injuries actions and did not remove juries from any other action in tort. In light of the support shown by the superior courts as to why juries are particularly valuable in defamations actions it is submitted that the fact that they are not relied upon in other cases is perhaps irrelevant.

BENEFITS OF A JURY TRIAL

The value of a jury verdict in their favour is invaluable to both a defendant and a plaintiff. It is respectfully submitted that it carries for greater weight in the mind of the public than the decision of a judge alone (In that regard one could consider the impact of the rival findings in the *Depp* cases on either side of the Atlantic). The public value the verdict of juries and trust them above all others which is why the constitution protects and the public expects (in the ordinary course) trial by jury in serious criminal matters. From the point of the parties the verdict of the juries is greater vindication of the rights of free expression or reputation than a decision of a judge alone.

Above I referred the observations of Geoffrey Robertson KC. In his recently published book Lawfare he has stated that the worst development in English defamation law was the abolition of trial by jury. This is the view of one of the chosen representatives of media defendants in that jurisdiction. The view is held that whilst the changes may have benefited those organs of the media with which the members of the judiciary were familiar it has negatively affected the tabloid media. Some have argued that the fact that judges alone now decide defamation cases has led to increased animus towards the judiciary in certain branches of the media.

In this jurisdiction one could easily see a circumstance whereby a verdict for example in favour of a politician could be discounted by members of the public at large on the basis of some real or imagined connection between that politician and a member of the judiciary. A verdict of a judge could be discounted on the basis of some bias, prejudice or caprice, yet again either real or imagined. These questions do not arise in relation to juries.

RESOLVING THE ISSUES

As I have stated above there are no appeals in relation the decision of the jury on liability and in that regard juries are invaluable in defamation matters. I accept that there have been issues with excessive awards in the past. Such awards benefit neither party as they inevitably lead to an appeal. I would hope that the decision in *Higgins* would resolve this issue and I would suggest that before any reform of role of juries is considered that decision should be given time to have impact.

In the event that this does not find favour with the committee I would suggest as an alternative that the Jury could give an indicative award which could then be either affirmed or varied by the trial judge in accordance with the guidance set out in *Higgins.* Such an approach would preserve what is valuable in the jury's assessment of damages (namely the societal view of the seriousness of the damage) but would also prevent the evil of runaway awards.

I hope that these observations have been of assistance to the committee and I remain available to the committee to provide further clarity or oral submission if the committee believes that might be of help.

MARK HARTY SC

Dentons Ireland LLP
20 Kildare Street
Dublin 2
Ireland

dentons.com

DAB_12(1)

MEMORANDUM

To: Joint Committee on Justice

From: Dentons

Date: 4 May 2023

Subject: Written Submission on the General Scheme of the Defamation (Amendment) Bill

1 Executive Summary

1.1 Dentons very much welcomes the opportunity to make a submission in respect of the General Scheme of the Defamation (Amendment) Bill (**General Scheme**), further to the invitations from the Joint Committee on Justice to Karyn Harty and Lesley Caplin. These submissions outline our views on the General Scheme and some key issues that we believe ought to be considered by the Joint Committee.

1.2 We are supportive of the general thrust of the proposed reforms but there are aspects of the proposed changes, particularly the intention to dispense with jury trials, with which we take issue. We have made other suggestions below in respect of specific elements of the proposed reforms that we believe may bring greater clarity and avoid pitfalls. We draw your attention in particular to our comments in respect of a serious harm threshold, jurisdiction, Norwich Pharmacal orders and the draft notice of complaint provisions in respect of online publications.

1.3 We would be happy to expand on any aspect of these submissions should that be of assistance to the Joint Committee.

2 Introduction

2.1 Dentons has more than 200 offices in more than 80 countries and is well known internationally for its expertise in the media sector, both contentious and non-contentious. Dentons Ireland LLP's media practice is led by Karyn Harty (partner) and Lesley Caplin (of Counsel), both experienced in defamation, contempt of court, privacy, digital media, civil jury actions and pre-publication advice.

2.2 In contentious matters relating to content, Dentons' practice globally is focused on media defence and our practice in Ireland reflects this focus. We have, however, in preparing these submissions sought to have regard to other perspectives when suggesting changes to the proposed legal framework, including the potential impact of reforms on individual plaintiffs who may need to have recourse to the courts and the impact on court resources of the suggested reforms.

3 Head 1 – Short Title and Commencement

3.1 We do not have any comments on this section, save that we would respectfully suggest that a standalone Act would benefit from much greater clarity than amending legislation, given the

complexity arising from some of the proposed amendments. Extensive cross-referencing will make the provisions difficult to read and interpret and, as a starting point, it seems important that this legislation should be readily understood by those affected by it and that those without legal expertise should be able to understand its general thrust without having to repeatedly cross-refer to the 2009 Act and other legislation. This is particularly important as regards the defences available under the Act.

3.2 By way of initial comment, we note that the draft does not address the area of artificial intelligence or content generated by algorithm, which as the Joint Committee will be aware, is an increasing area of focus in 2023. The Joint Committee may want to consider the potential impact of the EU's proposed AI Act in this regard.

3.3 For ease of reference below we follow the structure of the General Scheme.

4 Head 2 – Amendment of section 2 of the Act of 2009 (Definitions)

4.1 It seems sensible to clarify the ambit of the term 'periodical' as proposed and we have no comments on the draft wording. We note that the definition is limited to online publications emanating from within the State which is consistent with the position in respect of the Press Council's current remit.

4.2 We welcome the broadening of the remit of the Press Council to include digital news outlets.

5 Head 3 – Abolition of juries in High Court actions

5.1 We would support the retention of juries in respect of defamation actions for the reasons set out below.

5.2 An analysis in respect of the experience in England & Wales, where the right to jury trial for defamation was removed in 2013, may be instructive.

5.3 The experience there suggests that legal costs in defamation actions have not reduced. A pattern has also emerged of targeted criticism on social media of judge only defamation verdicts, with much commentary around judges 'getting it wrong' or showing undue favour to one party of the other, criticism to which jury verdicts are much less susceptible. Vindication is important where a claim is successfully defended as much as where actionable defamation is found to have occurred. A trial process that is susceptible to criticism can undermine the administration of justice and it is notable that one of the leading media defence KCs in London has recently argued for the reintroduction of juries.[1]

5.4 Juries bring real world experience to bear in assessing the credibility, authenticity and attitude of the parties in a defamation claim. They tend to grasp legal concepts relatively well once explained to them. They are often better attuned to and more comfortable with digital media, 'tabloid' journalism, magazines and online forums. They may value entertainment media and non-broadsheet news coverage, which is at risk of being perceived as less meritorious than broadsheet journalism. Freedom of expression ought to protect speech in all its forms, whether or not a media outlet seems serious or socially respectable.

5.5 While there is a widespread perception that defendants prefer judge-only trials, in our experience of representing a wide variety of defendants over many years, defendants often prefer to have cases heard by jury rather than by judge alone. The recent decision of the Northern Ireland Court of Appeal

[1] https://www.theguardian.com/law/2023/jan/31/russia-ukraine-war-reveals-englands-draconian-libel-laws-says-lawyer

in *Swann -v- Morrison* is an interesting example of a defendant seeking to avail of a jury trial and successfully overturning an order that two defamation actions be heard by judge alone.[2] What defendants do want are mechanisms to resolve claims early and fair court processes that reduce costs when cases do need to go to trial.

5.6 Notably, the Press Freedom Index published in May 2023, which ranks Ireland second in the world for press freedom has expressed some concern about the proposed abolition of jury trials in the General Scheme.

5.7 The system suffers from the ease with which jury panel members can get excused from jury duty. This leads to a compression of the type of citizens represented on juries, which are not as representative as they could be. The process whereby potential jurors can seek dispensation and broadening the categories of who can serve on a jury should be reviewed.

5.8 With regard to legal costs, in the recent action by Rebekah Vardy against Colleen Rooney in London it was reported that legal costs in the proceedings exceeded £3million. Similarly, in Johnny Depp's defamation action against the Sun's publishers NDN and Dan Wootton, Mr Depp is estimated to have incurred more than £1.5million in legal fees, whilst NDN is reported to have spent a similar sum defending the case. Geoffrey Robertson KC has recently cited costs of more than £1m as being standard for a simple 2 or 3 day libel action in London. While it must be emphasised that the cost of litigating defamation actions in Ireland does not come close to these figures, the abolition of juries in defamation actions in England & Wales has apparently not had any deflationary impact on legal costs. As this factor is often put forward as the primary justification for abolishing jury trials, it may require further examination.

5.9 In our experience the factors that contribute to higher costs in a defamation action are:

(a) the specialist nature of the work;

(b) the absence of effective summary procedures;

(c) over-complicated provisions in respect of offers to make amends, which are rarely used;

(d) delays in the common law motion list, where interlocutory applications are heard, and in the jury list;

(e) trial by ambush, with extensive time given over to legal argument in the course of the trial;

(f) the availability of appeals as of right, which can result in unmeritorious appeals and years of delay.

5.10 Much of the legal argument that takes place at trial could be dealt with ahead of the trial, using mechanisms that are already available, such as meaning applications as provided for under section 34(2) of the Act, and requiring greater precision and detail in pleadings. This would reduce legal costs and shorten trials. The judges in charge of the jury list have made a huge effort to put some structure on proceedings in the jury list without any formal case management system in place and without sufficient resources to do so. Of note, the jury list was excluded from the case management rules introduced in 2016 (albeit that those rules have not yet been implemented due to lack of judicial resources, which issue is now being addressed through the promised appointment of new judges). It is our view that the jury list would benefit from pro-active case management, in line with the

[2] Swann -v- Morrison [2023] NICA 19

recommendations of the Review Group on the 'Review of the Administration of Civil Justice' led by Mr Justice Kelly. The recent announcement that 24 new judges will be appointed to the High Court should enable the implementation of the case management rules and these should be extended to the jury list.

5.11 Uncertainty in respect of damages is often put forward as a ground for dispensing with juries in defamation actions and there have certainly been significant issues over the years with very large jury awards that are then set aside on appeal. This is not entirely the fault of juries, which until the 2009 Act could not receive any guidance in respect of damages and since the 2009 Act in many cases the jury was not given any information about comparative awards prior to its deliberations, on the basis of doubt as to whether this was permissible. The Supreme Court in *Higgins v The Irish Aviation Authority*[3] has given clear guidance on the approach to damages in defamation actions and indicated bands of damages that may be appropriate depending on the nature of the defamation. This should provide greater clarity for juries when measuring damages. It would be helpful if the legislation expressly provided for the type of guidance that juries can and should receive. We would recommend an amendment to section 31 of the 2009 Act to the effect that the trial judge can refer the jury to relevant judicial guidance on the value of claims.

5.12 Finally, many cases falling within the jury list are claims for defamation, false imprisonment and/or assault. Even if juries are dispensed with for defamation actions, the latter two causes of action will continue to have an entitlement to jury trial and this will create an anomaly, given that such cases often also involve defamation pleas. It is it unclear whether it is intended that such cases would continue to be heard by jury trial or that the defamation pleas would be dealt with by judge alone.

6 Serious harm test - generally

6.1 We note that it is proposed to introduce a serious harm threshold in respect of claims in three distinct scenarios, being (1) defamation claims by bodies corporate; (2) defamation claims by public authorities; and (3) transient retail defamation and we deal with these in turn. In principle we support the rationale behind the proposed provisions, subject to the below analysis, which we consider may dilute the impact of the proposed reforms and we therefore suggest alternative approaches below that we believe may prove more effective in practice.

6.2 Even prior to the introduction of a serious harm threshold in the English Defamation Act 2013, the courts there dealt with the concept of harm in a different manner to the Irish courts. In England & Wales defamation claims could be, and were, dismissed on the basis of a cost benefit analysis where the claim was viewed as trivial or publication was very limited. The Irish courts, however, have taken the view that there is no such threshold.

6.3 The *Jameel* line of authority in England & Wales prior to their 2013 Act[4] operated to filter out what were viewed as unmeritorious claims, either because the publication was too limited or because any compensation would be so low as to not merit the resources necessary to deal with the claim. In *Jameel* there had been limited publication to 5 people, 3 of whom were connected with the plaintiff. The Court's view was that even if the plaintiff had been defamed and received a verdict in his favour any damages would like be small, the cost of the exercise would have been out of all proportion to what had been achieved and the claim therefore constituted an abuse of process. This formed the platform for the serious harm test which was given statutory effect in section 1 of the 2013 Act and also reflected the quite different approach to measuring damages under English law.

[3] [2022] IESC 13
[4] *Jameel -v- Dow Jones & Co Inc.* [2005] QB 946.

6.4 In *Gilchrist -v- Sunday Newspapers and Ors*[5] the media defendants sought to dismiss the plaintiff's claim on this basis, contending that the publication was very limited and the probable benefit to the plaintiff, if successful, would be minimal and disproportionate to the costs of the proceedings and use of court time. The application was dismissed at first instance and on appeal the Court of Appeal held that limited publication was not a basis under Irish law for a defamation claim to be struck out as an abuse of process. The cost benefit analysis approach in England & Wales which derived from the 'overriding objective' introduced by the Civil Procedure Rules was not a basis on which the Irish courts would exercise an inherent jurisdiction to strike out proceedings as an abuse of process. The court noted that the legislature had provided in Section 6(5) of the 2009 Act that defamation is actionable *per se*, meaning that there is no threshold for defamation claims as matters stand under Irish law. If a plaintiff establishes the publication of defamatory statement concerning the plaintiff to one or more third parties, then the claim is actionable and the burden passes to the defendant. If the publication is limited then that falls to be taken into account when damages are being assessed but the plaintiff has a constitutional right to the courts and to the vindication of its good name, which rights must be weighed in the balance.

6.5 The above history of the treatment of harm matters because it will inform how the courts interpret any statutory serious harm threshold and indicates that the fact that defamation will remain actionable *per se* will heavily influence that interpretation, as will the balancing of constitutional rights necessary in the face of any attempt to dismiss a claim, which is likely to dilute the threshold and result in serious harm being interpreted to a lower standard than the rigid test applied in England & Wales.[6]

7 Head 4 – Serious harm test – bodies corporate

7.1 In principle it makes sense that a body corporate wishing to sue for defamation should have to show that it has suffered serious harm.

7.2 We are not convinced, however, that the insert of a serious harm test will operate as intended, given the constitutional context and balancing exercise required and the jurisprudential background outlined above. Having regard to the Court of Appeal's reasoning in *Gilchrist* as outlined above, any court is likely to view the fact that defamation is actionable *per se* as reflecting the fact that defamation in Irish law is regarded as inherently serious. This view can be seen expressed in a series of authorities, such as *Leech v Independent Newspapers*[7] *and McDonagh v Sunday Newspapers*.[8] There is a risk that the insertion of a serious harm threshold will not have much appreciable effect in practice as regards bodies corporate, where a view may be taken that any stateable defamation claim is likely to be 'serious' for the business concerned.

7.3 We consider that an approach that is more likely to filter out less meritorious claims would be to provide that corporate defamation is not actionable *per se* and requires proof of special damage. That will impose an element of rigour, requiring corporate plaintiffs to prove actual losses sustained as a result of the defamation. Trivial claims, or claims in respect of defamatory statements that did not in fact cause any appreciable harm, would be filtered out. This approach has the benefit of clarity, given that there is a body of existing law pre-the 2009 Act in respect of defamation claims requiring proof of special damage (e.g. slander, which required proof of special damage save in 4 specified circumstances) and it avoids a clash with competing constitutional rights and thus obviates

[5] [2017] IECA 190
[6] The test will also operate in the context of European law and interplay with recent decisions such as eDate and GTflix Tv v DR, in which the concept of focalisation relating to the extent to which online content has been accessed within the jurisdiction for the purposes of the Brussels Recast.
[7] [2015] 2 IR 214
[8] [2017] IESC 59

the need for a balancing exercise. A body corporate would either be able to prove actual loss resulting from the defamatory statement, or it would not and could not therefore ground a claim for damages in respect of the statement.

7.4 We therefore respectfully submit that the amending legislation should instead amend section 6(5) to exclude defamation of bodies corporate from the provision that defamation is actionable *per se*.

8 Head 5 – Serious harm test – public authorities

8.1 It is not clear to us why public authorities should have any entitlement to sue for damages for defamation.

8.2 If it is considered necessary to provide for such claims then in our respectful submission they should be treated in the same way as bodies corporate, per 6.4 above, with the addition of public authorities to the exception in section 6(5).

9 Head 6 – Serious harm test – transient retail defamation

9.1 Claims for damages in respect of the treatment of customers by retailers do arise and are generally, although not exclusively, dealt with in the Circuit Court. These claims often include claims for damages for false imprisonment or assault arising from the conduct of retail staff or security guards. Both false imprisonment and assault are within the cohort of civil actions in which there is an entitlement to a civil jury trial.

9.2 An appreciable number of these retail claims are successfully defended at trial on the basis of qualified privilege, although settlement levels can be quite high and there is a substantial cost to businesses of having to deal with such claims whether or not they have merit.

9.3 The insertion of a serious harm threshold in respect of such cases is likely, in our view, to give rise to two potential issues as regards the interpretation of the test as to what constitutes serious harm. First, the history of the treatment of harm under Irish law and the fact that defamation remains actionable *per se*, as outlined above. Second, ordinary citizens may be disproportionately impacted. A wealthy person may have little difficulty showing serious harm in this type of scenario and in principle, while we invariably appear on the defence side of such claims, it seems to us that a scenario where defamation becomes socially inaccessible should be avoided.

9.4 It is open to the legislature to exclude such claims entirely by providing that there is no cause of action in defamation in respect of transient statements made in a retail context as between retailer and customer.

9.5 Alternatively a specific statutory class of qualified privilege could be inserted that would address such claims provided that the retailer acts in a responsible manner, which would reflect the practice of courts but provide greater clarity, given that written judgments in Circuit Court cases are rarely handed down so there is not the same body of case law in respect of these claims as there is more generally in respect of defamation.

10 Head 7 – Obligation on solicitors (alternatives to legal proceedings)

10.1 This section as drafted appears to be premised upon an assumption that defamation proceedings involve media publications. Many claims relate to statements by non-media defendants (such as, for example, *Higgins -v- IAA* and *Kinsella -v- Kenmare Resources* to name two leading examples in recent years).

10.2 It is important that meaningful alternatives to litigation are made available and that there is sufficient awareness of the merits of alternatives like mediation and sector specific dispute resolution mechanisms.

10.3 Solicitors are, however, already obliged under the Mediation Act to advise plaintiffs of the option of mediating the dispute prior to issuing proceedings and must provide a statutory declaration so confirming when issuing proceedings. We suggest that this entire section could simply provide for an obligation to: "*advise the client of alternate dispute resolution mechanisms such as mediation or through mechanisms such as Press Council or Coimisiun na Meán, where applicable.*"

11 Head 8 – Obligation to consider mediation

11.1 In our experience mediation is particularly suited to defamation claims and can be a less costly and more effective means of resolving defamation disputes than court proceedings. Mediation enables parties to explore and agree to imaginative solutions which achieve vindication without the constraints of civil litigation.

11.2 This proposal duplicates the existing obligation under the Mediation Act and is unnecessary.

12 Head 9 – Formal offers

We have no comments in respect of this suggested provision.

13 Head 10 – Choice of jurisdiction

13.1 We have seen significant growth in the number of defamation actions being taken through the Irish courts in respect of matters relating to events that took place in other jurisdictions, where the defendants are not domiciled in Ireland. In some cases the plaintiffs themselves have no connection with Ireland but opt to sue through the Irish courts. The position of the Irish courts with regard to accepting jurisdiction in such cases has evolved as a result of some recent European decisions, to a position where in respect of online publication (which is usually now at issue) the plaintiff need only show that the content is accessible within Ireland, not that it has actually been read or viewed. It is, by way of comparison, difficult to sue for damages for defamation in the United States due to the pre-eminence of the First Amendment and following *New York Times -v- Sullivan*;[9] defamation actions in England & Wales have to meet a stringent serious harm test and are much less common; and the law in continental Europe is different, being a civil law system where defamation claims attract very low awards of damages, if at all. The low threshold for establishing a defamation action, the balancing of rights and the panoply of civil procedure tools available, such as discovery, combined with generous damages awards make Ireland an attractive forum for a wealthy plaintiff seeking a forum in which to sue.

13.2 The Rules of the Superior Courts permit service out of the jurisdiction on non-domestic defendants in certain circumstances. The process and method for serving a person who lives outside the jurisdiction depends on where the intended defendant resides. However, it generally involves an *ex parte* application in which a relatively low threshold is applied. An application for service out of the jurisdiction must be supported by an affidavit or other evidence stating the deponent's belief that the plaintiff has a good cause of action, the location or country where the defendant is or probably may be found, and

[9] There are some indications that US law may change as regards cases pending before the US Supreme Court but an examination of these is beyond the scope of this submission.

whether the defendant is or is not a citizen of Ireland, and the grounds on which the application is being made.

13.3 We very much see the rationale behind the proposed provision in respect of jurisdiction, but we respectfully submit that there is a direct clash between the intended provision and European law in particular which requires further consideration for the reasons set out below.

13.4 The primary legislation as regards choice of jurisdiction in defamation cases in Ireland derives from the Brussels I (Recast) Regulation 1215/2012 (**Brussels Recast**), which seeks to provide parties with relative certainty as to where they may sue or be sued, as well as reducing the risk of incongruous judgments across different member states. Article 7.2 of Brussels Recast continued to give effect to the rule in *Shevill & Ors. v. Presse Alliance S.A*, that a person domiciled in one member state can sue in the courts of the member state (or states) where the harmful event occurred or may occur or in the member state where the defendant is domiciled. Where the Brussels Recast does not apply, similar provisions can be relied on under the Lugano Convention as regards Denmark, Iceland, Norway and Switzerland. Where publication of the allegedly defamatory material occurred both in Ireland and in a jurisdiction that is not a party to Brussels Recast or the Lugano Convention, including the UK, the courts can avail of the common law doctrine of *forum non conveniens.* It is however in most cases a question of choice of forum because the content is online and generally accessible, subject to content being geo-blocked (such as streamed or broadcast content).[10]

13.5 In *Ryanair Ltd v Fleming*[11], the Supreme Court upheld the decision of the Court of Appeal which declined jurisdiction, where Ryanair issued defamation proceedings in the High Court against an Australian pilot who lived in Australia and had never visited Ireland. The claim fell to be considered under the doctrine of *forum conveniens*, Mr Justice Hogan finding that in order for a plaintiff to succeed in a jurisdiction application in a defamation claim, two things must be shown. First, the plaintiff must produce evidence that the defamatory statement was read in Ireland. Second, there must be more than a tenuous connection between the alleged defamation and Ireland, otherwise the natural forum for hearing the dispute is the defendant's place of domicile.

13.6 In *eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited*[12] the CJEU recognised the pervasiveness of defamatory content which is published online. The CJEU held that the plaintiff can choose to bring an action seeking damages for 'all the damage' caused either before the courts of the member state in which the publisher of the defamatory content is established, or where the plaintiff's 'centre of interest' is. Alternatively, the plaintiff may bring an action before the courts of each member state in which the defamatory content is or has been accessible, but only in respect of the damage caused within that member state. In the Irish case of *Grovit v Jan Jansen*[13] Ms Justice Hyland was not persuaded that it is a requirement of Irish law that, to establish publication in respect of an internet publication, it is necessary to establish that the material has actually been accessed in Ireland. Having regard to the decision in *eDate Advertising*, the court also held that there was no scope for adding an additional requirement of proof of access, or hits by users in Ireland.

13.7 The recent decision in *Anthony Robbins v Buzzfeed*[14] has reinforced the view at common law that once defamatory material is merely accessible in Ireland, the Irish courts have jurisdiction to hear the

[10] For example, BBC's iPlayer is not accessible in Ireland save for within the geographical area of Northern Ireland.
[11] [2015] IEA 265
[12] Joined Cases C-509/09 and C-161/10, eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited, ECLI–19
[13] [2020] IEHC 501
[14] [2021] IEHC 433

claim. Mr Justice Heslin held that whilst an essential element of the tort of defamation pursuant to section 6(2) of the Act is publication and to be successful at trial the plaintiff must prove publication actually occurred, in order to assert jurisdiction under Article 7(2) of Brussels Recast, a plaintiff need only prove accessibility of the online material.

13.8 In *Gtflix Tv v DR*[15] the CJEU departed from the Opinion of Advocat General Hogan and held that the courts of each member state in which defamatory material is or was accessible have jurisdiction to hear claims for damages arising from defamatory content, provided that the compensation sought is limited to the damage suffered within the member state of that court.

13.9 We are also concerned that, as currently drafted, section 1 is unconstitutional. Unenumerated constitutional rights emanate from Article 40.3.1 of the Constitution and the right of access to the courts was recognised as a personal unenumerated right in *McCauley v Minister for Posts and Telegraphs.*[16]

14 Head 11 – Dismissal/ Discontinuance of cases

14.1 In our experience plaintiffs often fail to move their cases on for several years and defendants often have to bear costs and uncertainty associated with stagnant defamation claims. It is difficult for a defendant to strike out a defamation claim, even where there have been several years of inexcusable inaction on the part of the plaintiff, as a defendant must show the delay has resulted in actual prejudice to their ability to defend the case.

14.2 We welcome the introduction of this section and we consider 2 years to be a reasonable timeframe for dismissal.

15 Head 12 – Amendment of section 17 of Act of 2009 (Defence of absolute privilege)

15.1 We see no issues with this section.

16 Head 13 – Amendment of section 18 and Schedule 1 of the Act of 2009 (Defence of qualified privilege)

16.1 We see no issues with this section.

17 Head 14 – Amendment of section 20 of Act of 2009 (Defence of honest opinion)

17.1 Section 20 of the Act in its present form is complex and difficult to interpret. By contrast the defence at common law was straightforward in its terms and easily understood. It is very rare for a defendant successfully to bring home a defence of honest opinion at trial and the requirement that the facts underlying the comment must be capable of proof undoubtedly makes the defence difficult to establish.

17.2 While it may seem superficially attractive to remove the requirement that the defendant must show that it believed in the truth of the opinion (or that the author so believed), the substitution of a requirement that the defendant genuinely held the opinion, or believed that the author genuinely held the opinion could lead to an anomalous situation where those expressing extreme, defamatory views are able to rely on holding the opinion without more, without having to show any basis for holding the opinion.

[15] Case C-251/20
[16] [1996] IR 345

17.3 Accordingly we believe this amendment requires further consideration.

18 Head 15 – Amendment of sections 22 (Offer to make amends) and 23 (Effect of offer to make amends) of Act of 2009

18.1 The mechanism set out in section 22 of the Act is barely used because the courts have interpreted the reference to "the court" in section 23(1)(c) as meaning a jury. Whether or not juries are retained it would make sense to stipulate that the court for the purposes of an offer to make amends means the trial judge.

18.2 There is a broader issue with the framing of ss 22 and 23, which are over complex and would benefit from simplification.

19 Head 16 – Amendment of section 26 of Act of 2009 (Fair and reasonable publication on a matter of public interest)

19.1 Section 26 of the Act was inspired by the English House of Lords decision in *Reynolds v Times Newspapers Ltd*[17] in which the defence of qualified privilege was extended to publications which were in the public interest and published in accordance with the requirements of responsible journalism. Section 26 has not, however, made any real impact in practice since its introduction.

19.2 The proposed recasting of the section makes sense, in terms of creating a greater prospect of defendants successfully relying on the defence if they can show they acted responsibly in publishing the defamatory statement.

19.3 In England, what followed *Reynolds* was a gradual shift by the courts to a more flexible approach[18] which gave greater weight to matters of public interest and freedom of expression. In *Flood v Times Newspapers Ltd*, the Supreme Court highlighted that the 'Nicholls Factors' set out by the court in *Reynolds* reflected the fact that the existing law on defamation did not have sufficient regard to the freedom of expression provisions set out in Article 10 of the European Convention of Human Rights. In *Yeo v Times Newspapers Ltd*[19] the court followed *Jameel* and *Flood* which supported editorial discretion and freedom of expression. The English courts moved away from the restrictive approach set out in *Reynolds* to have regard to all of the facts of a case notwithstanding that a publication may not adhere to the highest standards of responsible journalism on every occasion. This position was reflected in the codification of section 4 of the Defamation Act 2013. A defendant must now show that they "*reasonably believed that publishing the statement complained of was in the public interest.*"

19.4 It is, as outlined earlier in these submissions, important to note that there is a constitutional balancing of rights in Ireland that will inevitably impact the interpretation of any statutory amendments: *Hunter v Duckworth*[20].

20 Head 17 – Amendment of section 27 of Act of 2009 (Innocent publication) in relation to live broadcasts

20.1 We see no issues with this section.

[17] [2001] 2 AC 127
[18] Jameel v Wall Street Journal [2007] 1 AC
[19] [2015] EWHC 3375
[20] [2003] IEHC 81

21 Head 17A – Amendment of section 27 of Act of 2009 (Innocent publication) in relation to website operators

21.1 We see no issues with this section.

22 Head 18 – Amendment of sections 28 (Declaratory order), 30 (Correction order), 33 (Order prohibiting the publication of a defamatory statement), and 34 (Summary disposal of action), of Act of 2009

22.1 The wording underlined at section 1 of this Head is important. This imports a reasonableness test into the court's assessment of a defence to a defamatory statement or publication.

22.2 It is possible that the hearing of applications brought under these sections could result in what is effectively a 'mini-trial.' We would observe that we do not foresee a defendant in a defamation claim opting to proceed under these sections and risking an award of damages against them pursuant to section 34.

23 Head 19 – Amendment of section 29 of Act of 2009 (Lodgement of money in settlement of action)

23.1 The absence of any time limit for making a lodgment is an interesting proposal but it seems to run counter to the rationale behind accepting lodgments, which are designed to encourage early settlement and the saving of court time. We suggest that some time limit for making a lodgement should be preserved in this section, such as up and until the time when the matter is set down for trial.

24 Head 20 – Amendment of section 31 of Act of 2009 (Damages)

24.1 We suggest that sub-section (iv) should be removed from this section. The concepts of intrusion and privacy are not relevant to defamation claims, nor are they elements that can form the basis for a claim in defamation. We would caution against conflating defamation and privacy and legislating for privacy 'by the back door' in this way.

24.2 In *Nolan v Sunday Newspapers Limited*[21], the High Court awarded damages for defamation and breach of privacy. In the Court of Appeal, Mr Justice Peart upheld the quantum of the High Court awards but recalibrated the award of general damages by differentiating between general damages for defamation and damages for breach of the plaintiff's constitutional right to privacy. This clearly indicates that the courts consider privacy as a distinct cause of action to defamation that requires separate proof and cannot be compensated as part of a general award of damages.

24.3 Sub-section (iv) may, in our view, lead to plaintiffs adding a privacy based cause of action into all defamation claims as standard.

25 Head 21 – Amendment of section 32 of Act of 2009 (Aggravated and punitive damages)

25.1 This Head refers to 'aggravated and punitive damages,' however, we note that the section only contains references to aggravated damages. Aggravated and punitive damages are different concepts, the differences of which were set out by Dunne J in in the High Court in *Herrity v Associated Press.* [22]

[21] [2017] IEHC 367 and [2019] IEHC 141
[22] [2008] IEHC 249

25.2 Otherwise this section appears to simply give statutory effect to existing case law.

26 Head 22 – Factors to be considered by court in awarding costs

26.1 We do not see any issues with this section.

27 New Part 5 of Principal Act: Measures against abusive litigation to restrict public participation (SLAPPs)

27.1 We have contributed to and are supportive of the commentary and recommendations made by the Ireland Anti-SLAPPs Network in respect of the proposed provisions comprising a new Part 5, containing measures against abusive litigation to restrict public participation. The proliferation of political defamation claims in recent years that seem to be designed to quell public criticism of public figures is concerning and requires action, having regard to the European Commission's proposed Directive, which Ireland has supported.

28 Head 32 – Removal, or cesser of distribution, by intermediary of third party

28.1 In our view, this section would sit better after Head 17A – Innocent Publication in Relation to Website Operators. We suggest that the new Act should contain a specific Part dealing with online publication.

29 Head 33 – Power to make an identification order ('Norwich Pharmacal' Order)

29.1 It is a positive development that an application for a Norwich Pharmacal Order can be heard in the Circuit Court, which will hopefully reduce the costs involved for all parties and broaden access to obtaining such an order.

29.2 However, we consider that there is greater precision required in this section bearing in mind that the judges hearing these applications will be new to the jurisdiction.

29.3 We are concerned that how Norwich Pharmacal Orders are defined in this section could have consequences for Norwich Pharmacal applications more generally.

29.4 This Head refers to a Norwich Pharmacal Order as an 'identification order' which may require an Intermediary Service Provider to provide an applicant with details of an anonymous publisher including name, email address, and telephone number. In our experience, the court may in appropriate cases require production of other information such as documentation which evidences the identity of the party responsible for the defamatory content and it would be unfortunate if the statutory provisions unduly restricted the scope to obtain such orders, in appropriate cases. Furthermore, we would question whether reference should be made in the legislation to identifying information in circumstances where that is not always available to Intermediary Service Providers.

29.5 We are also concerned that an 'identification order' may result in the disclosure of personal information relating to third parties which is not relevant to the application.

29.6 What usually transpires in applications of this type is that costs of the application and complying with the Norwich Pharmacal Order are borne by the plaintiff. We suggest that this position is placed on a statutory footing. This will provide some comfort to platforms that there will be no financial implications for assisting plaintiffs and the court.

30 Head 34 – Notice of Complaint (online publication)

30.1 We are generally supportive of a statutory notice of complaint mechanism in respect of online publication of defamatory statements.

30.2 We are concerned however that the proposed notice and takedown regime does not dovetail sufficiently with the Digital Services Act and will be difficult for Intermediary Service Providers to act on from a practical perspective.

30.3 We are also concerned by the imputation of "*actual knowledge or awareness, for the purposes of Article 6 of the Digital Services Regulation, where [notices] allow a diligent provider of hosting services to determine that a statement is illegal/defamatory, and that the defendant has no defence, without a detailed legal examination*." It is difficult to see how a provider of hosting services could be in a position to assess whether a user has "*no defence*" to defamation proceedings on the basis of the notice alone.

WRITTEN SUBMISSION ON THE GENERAL SCHEME OF THE DEFAMATION (AMENDMENT) BILL

SUBMISSION DOCUMENT

DAVID WHELAN BL

4 MAY 2023

(A) Introduction

1. I was called to the Bar of Ireland in 2005 and have been in continuous practice for over 16 years. I specialize in corporate and commercial law and the law of defamation.

2. I am regularly briefed to appear as leading counsel at each level of the Superior Courts, including the Commercial division of the High Court, the Chancery division of the High Court, and the Court of Appeal.

3. I have acted in a large number of defamation actions including *Ryanair Ltd v Van Zwol & Ors* [2018] 3 IR 628, *Ryanair v Goss* [2016] IECA 328, *Griffin v Sunday Newspapers* [2012] 1 IR 114, and *Leech v Independent Newspapers (Ireland) Limited* 2004 No. 19853P.

(B) Recommendation to the Committee

Re s. 23 of the Defamation Act 2009 – Effect of offer to make amends

4. Section 22 of the *Defamation Act 2009* (the "Act") provides for the making of an offer to make amends by a person who has published a defamatory statement.

5. Section 23 of the Act provides for the effect of an offer to make amends and states that if an offer to make amends under s. 22 of the Act is accepted, the following provisions shall apply:

> *"(a) if the parties agree as to the measures that should be taken by the person who made the offer to ensure compliance by him or her with the terms of the offer, the High Court or, where a defamation action has already been brought, the court in which it was brought may, upon the application of the person to whom the offer was made, direct the party who made the offer to take those measures;*

(b) if the parties do not so agree, the person who made the offer may, with the leave of the High Court or, where a defamation action has already been brought, the court in which it was brought, make a correction and apology by means of a statement before the court in such terms as may be approved by the court and give an undertaking as to the manner of their publication;

(c) if the parties do not agree as to the damages or costs that should be paid by the person who made the offer, 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 defamation action, and in making a determination under this paragraph it shall take into account the adequacy of any measures already taken to ensure compliance with the terms of the offer by the person who made the offer;

(d) no defamation action shall be brought or, if already brought, proceeded with against another person in respect of the statement to which the offer to make amends applies unless the court considers that in all the circumstances of the case it is just and proper to so do."

6. As appears from the foregoing, the Act provides for a number of circumstances in which a person making or receiving an offer to make amends may refer certain matters for determination by the Court. As currently enacted, the Act requires persons wishing to make applications of this type to apply to the High Court, unless a defamation action has already been brought in a lower Court.

7. It is my experience that, in practice, offers to make amends are commonly made prior to the commencement of a defamation action. If an offer to make amends is made in these circumstances and it becomes necessary for either the person making or receiving the offer to seek a determination from the Court, those parties are required to bring that application before the High Court, regardless of the seriousness of the defamation and/or the value of the claim.

8. It seems to me that it would be prudent to consider amending s. 23 of the Act to permit applications for determinations in relation to offers to make amends to be made to either the High Court or the Circuit Court at the election of the moving party.

9. As currently drafted, it seems to me that s. 23 of the Act may discourage publishers of defamatory statements at a level which would ordinarily fall within the jurisdiction of the Circuit Court from making an offer to make amends, in circumstances where any determination which might be required in relation to that offer would necessarily take place in High Court, unless a defamation action has already been commenced in the Circuit Court.

(C) Conclusion

10. In light of the foregoing, I respectfully suggest that the Committee might consider amending the provisions of s. 23 of the Act to permit a party making or receiving an offer to make amends to bring any application which might be required in relation to that offer before either the High Court or the Circuit Court at the election of the moving party, as opposed to the mechanism currently provided for under the Act, which requires such applications to be made in the High Court unless a defamation action has already been commenced in the Circuit Court.

David Whelan BL

4 May 2023

DAB_14

Retail Ireland,
Ibec
84-86 Lower Baggot Street
Dublin 2

Joint Committee on Justice
Leinster House
Dublin 2

SENT VIA EMAIL

Thursday 4 May 2023

Re: General Scheme of the Defamation (Amendment) Bill

Dear Sir/Madam,

Retail Ireland would like to thank the Committee for affording us this opportunity to submit the views of retailers as part of its consideration of the General Scheme of the *Defamation (Amendment) Bill*.

Retail Ireland is the representative body for the entire retail sector in Ireland. Our members include Ireland's main retail brands, including major supermarket groups, department stores, DIY, electrical retailers, clothing and fashion retailers, symbol groups, forecourts and specialist retailers.

The retail sector very much welcomes the provisions of the Bill, specifically **Head 6** - **Serious harm test - transient retail defamation,** which recognises the ongoing challenge posed to businesses by spurious and vexatious defamation claims.

Based on feedback from member companies, and to provide additional reasonable protection for retailers against such claims, the following amendments are suggested:

Under point 1 (1), include the below additional points (d), (e) and (f):

1. It is not defamatory:

(1) for a retailer, or a person acting on their behalf, to:

(d) inform a customer that an electronic payment has not been successful, or that a transaction is incomplete, or has been delayed;

(e) ask a customer to return to a self-service check out to check that a transaction has been completed;

(f) question and verify the authenticity of a returned product to ensure it is the same product that was initially purchased;

The above common-sense additions are all aimed at ensuring that retailers are not exposed to unreasonable claims as they seek to go about their normal business, ensuring that all transactions are completed and that counterfeit goods are not fraudulently returned in place of an original product.

In recent years, retail workers are increasingly having to deal with unreasonable and aggressive customers, and manage difficult situation. Any additional support that the law can provide in such circumstances is welcome.

Taken with the current provisions set out under Head 6, the proposed changes outlined above would provide greater clarity and protection to retail workers as they carry out their jobs.

Thank you for the opportunity to contribute our members' views to this process. Should you have any questions, please do not hesitate to get in touch.

Yours faithfully,

_____

Arnold Dillon
Director, Retail Ireland
Arnold.Dillon@ibec.ie

McCann FitzGerald LLP - Submission to the Joint Committee on Justice

Written Submission on the General Scheme of the Defamation (Amendment) Bill

5 April 2023

SUBMISSION TO THE JOINT COMMITTEE ON JUSTICE

WRITTEN SUBMISSION ON THE GENERAL SCHEME OF THE DEFAMATION (AMENDMENT) BILL

1. Introduction

1.1 We refer to the request from the Joint Committee on Justice dated 11 April 2023 for contributions on the draft General Scheme of the Defamation (Amendment) Bill (the "**General Scheme**"). These submissions are limited and focus on issues arising with respect to the Heads of Bill dealing with online publication and the interaction of same with Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (the "**Digital Services Act**").

2. Context of this submission

2.1 By way of background, McCann FitzGerald LLP provides legal advice to a broad range of clients relating to defamation and publication more generally. These submissions do not advocate for any particular client or group of clients, but rather focus on areas which we believe require further clarification in the General Scheme to generate legal certainty.

2.2 In submissions dated 21 July 2020, made in response to a request from the then Minister for Justice and Equality for contributions on the Review of the Defamation Act 2009 (the "**Act**"), we noted that there had been a significant increase in claims in respect of digital content, many of which have no factual connection to Ireland. This trend has continued, and informs the present submissions.

2.3 The interplay of the legal principles and legislative framework concerning defamation law and the regulation and facilitation of online content requires legal certainty, particularly where new obligations are being proposed for online content providers by the General Scheme and by reference of the provisions of the Digital Services Act.

3. Executive Summary

3.1 This submission focuses on the mechanism for making complaints concerning allegedly defamatory material directly to online platforms. This is described as a 'Notice of Complaint' at Head 34 of the General Scheme and arises from the 'Notice and action mechanism' at Article 16 of the Digital Services Act.

3.2 The terms of Head 34(12) diverge from the terms of Article 16(3) of the Digital Services Act as Head 34(12) adds a requirement to determine that a statement is defamatory and that no defence is available to the claim of defamation "without a legal examination" in order for the Notice to give rise to actual knowledge or awareness, for the purposes of Article 6 of the Digital Services Regulation. It is not clear from the drafting of this Head how a determination as to whether potentially defamatory content is in fact defamatory or whether it could be subject to a defence would work in practice without a detailed legal examination and in particular, a court order.

3.3 A potentially defamatory statement is not automatically "illegal for the reasons set out in these submissions. It is unclear therefore how, in practice, an OIP can make these determinations without undertaking a full legal assessment and without a court order. This potentially creates a level of confusion for OIPs as to their obligations under the subhead as there is no detail

provided on how to assess whether the material is defamatory/whether there are defences available (without a full legal assessment being carried out) and how this should be approached in the absence of a court order. The current drafting may result in more potentially defamatory material being removed without any determination of whether or not it is truly defamatory which may breach individuals' freedom of expression and may potentially create a chilling effect on speech.

3.4 As described in the explanatory note to Head 34, we note that the intention is to set out in greater detail the mechanism provided for in Article 16 of the Digital Services Act. The Digital Services Act sets out certain exemptions from liability for OIPs regarding "illegal content" where such providers do not have actual knowledge of said illegal content or moved expeditiously to disable access to such material on gaining knowledge. An exception to this "safe harbour" is set out in Article 16(3) of the Digital Services Act (discussed below).

3.5 The General Scheme, at Head 34(12), appears to impose an obligation on OIPs to determine whether a published statement that has been flagged by way of a Notice of Complaint is "illegal/defamatory, and that the defendant has no defence" and to do so "without a detailed legal examination". As mentioned, there is some risk in conflating "illegal" and "defamatory" in circumstances where a statement may be *prima facie* defamatory but not automatically illegal. It is submitted that it is very difficult to make these assessments without undertaking a full legal assessment, thus creating uncertainty for OIPs.

3.6 We respectfully submit that:

(a) to make an assessment on whether material is defamatory, and that there is no defence, without a "detailed legal examination" will be difficult in practice to operate;

(b) the General Scheme currently does not include guidance on how this assessment regarding possible defences should be made "without a detailed legal examination" or what is expected of a "diligent provider" in this situation when undertaking an assessment, or where the assessment contemplated by the subhead ends and a legal assessment begins;

(c) some of the draft language may be interpreted to be somewhat contradictory – for example, under Head 34(11), the removal of a restriction in accordance with subhead 8 does not imply the statement is defamatory in the absence of a court order to that effect, yet under Head 34(12), Notices under Head 34 shall be considered to give rise to actual knowledge for the purpose of Article 6 of the Digital Services Act where they allow the online provider to make an assessment that the statement is defamatory, with no defence, but without undertaking a detailed legal analysis (but no guidance is provided as to how to make that assessment);

(d) it is submitted that as presently drafted the subhead may serve to generate confusion for OIPs as to what level of information gives rise to actual knowledge for the purposes of Article 16 (2) in a defamation context and/or or what a diligent OIP should do in under the subhead to meet the test under Article 6 of the Digital Services Act so as to ensure it continues to avail of the safe harbour provisions.

4. **Clarity required in the Complaint Process under Head 34**

4.1 We note that the reliefs set out under Head 32 (detailing the restriction or takedown by an OIP of a potentially defamatory online statement made by a third party) and Head 33 (providing the mechanism for Norwich Pharmacal style relief identifying the author of a potentially defamatory online statement) both require a Court order. These reliefs flow from the terms of the Digital Services Act.

4.2 In a similar manner, Head 34 of the General Scheme details a "Notice of Complaint" process; a new mechanism for complaints to be brought by individuals to OIPs regarding potentially defamatory material (the "**Complaint Process**"). The assessment process required under Head 34(2), which in certain circumstances can give rise to actual knowledge or awareness, for the purposes of Article 6 of the Digital Services Regulation does not involve a court process or court orders.

4.3 We note that the Digital Services Act does not refer expressly in any of its provisions to "defamatory" or "allegedly defamatory" material. The definition of "illegal content" in the Digital Services Act is information in itself or by reference to an activity, that is not in compliance with EU law or the law of a Member State, irrespective of the precise subject matter or nature of that law. Accordingly, defamatory content (assuming it can be established that the content is, in fact, defamatory, and that there are no available defences to same) is in our view caught by this broad definition and for the purposes of these submissions we define as "**potentially defamatory material**". However, as mentioned above, defamatory material is not automatically illegal.

4.4 We are conscious that the approach to the Complaint Process is delineated by the terms of Article 16 of the Digital Services Act and the "notice and action" mechanism it mandates for OIPs.

4.5 The aim of the Complaint Process appears to be to create an easy to access mechanism, which is user friendly and allows for the submission of Notices electronically regarding potentially defamatory content hosted by the OIP. The Complaint Process requires the OIP to act in an effectively mediatory capacity, between the complainant and author of potentially defamatory material. Notably, the restriction by an OIP of any potentially defamatory material can be undone on the request of the author of that material.

4.6 In line with the above process, subhead 8 ensures that restriction of access to a statement by an OIP does not imply or suggest that it was defamatory in the absence of a court order. Equally subhead 11 makes clear that the removal by an OIP of any restriction of access to a statement does not imply or suggest that the statement was **not** defamatory. This is in line with the automated, or semi-automated, process requiring the OIP to facilitate the exchange of Notices, as it does not presume that an OIP has made a binding judgment on the nature of the flagged content. Such judgment is expressly reserved to the power of a "court decision to that effect" under subhead 8.

4.7 The Complaint Process provides for the restriction of online material in circumstances where an OIP: (i) receives a Notice of Complaint from a service user, (ii) forwards the Notice of Complaint to the author of the statement; and (iii) does not receive a response from the author within 5 working days. Alternatively, if the OIP is unable to contact the author, it may also impose a restriction. However, pursuant to subhead 12, it appears that the OIP may be required to engage in some form of analysis and to make a decision on the substantive question of whether material may be defamatory, in part on the basis of the information provided with the Notice of Complaint.

4.8 Subhead 12 reproduces the exception in Article 16(3) of the Digital Services Act from the exemption in Article 6 for OIPs from liability for illegal or defamatory material when not having actual knowledge, nor awareness of facts or circumstances from which that illegal or defamatory material are apparent. The terms of Article 16(3) are:

> *3. Notices referred to in this Article shall be considered to give rise to actual knowledge or awareness for the purposes of Article 6 in respect of the specific item of information concerned where they allow a diligent provider of hosting services to identify the illegality of the relevant activity or information without a detailed legal examination.*

4.9 Subhead 12 adds wording to this provision (in bold):

> "*shall be considered to give rise to actual knowledge or awareness, for the purposes of Article 6 of the Digital Services Regulation, where they allow a diligent provider of hosting services to determine that a statement is illegal****/defamatory, and that the defendant has no defence****, without a detailed legal examination*."

4.10 In order for a Notice under subhead 12 to give rise to actual knowledge or awareness, for the purposes of Article 6 of the Digital Services Regulation, the OIP must be able to determine, without detailed legal examination, that material is defamatory and that no defence is available.

4.11 As mentioned above, an assessment of whether content is defamatory is nuanced and usually requires a detailed legal analysis including, *inter alia*, an examination of the ordinary meaning of the words followed by the analysis of potential defences. Without all of the available facts and evidence that would ordinarily be available to a court (and which may not be available to an OIP), it is not clear how an OIP could make this assessment in practice and accordingly manage an effective Complaint Process from both a complainant and author standpoint. There is a contradiction in requiring an assessment of the defences available to potentially defamatory material without a detailed legal examination. This leads to potential uncertainty as to the parameters of the OIP's obligation to undertake a form of assessment, but without undertaking a legal examination of potentially defamatory statements with no defence, in order to be deemed to not have actual knowledge or awareness for the purposes of the safe harbour provisions under Article 6 of the Digital Services Act.

4.12 By way of further comment, there is an insufficient level of detail contained in the present draft in circumstances where the OIP will need to make an assessment under subhead 12 upon receipt of a Notice of Complaint and within the framework of the Complaint Process. It is not clear from the terms of Head 34 at which point the OIP will need to have finalised an assessment under subhead 12 (for instance, whether this assessment needs to be completed before notifying the author of the statement pursuant to subhead 4; which envisages restriction which "*does not suggest/imply that the statement is defamatory*").

McCann FitzGerald LLP

5 May 2023

DABU_01

Ireland Anti-SLAPPs Network

Defamation (Amendment) Heads of Bill Submission

May 2023

Table of Contents

Who We Are:

This submission is on behalf of the Ireland Anti-SLAPPs Network and is comprised of the following organisations and individuals:

- Article 19
- Eoin O'Dell, Trinity College Dublin
- FLAC-Free Legal Advice Centres
- Index on Censorship
- Irish Council for Civil Liberties
- Irish Environmental Network
- Karyn Harty & Lesley Caplin (Dentons Ireland LLP)
- Mark Hanna, Durham University[1]
- Michael Foley, National Union of Journalists
- PILA- Public Interest Law Alliance
- Transparency International Ireland

[1] Dr Hanna would like his reservations to the recommendations on heads 24 & 26 noted.

Introduction:

This submission is made on behalf of the Ireland Anti-SLAPPs Network. While the draft bill itself primarily addresses defamation, it does contain provisions related to SLAPPs and it must be acknowledged that Ireland's existing defamation laws facilitate SLAPPs against NGOs, activists, journalists, and others. This submission represents a compromise position between the abovementioned organisations and individuals on a number of heads of bill, but we are satisfied that the amendments as posed would serve to substantially improve the bill beyond its current draft. While we strongly welcome the long-awaited publication of this draft bill, we are mindful of the trend towards the slow process of legislation. Given the long-standing demands for reform of Irish defamation laws from both domestic and international actors, we call on the government to prioritise the passage of this legislation in as short a timeframe as practicable while still allowing for proper scrutiny by the legislature and the public.

Summary of Recommendations:

Head 3-Abolition of juries in High Court actions
• The presumption of a right to a jury should be removed and either party to a defamation case should have the right to request a trial by jury. • An application from either or both parties for a jury trial is to be made to a judge, who will consider the best interests of justice when considering the application.

Head 4 -Serious harm test –bodies corporate
•Establish a serious harm test for all defamation actions, including those that fall outside the three circumstances (heads 4, 5 and 6) included in this draft. **And** •Establish a statutory bar for all bodies corporate, preventing them from bringing defamation actions. **And** •Prevent bodies corporate from funding private defamation actions brought by employees or directors in a private capacity to ensure these actions cannot be used as a proxy to bypass the statutory bar. **Or** •Prevent bodies corporate with more than 10 employees from bringing defamation actions. **Or** •If bodies corporate are still able to bring defamation actions, they should have to prove that the statement complained of has caused or is likely to cause financial loss

Head 5 –Serious harm test –public authorities
• Public authorities should be prevented from bringing defamation actions. **And** • If bodies corporate are still able to bring defamation actions (see our response to head 4), this prevention should extend to private bodies who deliver public services, in as much as it relates to that aspect of their work.

Or

- Falling short of this recommendation, private bodies who provide public services must demonstrate the public interest in bringing an action to align them with the obligations placed on public authorities.

Head 16 -Amendment of section26 of Act of 2009 (Fair and reasonable publication on a matter of public interest)

- Remove subheads 1(c) and 4 to ensure the bill supports an expansive view of public interest that is not defined by journalism alone and could apply to (inter alia) protected disclosures.
- Remove subhead 5 to ensure the defence is available for claims for a declaratory order.

Head 23 -New Part 5 of Principal Act: Measures against abusive litigation to restrict public participation (SLAPPs)

- Commit to explore broader anti-SLAPP legislative measures, perhaps as a standalone bill, to address all SLAPP threats, including those that do not use defamation to target public participation.

Head 24 – Definitions (Part 5)

- Amend to: "feature of concern", in relation to proceedings against public participation, means any of the following features. **Such features may include but are not limited to:**

  o (a) the making of claims of a disproportionate, excessive or unreasonable nature; etc.

- To ensure the features of concern are an accurate representation of the tactics deployed by SLAPP plaintiffs, we recommend further stakeholder engagement, with journalists, media outlets, campaigners, whistleblowers and other targets of SLAPPs, as well as legal analysis to ensure the features contained in the bill best reflects the tactics deployed.

Head 26-Early dismissal

- Amend to: "the court shall dismiss the proceedings without continuing to a full hearing, **if it can be reasonably determined to have been filed with an improper purpose**; it shall be for the plaintiff in the original proceedings to satisfy the Court that they are not **filed with an improper purpose"**;

- If it is decided to maintain the formulation of 'manifestly unfounded', the head should also include a definition of this term, which could be formulated as: "Proceedings shall be found to be manifestly unfounded if the plaintiff is unable to establish a prima facie case as to each essential element of the cause of action."

Head 27 -Strategic lawsuits against public participation

- Amend head 27, subhead 2(a) in line with head 26

Head 28 -Security for Costs

- Amend to: "In proceedings brought under another Part of this Act by a plaintiff against public participation, the Court may, on application by the defendant, require the plaintiff to provide security for costs **and damages**, if it considers appropriate in view of any features of concern, or of any other factors suggesting that the proceedings have been conducted in an abusive manner."

Head 30 -Damages

- Retain Head 30 to ensure courts can award damages to the defendant in proceedings deemed to be a SLAPP for harm suffered as a result of the proceedings.

Other: Civil Legal Aid

- To ensure proper compliance with the ECHR, and to enhance access to justice, we reiterate our recommendation for the removal of 'defamatory actions' as a 'designated matter' excluded under the Civil Legal Aid Act as part of the ongoing review process.

Analysis:

Head 3-Abolition of juries in High Court actions
The signatories to this submission consider that the presumption of the right to a jury should be removed and that either party to a defamation case should have the right to request a trial by jury. An application from either or both parties for a jury trial is to be made to a judge, who will consider the best interests of justice when considering the application.
Recommendations:
• The presumption of a right to a jury should be removed and either party to a defamation case should have the right to request a trial by jury. • An application from either or both parties for a jury trial is to be made to a judge, who will consider the best interests of justice when considering the application.

Head 4 -Serious harm test –bodies corporate
While we support the inclusion of the serious harm test in the three situations outlined in this draft (bodies corporate, public authorities and transient retail defamation), we believe that the serious harm test should extend to all parties and circumstances as a standard threshold for all defamation actions. Defamation actions that cannot satisfy this threshold exert a disproportionate threat to the right to free expression, as outlined in international human rights law. ARTICLE 19, in their Principles on Freedom of Expression and Protection of Reputation state that "Defamation laws should provide, and courts should ensure, that a statement is deemed to be defamatory only if its publication causes substantial or serious harm to reputation, thereby excluding nominal or minor harms." There is little evidence to suggest that this threshold should only be in place for a selective number of contexts. Instead this should be a universal and uniform threshold that all claimants have to meet to ensure their legal action can succeed. Defamation represents a balance of rights between the rights to free expression (Article 10) and the right to respect for private and family life (Article 8) of the ECHR. However, the European Court of Human Rights has commented on where this balance should sit in relation to defamation. For instance, in OOO Memo v. Russia (no. 2840/10), the judgement of which contained the first mention of SLAPPs by the Strasbourg court, it stated that "In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life". Even outside defamation, the court has highlighted the importance of a high threshold to protect free expression from undue interference. The judgement in Handyside v UK (no. 5493/72) stated that free expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population." Prior to addressing the issue of a serious harm test for cases involving private bodies, there is a broader issue of legal principle; whether private bodies should be prevented from bringing any action, irrespective of the seriousness of harm caused by the allegedly defamatory statement.

Defamation is an injury to a person's right to dignity and respect and should therefore be restricted to natural persons. The risks to equality of arms, already inherent in defamation actions in the absence of legal aid and as a result of the presumption of falsity, are significantly heightened when it comes to corporate plaintiffs or defendants. Such a prevention would not inhibit individuals from bodies corporate, such as employees or directors, from bringing private defamation actions but this should be limited to remedying reputational damage they themselves felt, as opposed to damage felt by the entity itself. When deciding whether such a private action is admissible, the claimant should have to prove that the body corporate to which they are attached is not funding the legal action. This would prevent individuals being used as a proxy to circumvent the provision against private bodies bringing defamation actions.

Short of preventing private companies from bringing defamation actions, as recommended in this submission, we can look at other jurisdictions for compromise positions. Defamation law in Australia prevents private companies who employ more than ten employees from bringing defamation action - smaller companies and NGOs (excluded corporations) fall outside this exclusion and are still able to bring actions. This allows for smaller businesses, whose reputations may be more closely linked to the reputations of their employees, or for employees who could be tarnished by reputational damage to their employers to be able to find relief through the courts. The same may not be said for larger companies where the connection between institution and individual may be more tenuous and so falls outside the definition outlined above as to the relevance of defamation for natural persons.

The option to fully remove corporate bodies from the Act was not considered by the review as it does not appear in either of the proposed recommendations, of which there were three;

1. *provide that a body corporate that operates for profit can only recover damages for defamation where it proves that the statement has caused or is likely to cause financial loss;*

2. *provide that a body corporate may not sue for defamation unless it first shows that the statement has caused or is likely to cause serious harm ; in the case of a body that trades for profit, this means serious financial loss;*

3. *do nothing*

Were bodies corporate still able to bring defamation actions they should have to prove serious harm through proving that the statement complained of has caused or is likely to cause financial loss. This would be in-keeping with our proposal that a serious harm test should be a universal or uniform threshold that all parties must meet to proceed a legal action.

Recommendations:

•Establish a serious harm test for all defamation actions, including those that fall outside the three circumstances (heads 4, 5 and 6) included in this draft.

And

•Establish a statutory bar for all bodies corporate, preventing them from bringing defamation actions.

And

•Prevent bodies corporate from funding private defamation actions brought by employees or directors in a private capacity to ensure these actions cannot be used as a proxy to bypass the statutory bar.

Or

•Prevent bodies corporate with more than 10 employees from bringing defamation actions.

Or

•If bodies corporate are still able to bring defamation actions, they should have to prove that the statement complained of has caused or is likely to cause financial loss

Head 5 –Serious harm test –public authorities

It is our position that public authorities should not be able to bring defamation actions. This is supported by ARTICLE 19's Principles on Freedom of Expression and Protection of Reputation, which states "Public bodies of all kinds – including all bodies that form part of the legislative, executive or judicial branches of government or which otherwise perform public functions – should be prohibited altogether from bringing defamation actions. The prohibition should extend to the heads of public bodies in relation to legal actions that in essence aim to protect the reputation of the public bodies rather than the individual head." The European Court of Human Rights has also raised this issue in a number of key judgements, including Lombardo and Others v. Malta (no. 7333/06), where the "Court considers that it is only in exceptional circumstances that a measure proscribing statements criticising the acts or omissions of an elected body such as a council can be justified with reference to 'the protection of the rights or reputations of others'." A more recent judgement in OOO Memo v. Russia (no. 2840/10) highlighted the risks of Executive bodies being able to bring defamation actions: "That executive bodies be allowed to bring defamation proceedings against members of the media places an excessive and disproportionate burden on the media and could have an inevitable chilling effect on the media in the performance of their task of purveyor of information and public watchdog".

As outlined in the Report of the Review of the Defamation Act 2009, a Private Members' Bill, the Defamation (Amendment) Bill 2014 included proposals to restrain a public body from bringing an action for defamation in respect of statements which may injure its reputation, by providing that only nominal damages of €1 may be awarded in such proceedings. Our position matches that of Senator Crown who brought forward the bill, who sought to prevent public bodies from using the resources of the State to influence comment by the press and public. However, the provision of nominal damages to dissuade such actions could still require targets of defamation actions to exert significant time and financial resources to secure legal representation and respond to pre-action communication, potentially distracting them from their important work.

While the draft bill states that public authorities have to satisfy the court that it is in the public interest to bring an action (head 5(2)), a rule prohibiting public authorities from bringing actions as outlined in the Derbyshire Principle in England and Wales, and s. 2 of Defamation and Malicious Publication (Scotland) Act 2021 would prevent even the threat of legal action from being able to be pursued. While s.2 of the Scottish Act is in its infancy, this section only brings existing case law, that of the Derbyshire Principle, onto a statutory footing. There is scant

evidence from Scotland, England and Wales that the Derbyshire Principle has detrimentally damaged the public sector's ability to protect its rights and reputation in a manner in keeping with the broader rights environment.

Whether public authorities are barred from bringing actions or are required to demonstrate the public interest in bringing an action and without further limitations to the ability of private companies, there is currently an unequal legal landscape as related to private bodies that provide a public service. In the framework proposed in this draft bill, a private company who has secured a contract to provide public services would not need to demonstrate the public interest in bringing an action and so have fewer thresholds to meet than other public authorities providing the same or similar services. Our position in head 4, which would either prevent or limit the ability of private bodies from bringing action could address this issue, but short of that, if public authorities are prevented from bringing actions, this should extend to private bodies delivering public services.

Recommendations:

- Public authorities should be prevented from bringing defamation actions.

  And

- If bodies corporate are still able to bring defamation actions (see our response to head 4), this prevention should extend to private bodies who deliver public services, in as much as it relates to that aspect of their work.

  Or

- Falling short of this recommendation, private bodies who provide public services must demonstrate the public interest in bringing an action to align them with the obligations placed on public authorities.

Head 16 -Amendment of section26 of Act of 2009 (Fair and reasonable publication on a matter of public interest)

The defences available to an individual accused of defamation of 'fair and reasonable comment in the public interest' and 'honest opinion' as contained in the 2009 Act are too limited and result in a second obstacle to defending claims.

The withdrawal of important statements, ideas and analysis from the public domain has a significant impact on freedom of expression.

The existing defence provided for in s.26 of the 2009 Act: "Fair and reasonable comment in the public interest" is overly complex, lacks clarity and provides too high a threshold for a defendant to meet. It also may not meet the standard required by article 10 of the ECHR which guarantees freedom of expression. Potential defences to defamatory actions that would comply with article 10 of the ECHR were explored by English and Irish Courts prior to the Defamation Act coming into force. A clear test was laid down in the English case of *Reynolds v Times Newspapers*, now known as the 'Reynolds defence', which in England, Wales and Scotland has been replaced with a more expansive 'defence of publication in the public interest'.

In *Hunter v Duckworth*, the Irish High Court regarded Reynolds as a persuasive authority and concluded that article 10 of the ECHR had informed the development of this defence, implying that publication in the public interest is a defence that is compatible with, if not required by the ECHR. If so this defence should not have been abolished by statute, which 15(1) of the Act sets out to do. [2]

By comparison, the equivalent English Defamation Act does abolish the 'Reynolds Defence' but arguably it can do so because s.4(1) of that Act provides for an equivalent defence. It therefore, more clearly meets the requirements of article 10, ECHR. S.4(1) provides that:

(1) It is a defence to an action for defamation for the defendant to show that-

> (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
>
> (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

Clause 1(c) represents a departure from the direction taken in the 2013 reform of defamation in England and Wales, as well as the more recent reform in Scotland, through s.6 of the Defamation and Malicious Publication (Scotland) Act 2021, which incorporates such questions into language similar to 1(b) as to whether the "defendant reasonably believed that publishing the statement complained of was in the public interest". This would ensure that 1(c) does not function as a checklist which could raise questions as to whether they could depend on this defence. The 'Reynolds test', which was replaced by the public interest defence in England, Wales and later, Scotland, provided for a set of criteria that publishers could use to show that their journalism was robust and responsible. Many actors supported the inclusion of a public interest defence instead of the test as it would be far less prescriptive and more flexible to different situations, while also encouraging best practice.

The use of the defence could also be further disincentivised by clause 1(c) due to its focus on journalism. While journalists and media workers are commonly targeted with defamation claims due to the nature of their work, they are not the exclusive targets. While clause 4 attempts to address this potential narrowing of focus, there remains a concern that other actors, such as whistle-blowers, human rights and environmental defenders and academics may believe that as they are not journalists and so may not be aware of "standards of responsible journalism" this could lead them to step away from their work as they believe there is no public interest defence available to them. The 'Reynolds test' was again narrowly drafted along the lines of journalistic reporting and provided a framework that may not be as compatible for other actors targeted with defamation threats for their work that was in the public interest. Expanding this protection beyond journalists alone was one of the key reasons that members of civil society successfully campaigned for the reform of defamation law in both England and Wales, and Scotland.

While not explicitly an anti-SLAPP provision, the European Commission draft anti-SLAPP directive has recommended a more expansive interpretation of public participation, beyond journalism alone. This is intended to cover the exercise of the right to freedom of expression and information, such as the creation, exhibition, advertisement or other promotion of journalistic,

[2] See further O'Dell "The Defamation Act, 2009: The Constitution Dimension", presented at Trinity College Dublin, 2009

political, scientific, academic, artistic, commentary or satirical communications, publications or works, and preparatory, supporting or assisting action directly linked thereto, as well as the exercise of the right to freedom of association and peaceful assembly.

Subhead 5 should be deleted, as it fatally undermines the public interest defence. It provokes various questions: why should the defence apply only for claims to damages and not to claims for a declaratory order? if there is some reason that justifies the distinction, why is it applied only to this defence and not to others? The obvious answers to these questions damn the subsection: a defendant entitled to the benefit of the defence should be able to rely on it against any and all claims and remedies; and there is no good reason to permit it in claims for damages and not for declaratory orders, in this context or in the context of any other defence. If the public interest justifies the defence, it justifies the defence in all circumstances. Limiting the defence in this way will rob it of all utility, as defendants will be just as reluctant to face an action for a declaratory order as they would be to face one for damages. The potential for high damages awards might be removed in such cases, but the spectre of litigation will still be sufficient to chill publication. The distinction will render the defence a dead letter.

Recommendations:

- Remove subheads 1(c) and 4 to ensure the bill supports an expansive view of public interest that is not defined by journalism alone and could apply to (inter alia) protected disclosures.
- Remove subhead 5 to ensure the defence is available for claims for a declaratory order.

Head 23 -New Part 5 of Principal Act: Measures against abusive litigation to restrict public participation (SLAPPs)

While we support the inclusion of Head 23 to make an explicit reference to SLAPPs in line with the proposed European Commission Anti-SLAPPs directive (COM (2022) 177), we acknowledge that SLAPPs are not confined to one cause of action alone. Head 24 defines "proceedings against public participation" as "proceedings brought under another Part of this Act against an act of public participation;". Limiting anti-SLAPP provisions to defamation could restrict the effectiveness of Ireland's overall legal framework to tackle SLAPPs. As SLAPPs represent abuse through the litigation process, limiting anti-SLAPP provisions to defamation alone could encourage claimants to use other causes of action to reach their goal: shutting down acts of public participation. As a result, key parts of this bill, such as head 26 'early dismissal', as well as proceedings under part 5, should be available to all targets of SLAPPs, not solely those who have been targeted with defamation actions defined as a SLAPP by this bill. While we support the inclusion of heads 23 through to 31, we would recommend further exploration and action outside this bill on a broader legislative response to SLAPPs on a more systematic level.

While it is promising that Ireland strongly supports the proposal, and has opted into its adoption, we join the Coalition Against SLAPPs in Europe (CASE) in raising its concerns regarding the most recent compromise proposal we have reviewed, produced under the leadership of the Swedish presidency. As outlined in a letter to Simon Harris TD, Minister for Justice and Micheál Martin TD, Minister for Foreign Affairs and Trade, signed by members of the Ireland Anti-SLAPP Network, this compromise proposal waters down crucial protections, radically narrows the scope of the procedural safeguards proposed by the EC and fails to meet the expectations of the European Parliament. The sum effect of the changes contained in the compromise directive would be to

gut the potential impact and efficacy of any future directive and so should not guide the national implementation of anti-SLAPP legislation.

Recommendations:

- Commit to explore broader anti-SLAPP legislative measures, perhaps as a standalone bill, to address all SLAPP threats, including those that do not use defamation to target public participation.

Head 24 – Definitions (Part 5)

While we support the inclusion of a detailed but non-exhaustive list of features that are identified frequently as hallmarks of typical SLAPPs, it is crucial that the "features of concern" contained in the draft bill are wide enough to cover all qualities that are indicative of SLAPPs. As this is a new proposed legal power, an expansive list would support judges, juries and courts when responding to potential SLAPP threats.

The draft states: "'feature of concern", in relation to proceedings against public participation, means any of the following features:" This presents six features that are emblematic of SLAPPs but threatens to limit interpretation to those six alone. For example, the UK Model Anti-SLAPP law, developed by the UK Anti-SLAPP Coalition, included a more extensive list to highlight the tactics deployed by those bringing SLAPPs and to better equip courts to respond. It also specifies clearly that the list is non-exhaustive to enable courts to respond to the specifics of each situation. By mapping these features we must ensure that this definition is an aid to courts, as intended, and not a method by which the courts can be limited in their interpretation. We know that SLAPP claimants evolve their approach to make the most of limitations in the existing legal framework. To ensure the anti-SLAPP framework is suitably robust, it must be similarly flexible and an extensive but non-exhaustive list of features is key to this.

As well as being non-exhaustive, it is important that the features are extensive and accurate enough to represent the tactics of SLAPP claimants in Ireland. As the reform process proceeds, we would recommend detailed consultation with key stakeholders including from the legal profession, regulators, journalists, media outlets, environmental and human rights defenders and anti-corruption organisations to ensure these features can address the situation as it is for those targeted with SLAPPs.

Recommendations:

- Amend to: "feature of concern", in relation to proceedings against public participation, means any of the following features. **Such features may include but are not limited to:**

  o (a) the making of claims of a disproportionate, excessive or unreasonable nature; etc.

- To ensure the features of concern are an accurate representation of the tactics deployed by SLAPP plaintiffs, we recommend further stakeholder engagement, with journalists, media outlets, campaigners, whistleblowers and other targets of SLAPPs, as well as legal analysis to ensure the features contained in the bill best reflects the tactics deployed.

Head 26-Early dismissal
The legislation proposes that the early dismissal mechanism apply to cases that are "manifestly unfounded", but we would urge the government to change this to "if it can be reasonably determined to have been filed with an improper purpose". This would ensure that all SLAPPs would be covered by the legislation, while also establishing an objective test that must be satisfied for a case to proceed. In the compromise proposal of the European Commission Directive, a manifestly unfounded claim is understood "as a claim which is so obviously unfounded that there is no scope for any reasonable doubt (..)". Most abusive lawsuits will not meet this far too high threshold. To move away from this problematic threshold, as another way to proceed, and to give courts and judges a guide through which they can adjudge whether to dismiss a case prior to full proceedings, the head itself could include a definition, such as "Proceedings shall be found to be manifestly unfounded if the plaintiff is unable to establish a prima facie case as to each essential element of the cause of action". However, Head 26, para 2(c) states that the court shall not dismiss the proceedings if "the plaintiff's claims are likely to succeed if the case proceeds to full hearing". We support the threshold recommended here as it requires SLAPP plaintiffs to show a likelihood of prevailing at trial and a greater public interest in the case making it to court than in dismissal. This threshold is high enough to filter out SLAPPs from making it to court. This approach has also been recommended by the UK Anti-SLAPP Coalition in response to the UK Government's July 2022 proposals to bring forward legislative responses in England and Wales.
Recommendations:
• Amend to: "the court shall dismiss the proceedings without continuing to a full hearing, **if it can be reasonably determined to have been filed with an improper purpose**; it shall be for the plaintiff in the original proceedings to satisfy the Court that they are not **filed with an improper purpose"**; • If it is decided to maintain the formulation of 'manifestly unfounded', the head should also include a definition of this term, which could be formulated as: "Proceedings shall be found to be manifestly unfounded if the plaintiff is unable to establish a prima facie case as to each essential element of the cause of action."

Head 27 -Strategic lawsuits against public participation
As outlined in our response to Head 26, we would urge the government to change head 27 para 2(a) to use the formulation found in Head 26 to ensure there is an objective test that does not establish a threshold that was too high for any threat to meet.
Recommendations:
• Amend head 27, subhead 2(a) in line with head 26

Head 28 -Security for Costs

We support the inclusion of Head 28 to enable courts to, on application by the defendant, require the plaintiff to provide security for costs. However, as Head 30 allows for courts to award damages to the defendant in proceedings deemed to be a SLAPP for harm suffered as a result of the proceedings, we would recommend this draft to be amended in line with Article 8 of the draft EC Anti-SLAPP directive to require the plaintiff to provide security for damages, alongside costs.

Recommendations:

- Amend to: "In proceedings brought under another Part of this Act by a plaintiff against public participation, the Court may, on application by the defendant, require the plaintiff to provide security for costs **and damages**, if it considers appropriate in view of any features of concern, or of any other factors suggesting that the proceedings have been conducted in an abusive manner."

Head 30 -Damages

We support the inclusion of this head, as it enables courts to award damages to the defendant in proceedings deemed to be a SLAPP for harm suffered as a result of the proceedings. This would be a significant acknowledgement of the harm caused (including psychological harm) by SLAPP actions, exacerbated by the time and resources required to mount a defence, alongside the impact on the defendant's ability to continue work, as well as intensive processes such as discovery which can be easily manipulated by SLAPP claimants to drain effort, resources, and resolve. This would also be a strong disincentive for SLAPP claimants from bringing vexatious legal threats due to the increased risk of having to pay damages to the defendant. In the UK Model Anti-SLAPP Law prepared by the UK Anti-SLAPP Coalition, ensuring the costs for SLAPP filers are sufficiently high to deter further SLAPPs is one of the three key conditions that should be met by any legislative response to SLAPPs.

As outlined in the draft, this head is underpinned by Article 15 of the draft EC Anti-SLAPP Directive published in April 2022, which stated that Member States shall take the necessary measures to ensure that a natural or legal person who has suffered harm as a result of an abusive court proceedings against public participation is able to claim and to obtain full compensation for that harm. However, in the most recent compromise proposal we have reviewed, this article has been removed, leaving it to Article 14 (award of costs) and Article 16 (penalties) to provide a meaningful deterrent. Unfortunately, the compromise proposal weakens both of these provisions, leaving it uncertain as to whether or not those who engage in the use of SLAPPs will be sanctioned - and ambiguous as to what form these sanctions will take. It is our position that Ireland should not follow the path outlined in the compromise position as it severely weakens the ability of the bill to dissuade future SLAPP threats or actions.

Recommendations:

- Retain Head 30 to ensure courts can award damages to the defendant in proceedings deemed to be a SLAPP for harm suffered as a result of the proceedings.

Other: Civil Legal Aid

Irish law currently excludes defamation actions from legal aid. S.28 of the Civil Legal Aid Act 1995 assigns 'defamation' as a "designated matter" that is excluded from legal aid with a limited exception in 28(9)(b). The exclusion of defamatory legal actions from the civil legal aid scheme is a disincentive to defend defamatory actions. A person is more likely to withdraw a statement rather than defend it without proper legal representation, creating a chilling effect on speech.

When it comes to an individual defending his right to freedom of expression against a claim of defamation, there may be a significant imbalance of power if the person alleging the defamation has deep pockets. The same can be said of wealthy individuals who threaten others with actions for defamation. Without legal aid, action or defence under the Defamation Act is safe only for those who can financially afford to risk legal costs. This threatens the constitutional right of everyone to equality before the law.

It is also contrary to Article 6 of the ECHR, which provides that everyone is entitled to "a fair and public hearing" in the "determination of his civil rights and obligations". In *Steel and Morris*, the CJEU found that the UK's blanket exclusion of defamation proceedings from the remit of civil legal aid infringed Article 6 rights. It is highly likely that some of the provisions of the *Civil Legal Aid Act, 1995* are incompatible with the ECHR in this context.[3]

The practical effect of this exclusion may disproportionately affect marginalised groups in Ireland. The Committee on Economic, Social and Cultural Rights stated in its concluding observations on Ireland's 3rd periodic report that:

> *"The Committee is concerned at the lack of free legal aid services, which prevents especially disadvantaged and marginalized individuals and groups from claiming their rights and obtaining appropriate remedies, particularly in the areas of employment, housing and forced evictions, and social welfare benefits. The Committee recommends that the State party ensure the provision of free legal aid services in a wide range of areas, including by expanding the remit of the Civil Legal Aid Scheme."*[4]

This matter was discussed in the report of the Review of the Defamation Act under the heading 4.6, "Costs and accessibility of defamation actions". The report found that the prohibitively high costs of defamation actions were a barrier to accessing justice. As a result, the report recommended to;

> *"Remove the exclusion of defamation from the Civil Legal Aid Act 1995; this issue together with the relative priority to be afforded to defamation cases to be considered within the forthcoming overall review of civil legal aid."*

Recommendations:

- To ensure proper compliance with the ECHR, and to enhance access to justice, we reiterate our recommendation for the removal of 'defamatory actions' as a 'designated matter' excluded under the Civil Legal Aid Act as part of the ongoing review process.

[3] FLAC, "Accessing justice in hard times: The impact of the economic downturn on the scheme of civil legal aid in Ireland" (Free Legal Advice Centres January 2016),

[4] UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the 3rd periodic report of Ireland : Committee on Economic, Social and Cultural Rights* (55th sess. 2015 Geneva),

Houses of the Oireachtas
Leinster House
Kildare Street
Dublin 2
D02 XR20

www.oireachtas.ie
Tel: +353 (0)1 6183000 or 076 1001700
Twitter: @OireachtasNews

Connect with us

Download our App

Download on the App Store

GET IT ON Google Play