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OPENING STATEMENT TO THE OIREACHTAS JOINT  
COMMITTEE ON JUSTICE

# GENERAL SCHEME OF THE DEFAMATION (AMENDMENT) BILL

JUNE 2023

**OPENING STATEMENT OF THE COUNCIL OF THE BAR OF IRELAND**  
**TO THE OIREACTHAS JOINT COMMITTEE ON JUSTICE**  
**TO DISCUSS THE GENERAL SCHEME OF THE DEFAMATION (AMENDMENT) BILL**

**Introduction**

The Council of The Bar of Ireland (“the Council”) welcomes the invitation to attend before the Oireachtas Joint Committee on Justice to discuss the proposed amendments to the law, arising out of the review of the current law relating to defamation. The Council hopes to be of assistance to the Oireachtas Joint Committee in their endeavours.

Defamation law remains a key area of law within Ireland. Effective law on the tort of defamation requires, on a broad level, respect between the competing right to a citizen’s good name, free from unjust attack, and the counterbalance of the right to the freedom of expression. These are Constitutionally protected rights.

It is a matter of considerable public importance as well as being a central part of a properly functioning democracy, that the law effectively manages to balance those competing rights.

However, the implementation of practical, workable and fair legislation (in concert with established common law norms) is a difficult and complicated matter. The strengthening of the rights of one citizen can lead to the unfair weakening of the rights of another citizen.

The Council of The Bar of Ireland, as the accredited representative body of the independent referral Bar in Ireland, represents experienced and expert practitioners in the area of the law of defamation. Its members represent parties across all aspects of the tort of defamation including individual citizens, established members of the print and broadcast media as well as members of social media who publish material on a daily basis. However, as we have pointed out in our written submission, the vast majority of cases do not include members of the press.

As a representative body it would not be appropriate for the Council to take a definitive view of the General Scheme of the Defamation (Amendment) Bill (“the General Scheme”) as a whole. It is acknowledged that the complexities in the law of defamation are many and that reform in the area is needed. However, the Council also observes that the amendments proposed in the General Scheme are significant, far reaching in nature and appear to be weighted more in favour of the Defendant than the Plaintiff.

Many of the issues identified within the General Scheme are legally extremely complicated and are perhaps matters more appropriately dealt with by those drafting the legislation. The Council’s written submission sought to focus on particular areas where the Council feels that the Oireachtas may wish to give greater consideration to the amendments being proposed.

The Council draws particular attention to three key areas as follows;

1. The proposed removal of Juries in High Court Defamation matters;
2. The proposed introduction of a serious harm test; and
3. The proposed amendments in the areas of the Section 26 Defence.

## **1. Removal of Juries**

Perhaps the most significant proposal centres on the removal of Juries in High Court Defamation matters. On the whole the Council would not be supportive of the total abolition of the role of the jury in Defamation cases. Juries can and do play a key role in this area of Civil Law and the total abolition of their role, it is feared, could or would lead to a general increase in the cost of litigation. In particular it may lead to an increase in applications at the preliminary stages, prior to trial.

The Abolition of Juries would also remove the important peer review element central to both parties in any case, whereby a Plaintiff's reputation can be vindicated, or a Defendant's publication can be assessed, by a jury of their peers.

## **2. Serious Harm Test**

A further area where the Council sought to make observations concerned the proposed introduction of a serious harm test, in certain circumstances.

In the first instance it is questionable as to whether there is a need for the introduction of such a test at all. In general, it can be said that sitting Judges have been successful in identifying claims which can be described as unmeritorious.

Further, as matters stand, there is no definition of the meaning of "serious harm" at this stage as regards the personal litigant and nor is there an identified applicable test that one must satisfy to initiate litigation.

While it may be a matter more properly for those drafting the legislation, it must be borne in mind that any litigant who satisfies the serious harm test, must therefore by extension, be entitled to a level of compensation commensurate with the serious nature of the harm inflicted. It is the position of the Council that the technical nature of such a test, were it to be introduced, would have the unintended consequence of increasing both the cost of litigation and the level of damages. There is some evidence from the United Kingdom that the introduction of the serious harm test in that jurisdiction has increased the costs associated with defamation litigation.

## **3. Section 26 Defence**

The Council also identified the proposed amendments in the areas of the Section 26 Defence and the area of Strategic Lawsuits against Public Participation (SLAPP) as being worthy of further consideration prior to their being included in any draft legislation.

The amendments proposed to section 26, in Head 16 of the General Scheme, while clearly identifying the difficulties of the current legislation, are far reaching and will, it is submitted, render the "defence" only open to the media rather than the general public. It is the Council's view that the law should be, where possible, as consistent as possible for all parties involved.

The implementation of any anti-SLAPP measures in the legislation in advance of the finalisation of the EU Directive on the issue and formulation of a uniform approach across the EU would be unwise.

**Closing remarks**

The Council remains committed to being part of the process of ensuring that any amendments being proposed in the area of the law of Defamation are workable, balanced and align to the notion that all the engaged Constitutional rights of the Citizen are respected and vindicated.



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