

## MEMORANDUM

To: Joint Committee on Justice

From: Dentons

Date: 15 June 2023

Subject: Opening Statement to the Joint Committee on Justice in relation to the General Scheme of the Defamation (Amendment) Bill

1. Thank you for the opportunity to participate in this meeting of the Joint Committee on Justice in relation to the General Scheme of the Defamation (Amendment) Bill.
2. I am Karyn Harty, Head of Disputes at Dentons Ireland. I serve as Global Co-Chair for Disputes at Dentons, which I joined in 2022 after 24 years with an Irish law firm, and I have specialised in media defence for more than 25 years, representing a wide range of international newspapers, broadcasters, magazines and book publishers and more recently a number of different digital media companies. I am also a regular speaker on the use of technology for legal services and served on IBEC's AI Advisory Committee. I am joined today by my colleague Lesley Caplin, Of Counsel at Dentons who has specialised in media defence for 17 years and is an experienced civil jury practitioner. Lesley represents a wide range of clients, including broadcasters, digital platforms, newspapers and publishers with a particular focus on digital media.
3. Dentons' media practice globally focuses on media defence and we do not as a rule take claims against media organisations. We recognise that the Constitution guarantees a number of competing rights, including freedom of expression and the right to one's good name, and we have sought to have regard to the need to balance rights in preparing our submissions.
4. The proposal to reform the Defamation Act 2009 (**the 2009 Act**) is welcome. The legislation is not operating as it should and Ireland's defamation regime in its current form is detracting from, rather than contributing to, the free and fair circulation of news and other discourse, which is so fundamental to our democratic system. As legal practitioners, we are perhaps uniquely placed to speak to aspects of the Act that don't work as well as they should and to highlight potential roadblocks in respect of the changes proposed in the draft provisions. In making written submissions to the Committee, Dentons has sought to assist its work by suggesting alternative approaches that may be more workable, or at least less vulnerable to challenge.
5. In general we support the scheme of the proposed reforms but there are aspects of the proposed changes that seem to us either to be unnecessary or likely to give rise to problems. These are discussed in some detail in our submission and we are very happy to answer questions in this regard. We do not, for example, support the **proposal to abolish jury trials** for defamation and we are happy to expand on our thinking in this regard, appreciating that some others in the industry take a contrary view.

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6. Bearing in mind the importance of those affected by this legislation understanding its effect, we favour a **standalone Act**, which would benefit from much greater clarity than amending legislation that could only be properly understood by cross referring to the 2009 Act and other legislation.
7. We are concerned that the **serious harm tests** proposed in the General Scheme may not have the intended outcome in practice, for the reasons set out in our submissions. We have therefore suggested an alternative approach of making defamation claims by companies and public authorities, and claims in respect of retail defamation, actionable only on proof of special damage.
8. We welcome the proposal to make it easier to **strike out** claims for want of prosecution. We have raised a flag in relation to the proposed reworking of the defence of **honest opinion** and we have suggested a further look at the framing of the **offer to make amends regime** in ss 22 and 23 which would benefit from simplification.
9. We fully support the proposal to regulate **SLAPP litigation**, a global phenomenon which seriously impacts investigative journalism and has created pockets of impunity in Ireland and elsewhere, and we have respectfully adopted the submission of Index on Censorship in this regard.
10. In closing these opening remarks, we would emphasise that it is also essential that any new defamation regime has regard to **evolving technologies** and is consistent with the Digital Services Act and the forthcoming Artificial Intelligence Act, while also being aligned with the new Media Commission and its mechanisms for resolving complaints about on-line content (which have yet to be announced).
11. We look forward to assisting the Committee with its deliberations.

**Karyn Harty and Lesley Caplin**

**Dentons Ireland LLP**