THE BAR
OF IRELAND
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BARRA NA hÉIREANN
An Leabharlann Dlí

SUBMISSION TO THE JOINT COMMITTEE ON JUSTICE

GENERAL SCHEME OF THE DEFAMATION (AMENDMENT) BILL

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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.

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