Ireland Anti-SLAPPs Network

Defamation (Amendment) Heads of Bill Submission

May 2023

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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),