



LAW SOCIETY  
OF IRELAND

SUBMISSION ON THE DRAFT RECOMMENDATION  
OF THE COMMITTEE OF MINISTERS ON  
COUNTERING THE USE OF STRATEGIC  
LITIGATION AGAINST PUBLIC PARTICIPATION  
(SLAPPS)

COUNCIL OF EUROPE

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## Section 1: Introduction

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The Law Society of Ireland is the educational, representative and co-regulatory body for the solicitors' profession in Ireland. The Society is comprised of a number of different Committees with specialist legal expertise in specific areas, such as human rights, litigation, environmental and planning law. These Committees regularly draw on their experience and knowledge to provide submissions and commentary on issues related to the legal profession and their clients, particularly in relation to law reform, access to justice and the rule of law.

The Law Society welcomes the [Draft Recommendation CM/Rec\(20XX\)XX of the Committee of Ministers to member states on countering the use of Strategic Lawsuits against Public Participation \(SLAPPs\)](#) ('the **Recommendation**') and recognises the importance in introducing safeguards against unfounded and abusive litigation. The Recommendation describes SLAPPs as "vexatious and malicious use of legal proceedings to strategically intimidate and ultimately silence anyone wishing to participate in public debate or public affairs, including threatening or taking legal action on fully or partially unfounded claims, and exploiting imbalances in financial, political or societal power while doing so." This form of litigation not only represents an attack upon public participation, but also an attack on the courts system, when the architecture to settle genuine complaints is used to silence and intimidate persons legitimately exercising their rights.

The Law Society welcomes recognition within the Recommendation of the equal importance of rights guaranteed by the European Convention on Human Rights, including the right to freedom of expression, the right to a fair trial, the right to respect for private and family life, and the right to an effective remedy. Any proposed measures should not restrict access to justice and access to the courts for legitimate cases, nor interfere with the independence, quality and efficiency of national justice systems that are crucial for the achievement of effective justice.<sup>1</sup>

The Law Society is concerned that discourse around SLAPPs has, in some cases, led to increased hostility towards lawyers. This is particularly unsettling given the current environment, as the UN Special Rapporteur on the independence of judges and lawyers has noted increasing widespread efforts to target lawyers, such as threats, arrests and prosecutions, including using abusive litigation.

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<sup>1</sup> CCBE position on abusive litigations targeting journalists and right defenders (10 December 2021) available at: [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/ACCESS\\_TO\\_JUSTICE/ATJ\\_Position\\_papers/EN\\_AtJ\\_20211210\\_CCBE-Position-on-abusive-litigations-targeting-journalists-and-right-defenders.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ACCESS_TO_JUSTICE/ATJ_Position_papers/EN_AtJ_20211210_CCBE-Position-on-abusive-litigations-targeting-journalists-and-right-defenders.pdf)

However, the Law Society is cognisant of the unique position of lawyers within the context of SLAPPs and their responsibility to uphold their professional and ethical values when engaging in their professional duties. While including tackling the threat of SLAPPs within her mandate<sup>2</sup>, the UN Rapporteur stated that:

*“International human rights law requires that States create independent and impartial legal systems that guarantee that no one is above the law, no one is outside the protection of the law and no one is excluded or harmed by the law”.*<sup>3</sup>

This submission looks at the development of Strategic Lawsuits against Public Participation internationally, across Europe and within Ireland. It provides a discussion on the role of lawyers in SLAPPs before arriving to an analysis of the proposed Council of Europe Recommendation and issuing of recommendations therein.

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<sup>2</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite, on “Reimagining justice: confronting contemporary challenges to the independence of judges and lawyers” A/HRC/53/31 (13 April 2023) para 52

<sup>3</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite, A/HRC/53/31 (13 April 2023) para 5.

## Section 2: Strategic Lawsuits against Public Participation

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The term ‘strategic lawsuits against public participation’ was developed in the 1980s by academics researching lawsuits taken against non-governmental organisations and community groups in the United States.<sup>4</sup> Since then, the phenomenon has become more widespread, resulting in calls for stronger protections against manifestly unfounded and abusive lawsuits across Europe.

In November 2021, the European Parliament made a [resolution](#) to strengthen democracy, media freedom and pluralism in the EU, which contained a number of proposed measures to protect persons against the threat of SLAPPs. It recognised that such abusive litigation severely undermines the right of effective access to justice for victims of SLAPPs, threatens the rule of law, and constitutes a misuse of Member States’ justice systems and legal frameworks. The European Parliament subsequently launched the [draft Directive](#) and the European Commission [Recommendation](#) on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings (further discussed in section 4).

The European Commission’s Rule of Law Report 2022 notes that:

*“Strategic lawsuits against public participation (SLAPPs) are a particular form of harassment used against journalists and rights defenders engaged in public participation on matters of public interest. This phenomenon has been gaining ground in the EU. Effective safeguards are needed to prevent such harassment from silencing journalists and create a chilling effect on media freedom and freedom of expression. Defamation is one of the most common grounds on which SLAPPs are brought against journalists.”<sup>5</sup>*

The [Business & Human Rights Resource Centre](#) identified 355 potential SLAPP cases brought or initiated by business actors since 2015 against individuals and groups related to their defence of human rights and/or the environment. The highest number of SLAPPs took place in Latin America (39%), followed by Asia and the Pacific (25%), Europe & Central Asia (18%), Africa (8.5%), and North America (9%).

The [Coalition against SLAPPs in Europe](#) (CASE) reported that SLAPP cases are rising across Europe year on year. According to their 2022 report, such cases are initiated in countries with

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<sup>4</sup> Penelope Canan and George W. Pring, “Strategic Lawsuits against Public Participation,” *Social Problems* 35, no. 5 (December 1988): 506-519.

<sup>5</sup> Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions 2022, Rule of Law Report: The rule of law situation in the European Union COM/2022/500 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022DC0500>

strong democracies and those with critical rule of law concerns, with a common factor being the abuse of existing laws to intimidate and harass those who speak out and actively participate in the civic space.

Snezana Green, senior legal counsel at the Media Development Investment Fund, stated that:

*“The practice of abusing legal systems by those in power to silence critics has reached global proportions. Its damage is far-reaching and curbing it is an imperative for democracy and maintaining peace.”<sup>6</sup>*

The significant rise in abusive litigation has led to developments nationally and internationally to curb the harmful effects of SLAPPs on individuals and justice systems.

## Section 3: SLAPPs in the Irish Context

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The Law Society is aware of increasing reports of suspected abusive litigation initiated in Ireland, primarily against journalists, activists and environmental defenders. The Irish Government has attempted to introduce legislative reforms to protect persons against abusive litigation within the context of defamation, as will be discussed below.

### Journalists

In 2022, CASE identified Ireland as a jurisdiction of concern for SLAPPs, amongst Croatia and Malta.<sup>7</sup> Article 19, an international human rights organisation that defends and promotes freedom of expression and freedom of information worldwide, examined the prevalence of SLAPPs across a number of European countries in their [2022 report](#). They found that the majority of SLAPP cases in Ireland are brought under the tort of defamation. In regards to Ireland, the [report](#) states that:

*“Research suggests that 80% of all defamation cases are brought against the media, indicating that defamation laws are widely used to restrict reporting that speaks truth to power. The duration and cost of proceedings, along with the fact that juries that hear cases often award very high sums in damages, have a significant chilling effect on the media – as noted by the Press Council as well as by the Press Ombudsman. A 2016*

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<sup>6</sup> Snezana Green, “SLAPPs and Legal Harassment: A Scourge that Must Be Stopped,” Media Development Investment Fund, December 3, 2021, <https://www.mdif.org/slapps-and-legal-harassment-a-scourge-that-must-be-stopped/>.

<sup>7</sup> *Shutting Out Criticism: How SLAPPs Threaten European Democracy: A report by The Coalition Against SLAPPs in Europe*, March 2022, available at: <https://www.the-case.eu/wp-content/uploads/2023/04/CASEREportSLAPPsEurope.pdf> Accessed 06/07/23

*survey showed that between 2010 and 2015, Irish media spent more than EUR 30 million defending defamation actions (in awards, settlements, as well as legal costs)."*

The International Press Institute (IPI) [reported](#) in March 2023 that affluent and powerful persons often use Ireland's legal system to influence reporting about them. Journalists and representatives from civil society organisations anonymously disclosed proceedings or threats made against them to the IPI. These cases included a survivor of sexual abuse receiving a pre-action letter of potential defamation proceedings in advance of speaking at a public event, and a small publishing company receiving four pre-action letters warning of defamation proceedings in response to their coverage of Ireland's housing crisis. In the latter case, the majority of the letters received represented persons with commercial interest in the housing sector.<sup>8</sup>

In September 2020, the [European Centre for Press and Media Freedom](#) (ECPMF) and other organisations, wrote to the Ministers for Justice and Minister for Foreign Affairs raising concerns about proceedings issued against a media organisation in respect of a report on an eviction in Dublin. The [letter](#) expressed belief that the proceedings constituted a SLAPP with the intention to "intimidate and silence an independent media outlet... in an effort to discourage them from reporting further on a particular person or issue." This incident was subject of a [Media Freedom Alert](#) to the Council of Europe. Ireland has been the subject of [media freedom alerts](#) involving proceedings taken against journalists by a number of politicians.

#### Defamation (Amendment) Bill

The Irish Government published the [Draft General Scheme of the Defamation \(Amendment\) Bill](#) ('the **Bill**') in March 2023. The Bill makes significant changes to defamation law and includes a new Part 5 that introduces measures against abusive litigation to restrict public participation. The proposed legislation provides that defamation proceedings which are brought in relation to an act of public participation by a defendant, the defendant may apply to the court for either early dismissal of the proceedings or, on the full hearing, a number of remedies including a declaratory order that the proceedings constitute a SLAPP.

In deciding any proceedings brought under Part 5 of the [Bill](#), the Court shall take into account:

*"(a) the right to freedom of expression and information, and the actual or potential chilling effect of the proceedings on freedom of expression;*

*(b) the right to vindicate one's good name, and the gravity of the defamation claimed;*

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<sup>8</sup> International Press Institute, Ireland: How the wealthy and powerful abuse legal system to silence reporting (March 2023) available at: <https://ipi.media/ireland-how-the-wealthy-and-powerful-abuse-legal-system-to-silence-reporting/>

- (c) the importance of public participation in the public interest,*
- (d) the right of both parties to seek an effective remedy through litigation;*
- (e) the public interest in deterring abusive litigation, and*
- (f) the extent to which the proceedings against public participation can be managed by the court in an efficient and proportionate manner.”*

The above checklist provides safeguards to ensure the correct balance of fundamental rights of both the applicant and defendant. The Bill largely takes into account the legislative proposal for an EU [Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings \(“strategic lawsuits against public participation”\) \(COM/2022/177\)](#). For example, the Bill provides similar definitions of “acts of public participation” and “public interest” which are based on Article 3 of the proposed Directive. The Bill also identifies ‘features of concern’ to help courts in identifying a SLAPP suit, which are based on Article 3.3 of the proposed EU Directive and on the UK Ministry of Justice paper of 20 July 2022 on proposed legislative action against SLAPPs, [‘Strategic Lawsuits Against Public Participation \(SLAPPs\): Government Response to the Call for Evidence’](#).

Ireland Anti-SLAPP Network, a coalition of NGOs and legal experts working together against SLAPPs, appeared before the Oireachtas Joint Committee on Justice to discuss the Defamation (Amendment) Bill 2023.<sup>9</sup> The Network broadly welcomed the proposed Bill, but made a number of [recommendations](#), including that the definition of SLAPPs should be more inclusive, rather than be limited to the “features of concern” and that protections under Part 5 of the Bill should include anyone who is facing existing SLAPPs.

The Law Society made a submission to the Joint Oireachtas Committee of Justice in May 2023 on the General Scheme of the Defamation (Amendment) Bill, available [here](#).

### Environmental Defenders

The UN Special Rapporteur on environmental defenders under the Aarhus Convention, Michel Forst, has warned against the increasing use of SLAPPs against environmental defenders across Europe and the Aarhus region in his [letter](#) from 12 July 2023. The Rapporteur [welcomed](#) steps taken by the European Parliament and European Commission to introduce procedural safeguards against SLAPPs, such as the early dismissal of SLAPP claims, an

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<sup>9</sup> Ireland Anti-SLAPP Network, Opening Statement on behalf of the Ireland Anti-SLAPPs Network Ireland Oireachtas Joint Committee on Justice (July 4th 2023) Pre-Legislative hearings- Defamation (Amendment) Bill 2023, available at: [https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint\\_committee\\_on\\_justice/submissions/2023/2023-07-04\\_opening-statement-jessica-ni-mhainin-index-on-censorship-et-al-iccl-anti-slapps-network\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_justice/submissions/2023/2023-07-04_opening-statement-jessica-ni-mhainin-index-on-censorship-et-al-iccl-anti-slapps-network_en.pdf)

accelerated procedure, procedural costs and damages. Similar procedures are included in the Council of Ministers' Recommendation on SLAPPs.

Aurel Ciobanu-Dordea, Director for Circular Economy in the European Commission's Directorate-General for Environment, [criticised](#) the targeting of Irish environmental organisations who raise environmental concerns, and the “penal and uncertain costs” associated with bringing environment court cases in Ireland. Mr Ciobanu-Dordea [underlined](#) that,

*“A particular concern for us is the increasingly aggressive stance being taken against environmental campaigners in Ireland. There is evidence not only of increased use of SLAPP suits, but also negative reporting in mainstream media, and even from politicians – like threatening to cut off funding to certain NGOs.”*

Eco Advocacy, an Irish non-profit organisation defending environmental law, has commented extensively on SLAPP litigation in environmental matters. The organisation [reports](#) how environmental defenders subject to abusive litigation are placed under enormous pressure due to their public participation in planning and environmental law matters which they often undertake on a voluntary and altruistic basis in defending the public interest. Environmental defenders may incur significant legal fees in defending themselves, and, in some cases, abusive litigants may seek damages and costs in attempts to intimidate the defendant and create a fear of bankruptcy. [Eco Advocacy](#) explains how within the Irish context, the “*solicitors letter*’ is often used as a form of intimidation, but a SLAPP type suit is sometimes resorted to.”

#### Planning and Development Act 2000

Environmental litigation brought by environmental defenders can be particularly complex. An example of this within the Irish context is under [section 160 of the Planning and Development Act 2000](#) (‘the **2000 Act**’), as amended, regarding injunctions in relation to unauthorised developments. Local authorities seldom take enforcement actions under section 160 of the 2000 Act. Instead, private individuals take the majority of actions in this regard. This places the responsibility for taking legal actions against unauthorised developments on private litigants, including the stress, anxiety and cost implications that flow from this course of action. While there are some cost protection arrangements available under [Section 50B of the 2000 Act](#), existing proposals for legislative reform in environmental and planning matters suggest the dilution or removal of cost protections. This would place further obstacles against environmental groups taking public interest and environmental protection actions, often against well-resourced opponents.

The Law Society provided a [submission](#) to the Joint Committee on Housing, Planning and Local Government on the General Scheme of the Housing and Planning and Development Bill 2019. Law Society representatives also appeared before the Joint Committee in [March 2023](#).

### Aarhus Convention

The Aarhus Convention contains a number of limited protections for environmental activists, which comments on the penalisation, persecution or harassment of persons exercising their rights under the Convention.

Article 3.8 of the [Aarhus Convention](#) states:

*“Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.”*

The inclusion of specific protections for public participation in environmental matters within the Aarhus Convention reflects the serious threats that environmental campaigners, and others, face in public participation on environmental matters. It emphasises the obligations placed on state signatories to vindicate and protect rights under the Convention. However, in reality, non-compliance of Article 3.8 of the Aarhus Convention has rarely been engaged in cases brought before the [Aarhus Convention Compliance Committee](#), which perhaps does not adequately reflect the quantity and significance of the challenges faced by environmental defenders.

The parties to the Aarhus Convention recently established a “[Rapid Response Mechanism](#)” for the protection of environmental defenders, the main feature of the mechanism being the appointment of a Special Rapporteur with the power to take immediate action if needed. The Rapporteur’s role is to take measures to protect any person experiencing, or at imminent threat of penalization, persecution, or harassment for seeking to exercise their rights under the Aarhus Convention. Under this new arrangement, members of the public can bring complaints on their own behalf or on behalf of other parties to the Convention to the Special Rapporteur.

While the new Rapid Response Mechanism may provide immediate protection to environmental defenders experiencing harmful acts such as detention or abusive litigation, the overall efficiency of the Aarhus Convention for protection against SLAPPs must be seen as limited.

## Existing Safeguards in Irish Law

Existing protections are present in Irish law, primarily in the civil law context, such as the tort of abuse of process.<sup>10</sup> The courts hold an inherent power to dismiss proceedings which constitute an abuse of process, and, strictly speaking, there is no time limit within which such cases must be dealt. However, the courts have noted that the inherent jurisdiction to strike out proceedings as an abuse of process should only be exercised with great caution.

The concepts that an action may be frivolous or vexatious are inherent in the tort of abuse of process. For example, these terms can be seen in statutory expressions, such as section 50B(3)(a)(b) and (c) of the [2000 Act](#) as amended, which provides that the court may award costs against a party in proceedings (to which this section applies) if the court considers that a claim or counterclaim by the party is frivolous or vexatious, or because of the manner in which the party has conducted the proceedings. Such provisions may well be utilised to combat SLAPP litigation in environmental matters.

## **Section 4: The Role of Lawyers**

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The Law Society recognises the unique position of lawyers within the context of SLAPPs which raises significant questions for legal practitioners and their representative bodies.

The Council of Bars and Law Societies of Europe (CCBE) has conducted extensive research and debate into the issue of SLAPPs and released its position on [abusive litigations targeting journalists and right defenders](#) in December 2021, followed by its position on the [draft Directive and Commission Recommendation](#) in March 2023. The Law Society fully supports the position of the CCBE in relation to abusive litigation, and reiterates this position below.

The CCBE supports efforts to discourage unfounded or abusive court proceedings brought against natural and legal persons because of their engagement in public participation, while also being committed to the rule of law, the right to access to justice and to a fair trial. It stresses the important role of lawyers representing claimants and defendants in cases possibly related to unfounded and abusive court proceedings.

Lawyers hold a key position in ensuring the trust of the public in actions of the courts, which is fundamental in a democratic system governed by the rule of law.

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<sup>10</sup> *Dublin Waterworld Limited v National Sports Campus Development Authority* [2017] IEHC 293.

## Ethical Rules / Code of Conduct

Lawyers are required to respect the key principles of dignity, conscience, integrity and loyalty when carrying out their duties. These principles are prescribed in the [CCBE Code of Conduct and the Charter of Core principles of the European Legal Profession](#) and in the ethical regulations of national Bars and Law Societies. The setting of ethical/deontological rules is the competence of national Bars and Law Societies of Member States and is one of the utmost important cornerstones of self-regulation of the legal profession.<sup>11</sup>

The significance of self-regulation of the legal profession been recognised by the relevant case law of the European Court of Justice<sup>12</sup> and the European Court of Human Rights (ECtHR).<sup>13</sup> In *Jankauskas v. Lithuania*, the ECtHR recognised “that professional associations of lawyers play a fundamental role in ensuring the protection of human rights and must therefore be able to act independently, and that respect towards professional colleagues and self-regulation of the legal profession are paramount”.<sup>14</sup> The UN Special Rapporteur on the independence of judges and lawyers recently recommended that States introduce measures to protect and enhance an independent and impartial judiciary, as well as an independent legal profession.<sup>15</sup>

The Solicitors Regulatory Authority (‘the **SRA**’) is the regulatory body for solicitors in England and Wales and provides an example of national regulation of the legal profession in relation to SLAPPs. The SRA issued a [warning notice](#) in November 2022 to solicitors that expressed concern that solicitors and law firms are pursuing SLAPPs on behalf of their clients.<sup>16</sup> The SRA reminded solicitors of their authority to take action and investigate complaints in respect of abusive conduct, and reminded solicitors of their obligations to comply with the [SRA Principles](#), the [Code of Conduct for Solicitors](#) and the [Code of Conduct for Firms](#). It states that:

*“We expect you to be able to identify proposed courses of action (including pre-action) that could be defined as SLAPPs, or are otherwise abusive, and decline to act in this way. We expect you to advise clients against pursuing a course which amounts to abusive conduct, including making any threats in correspondence which are unjustified or illegal.”*

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<sup>11</sup>[https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/ACCESS\\_TO\\_JUSTICE/ATJ\\_Position\\_papers/EN\\_AtJ\\_20211210\\_CCBE-Position-on-abusive-litigations-targeting-journalists-and-right-defenders.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ACCESS_TO_JUSTICE/ATJ_Position_papers/EN_AtJ_20211210_CCBE-Position-on-abusive-litigations-targeting-journalists-and-right-defenders.pdf)

<sup>12</sup> *Reisebüro Broede* (case C-3/95), 12.12.1996, § 38; *Wouters* (case C-309/99), 19.02.2002, § 97).

<sup>13</sup> ECtHR, *Jankauskas v. Lithuania* (case n° 50446/09), 27.06.2017, § 78

<sup>14</sup> *Ibid.*

<sup>15</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite, on “Reimagining justice: confronting contemporary challenges to the independence of judges and lawyers” A/HRC/53/31 (13 April 2023) para 74.

<sup>16</sup> The SRA defines SLAPPs as “an alleged misuse of the legal system, and the bringing or threatening of proceedings, in order to harass or intimidate another who could be criticising or holding them account for their actions and thereby discouraging scrutiny of matters in the public interest. The key aim of a SLAPP is to prevent publication on matters of public importance, such as academic research, whistleblowing or campaigning or investigative journalism. Claims of defamation or invasion of privacy are the causes of action most associated with SLAPPs, but other causes of action (such as breach of confidence) could also be used for this purpose.” Source: <https://www.sra.org.uk/solicitors/guidance/slapps-warning-notice/>

The SRA provides a list of '[behaviours](#)' it considers to be a matter of concern and likely to result in regulatory action against solicitors that undertake such actions, which includes: seeking to threaten or advance meritless claims, making unduly aggressive and intimidating threats, such as threats which are intended to intimidate recipients into not seeking their own legal advice, and sending an excessive number of letters that are disproportionate to the issues in dispute and the responses received.

The President of the Law Society of England and Wales, I. Stephanie Boyce appears to welcome the above approach and [stated](#) "*action is needed against SLAPPs to prevent potential abuses of the administration of justice*". The Law Society of England and Wales [recognises](#) that reforms need to strike the right balance between freedom of speech – particularly concerning the public interest – and the right of businesses and individuals to protect their reputation against false allegations.

While national Bars and Law Societies could be encouraged to introduce measures against abusive litigation within their code of conducts, any monitoring or sanctions related therein must fall under the remit of lawyers respective independent regulatory and supervisory bodies.

#### Proposed EU Directive on SLAPPs

On Tuesday, 11 July 2023, the [European Parliament](#) accepted the following amendments to the proposed draft EU Directive on SLAPPs, which concern the training of legal practitioners and deontological rules for legal professionals.

##### ***Article 18h (new) - Training of practitioners***

- 1. With due respect for the independence of the legal profession, Member States shall recommend that those responsible for the training of lawyers make available both general and specialist training to increase the awareness of strategic lawsuits against public participation and the procedural safeguards against them provided for in this Directive.*
- 2. Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall request that those responsible for the training of judges make available both general and specialist training to increase the awareness of judges of the needs of natural or legal persons engaging in public participation.*
- 3. Through their public services or by funding SLAPP support organisations, Member States shall encourage initiatives enabling those providing support to*

*those targeted by manifestly unfounded or abusive court proceedings against public participation to receive adequate training.*

**Article 18j (new) - Deontological rules for legal professionals**

*Member States shall, with due respect for the independence of the legal profession, encourage the adoption by professional associations of deontological rules that guide the conduct of legal professionals to discourage the taking of abusive lawsuits against public participation, and where appropriate, considering measures to address any violation of those rules.<sup>17</sup>*

Although the legislation process is still ongoing, the above amendments highlight growing concern amongst legislators on the role of lawyers in SLAPPs.

The Law Society welcomes the amendments to the draft Directive and recognises the need for increased efforts to prevent abusive litigation and measures to restrict those from participating in same. However, the Law Society reiterates the point that the setting of ethical/deontological rules is the competence of national Bars and Law Societies of Member States and is considered the cornerstones of self-regulation of the legal profession. Any attempts by government or legislators to impose mandatory measures or monitoring powers on lawyers in this regard would jeopardise the respected independence of the legal profession.

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<sup>17</sup> [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0264\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0264_EN.html)

## Section 5: Observations on the Appendix to Recommendation CM/Rec(20XX)XX

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This section provides an analysis of the relevant sections contained under the Draft [Recommendation CM/Rec \(20XX\) XX](#) of the Committee of Ministers to Member States on countering the use of SLAPPs.

### Key Terms

#### *Public interest and public participation*

The Law Society welcomes the definition of the ‘public interest’ and ‘public participation’ which are sufficiently broad and comprehensive. In particular, we support the specific mentioning of legal professionals when defining ‘public participation’ and the recognition of legal activities with the purpose of advancing social change as being encompassed under such activities. In relation to the definition of ‘public interest’, we propose that this be examined carefully in light of the Irish experience of SLAPP litigation, which focuses largely on defamation claims. The definition states that:

*“The public interest extends to issues which may give rise to considerable controversy but it cannot be reduced to the public’s thirst for information about the private life of others, or to an audience’s wish for sensationalism or voyeurism.”*

While supportive of the general scheme of the statement, we would caution that safeguards be put in place to ensure it is not leveraged to create a loophole in protections, as within the context of defamation, the distinction between private and public life can be blurry.

#### *SLAPP indicators*

The inclusion of SLAPP indicators under paragraph 8 are particularly useful, and support the statement recognising that not all of the listed characteristics will be found in SLAPPs.

Under paragraph 8, subsection (ii), it states,

*“the arguments put forward by the claimant are aggressively formulated partially or fully unfounded.”*

The Law Society suggest that this section be divided into two separate sections as follows:

- 1. The arguments put forward by the claimant are aggressively communicated, and*
- 2. The arguments put forward by the claimant are partially or fully unfounded.*

Both of the above points are considered separate indicators given that they relate to different issues: aggressive communication and unfounded claims. The text at present is relatively confusing and may benefit from the amendment proposed above.

### **Recommendation**

The Law Society recommends that paragraph 8 (ii) of the Annex on SLAPP indicators provide for two separate indicators on aggressive communication and unfounded claims.

### Legal Framework

The Law Society welcomes this section and supports the call for Member States to ensure their national legal systems provide a comprehensive legal framework to prevent and minimise the harmful impact of SLAPPs. As previously discussed, Ireland has taken steps to implement anti-SLAPP measures under the proposed [Defamation \(Amendment\) Bill](#). We further welcome the European Parliament's proposed Directive on SLAPPs which would introduce a uniform approach to cross-border SLAPPs across the European Union.

### Procedural Safeguards

The procedural safeguards identified under this section are effective case management, early dismissal of claims, stay of proceedings, accelerated procedure, procedural costs and damages, cost shifting and discontinuation of cases upon death of the defendant.

The Law Society welcomes the proposed procedural safeguards, and recognises that similar provisions are currently being legislated for in Ireland in relation to defamation claims under the proposed Defamation (Amendment) Bill.

Effective case management is a vital component of any robust mechanism to target abusive litigation and should be utilised in cases where suspicions of SLAPP litigation arise. Court delays and procedural inefficiency can be a powerful tool used by litigants bringing SLAPP suits to increase costs for defendants and elongate the litigation process.

Early dismissal of claims against public participation is also another welcome development. This has been addressed in the draft Defamation (Amendment) Bill which envisions that an application for early dismissal can be made at any stage and that the court:

1. Must dismiss if it is satisfied that the proceedings are 'manifestly unfounded' and
2. May dismiss if not satisfied that they are manifestly unfounded, but is satisfied that they exhibit 'features of concern' typical of abusive proceedings.

The bill reflects the European Commission's proposed Directive and strikes a careful balance between the rights of individuals to vindicate their name and protection from SLAPP litigation.

Procedural costs, damages and costs shifting are significantly important and may help reduce the financial impact on persons targeted with SLAPPs. The Annex proposes that Member States introduce rules to ensure that in court proceedings against public participation, judicial and other authorities have the power to require the claimant to provide security for procedural costs, or for procedural costs and damages, if it considers such security appropriate in view of the presence of SLAPP indicators. We support the proposal that specific legislative provision be made for security for costs where the elements of SLAPP litigation are present.

Paragraph 37 of the Annex regarding discontinuation of cases upon death of the defendant is an aspect that may give rise to concern. We support the proposal that there should be a discontinuation of claims against public participation upon the death of the defendant. However, we would caution that such a discontinuation should be at the discretion of the court, by way of motion, and discontinuation should apply only where a court is satisfied that the litigation was a SLAPP suit.

#### **Recommendation**

The Law Society recommends that the discontinuation of claims against public participation upon the death of the defendant should ensure that such discontinuation is at the discretion of the court, by way of motion, and should apply only where a court is satisfied that the litigation was a SLAPP suit.

#### Remedies

Paragraph 38 of the Annex calls for Member States to ensure that those defending acts of public participation in court are eligible for legal aid. While we support this point in principle, we note that it be difficult to implement in practice unless sufficient resources are allocated to national providers of legal aid, such as the Legal Aid Board in Ireland. Potential victims of SLAPP litigation must be assured of legal aid at the earliest possible stage of proceedings. However, this comes with obvious difficulties, such as the early identification of SLAPP suits and the current delays at the Legal Aid Board in Ireland for initial consultations.

Paragraph 39 of the Annex proposes that Member States make adequate provision for SLAPP victims to be fully compensated for damages incurred as a result of the SLAPP, covering both material and immaterial damages, such as loss of income and emotional distress. This would be a powerful disincentive to abuse of the court system and would have a dissuasive effect

on potential SLAPP litigation. Similarly, the draft Defamation (Amendment) Bill requires that where a case has been adjudicated to be a SLAPP, the “*applicant shall be entitled to recover full compensation for any harm suffered as a result of the application, or of those proceedings, from the plaintiff.*”

Paragraph 40 of the Annex proposes that Member States provide for the capping of immaterial damages to be recuperated by claimants, in order to pre-empt abusive or disproportionate financial penalties for the defendants, which would cause a chilling effect on their public participation, and to avoid creating financial incentives for filing legal action. In an Irish context, this proposal would most affect awards for defamation. The scale of defamation awards in Ireland has attracted significant public and academic commentary, as previously discussed.

### **Recommendation**

The Law Society recommends that sufficient resources be allocated to national providers of legal aid, such as the Legal Aid Board in Ireland, to ensure that those defending acts of public participation have sufficient early access to legal advice.

### Culture of Transparency

Paragraphs 43 to 45 of the Annex recommend that Member States introduce measures to provide that judges order publication of courts’ findings that a case was a SLAPP, alongside the names of the legal or natural persons who filed the SLAPP, in compliance with existing European human rights and data-protection standards. This reflects the current procedure in the Irish courts where written judgements are public as a matter of course, unless there is a reason not to publish.

The Law Society supports the proposal under paragraph 44 for data gathering on SLAPP cases and for a public register to be maintained of cases that have been classified as SLAPPs in compliance with existing European human rights and data-protection standards.

### Support for targets and victims of SLAPPs

Paragraph 47 of the Annex recommends that Member States consider providing adequate access to free legal assistance to targets of SLAPPs, and encourage and financially empower independent organisations specialising in legal support to provide SLAPP targets with legal services.

The Law Society fully supports such measures and re-emphasizes the importance of access to early legal aid for victims and the requirement for additional funding for legal aid, where

required, in order to be effective. It is important to ensure that high quality legal support and assistance is easily obtained and accessible. There is a strong role for lawyers to provide this assistance.

#### Education, training and awareness raising

Paragraphs 52 to 54 of the Annex issue recommendations in relation to education, training and awareness-raising on SLAPPs. It proposes the provision of tailor-made training of legal professionals and relevant public authorities, taking into account the established case-law of the ECtHR, the existing procedural tools and the substantive standards. It further encourages awareness-raising activities to stress the importance of acting in accordance with legal professional ethics as the first shield against SLAPPs.

The Law Society fully supports this recommendation, recognising the importance for lawyers to respect the core values of the profession and their respective ethical/deontological rules.

#### **Recommendation**

- The Law Society fully supports the proposed recommendation on introducing education, training and awareness raising on the issue of SLAPPs for legal professionals and members of the public.
- The Law Society recognises the importance for lawyers to respect the core values of the profession and their respective ethical/deontological rules.

#### Additional Recommendations

The Recommendation seeks to impose additional powers and responsibilities on the judiciary, such as effective case management and the expedient consideration of requests for early dismissal of claims against public participation. The introduction of these changes will require further judicial resources in certain jurisdictions. The Law Society therefore encourages additional judicial appointments to enable these changes to be fully and properly implemented.

#### **Recommendation**

The Law Society recommends the allocation of additional judicial appointments, where necessary, to ensure the additional powers and responsibilities of the judiciary under the Recommendation are fulfilled.

## Section 6: Conclusion

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The issue of strategic litigation against public participation is evidently becoming more widespread with harmful impacts on persons across many different professions and roles. Journalists, environmental defenders and lawyers are increasingly becoming targets of SLAPPs with an increase in cases also being reported in Ireland. The fact that this phenomenon is expanding is particularly concerning given that abusive litigation endangers democratic societies by undermining the proper administrative of justice and constitutes a misuse of Member States' justice systems and legal frameworks.

The Law Society supports the measures taken by the European Union and the Council of Europe to tackle SLAPPs, particularly through encouraging the introduction of procedural safeguards and remedies for targets as contained in the Council of Ministers' Recommendation. The Law Society welcomes the encouragement of professional associations to adopt deontological rules that guide the conduct of legal professionals to discourage the taking of abusive lawsuits against public participation, as seen under the new Article 18j of the draft EU Directive. However, any monitoring or sanctions related therein must fall under the remit of lawyers' respective independent regulatory and supervisory bodies.

Overall, the Law Society is satisfied with the Council of Europe Recommendation and is encouraged by efforts to protect those most vulnerable from abusive litigation.



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