

Consultation Response

A Scottish Government Consultation on Strategic Lawsuits Against Public Participation

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Access to Justice and Civil Justice Committees welcome the opportunity to consider and respond to the Scottish Government Consultation on Strategic Lawsuits Against Public Participation¹. We have the following comments to put forward for consideration.

1. Have you been affected by SLAPPs in Scotland, either personally or in the course of your employment? If yes, please provide details.

As a professional body, this question is not applicable.

2. If you have experienced a SLAPP, how did the matter resolve (if it has resolved)?

See response to question 1.

3. If you have experienced a SLAPP, what was the impact on you personally and/ or the work you were undertaking at the time?

See response to question 1.

4. Are you aware of, or have you acted on behalf of, an individual or organisation who has benefited financially from bringing a SLAPP? If so, in what way did they benefit financially?

We have no further comments.

5. Should anti-SLAPP legislation be introduced in Scotland? Please provide reasons for your view

We believe that a justice system that maintains the rule of law and ensures public confidence should not tolerate SLAPPs, just as it should not tolerate vexatious actions or abuse of process more generally.

We have been monitoring developments, both the implementation of the Defamation and Malicious Publication (Scotland) Act 2021 in our courts, and also action about SLAPPs in England

¹ [Strategic Lawsuits Against Public Participation \(SLAPPs\) - Scottish Government consultations - Citizen Space](#)

and Wales, and across Europe, including through our work with the Council of Law Societies and Bar Associations of Europe (CCBE).

We are not aware of significant concerns around SLAPPs in Scotland currently, though there have been some suggestions of action proposed in a planning and environment context.

Overall, the number of defamation cases remains low in Scottish courts, though the increasing use of social media platforms increases the risk that comments by individuals or organisations could cause serious harm and see court action brought.

We believe there is a range of non-legislative actions which could be taken to help tackle SLAPPs, complementing or preceding legislative reform:

- Increase awareness among journalists, authors, campaigners, and other civil society actors about SLAPP tactics and risks, so they can recognise and respond to threats effectively;
- Develop networks of pro bono lawyers, legal clinics, and support organisations to assist SLAPP targets with legal advice, representation, and psychological support;
- Collect and publish data on the prevalence, nature, and outcomes of SLAPPs to build the evidence base for further action.

Current Requirements for Solicitors

The [Law Society of Scotland Practice Rules 2011](#) – of which compliance with is mandatory for all Scottish Solicitors – set out requirements of professional and ethical practice.

There are many principles within the Practice Rules; but one stand out principle is to act at all times with trust and personal integrity (Rule B1.2) and to refuse improper instruction by a client (Rule B1.5).

Furthermore, Rule B.1.13 [B1.13: Relations with the courts | Law Society of Scotland](#) sets out that solicitors must maintain due respect and courtesy towards the court while honourably pursuing the interests of their clients. It also confirms that where a solicitor appears against a person who represents themselves, that solicitor must avoid taking unfair advantage of that person and must, consistently with their duty to their client, co-operate with the court in enabling that person's case to be fairly stated and justice to be done.

Separately, there are also powers available to the court, as with vexatious claims or abuse of court processes more generally, which can be used to address SLAPPs.

We would defer to the judiciary on whether current court powers are adequate to address current or future issues around SLAPPs.

6. Do you have any views or evidence on whether any of the measures in other jurisdictions are working effectively? Please provide evidence or reasons for your view.

We appreciate the concerns expressed in the recent petition - [PE1975: Reform the law relating to Strategic Lawsuits Against Public Participation \(SLAPPs\)](#) - and by the Citizen Participation and Public Petitions Committee that Scotland might be considered a venue to bring action, should other jurisdictions reform defamation law or court rules to deter SLAPPs.

Challenges around choice of venue have been raised previously, with the different laws and processes governing defamation law in Scotland and in England and Wales. Raising the threshold for action from harm to significant harm was enacted in England and Wales in 2013, though not in Scotland until 2021. In that intervening period, where the threshold to bring defamation action was lower in Scotland, there was not a significant increase in the number of cases brought in Scotland.

We are aware of other jurisdictions that have anti-SLAPPs law; such as some Provinces in Canada, some states in the USA, and an EU Directive. At this stage there is insufficient evidence to reach a conclusion on their effectiveness.

7. Do you have any views on the applicability or otherwise of approaches in other jurisdictions to Scotland and our legal system? Please provide reasons for your view.

We have no further comments.

8. Are you aware of any other provisions of Scots law that may support someone who is the subject of a SLAPP?

We are aware that Scots law lacks dedicated anti-SLAPP provisions. While general defences in human rights protections may offer some support, they do not provide the procedural tools needed to quickly dismiss SLAPPs or adequately protect those targeted.

Having participated in a number of conversations on SLAPPs, there seems to be an opinion that guidance and protections against SLAPPs should be extended to include a wide range of civil society actors - not just journalists.

Legal aid is not available for defamation actions in Scotland, unless, according to current Scottish Legal Aid Board guidance, “the degree of exceptionality is similar to other cases where the Court of Session, the Supreme Court or the European Court of Human Rights [ECtHR] have ruled that the absence of public funding for representation would be a violation of human rights.”

One of the features of legal aid is that a legally aided party is indemnified against awards of expenses, albeit that these become payable by the Scottish Legal Aid Board.

Though we do not think that this would be an appropriate response to SLAPPs, some consideration could be given to the scope of legal aid in other defamation proceedings, where these are unusually

complex, involve significant financial disparity between parties, and engage issues of human rights and freedom of speech.

9. Can you envisage any conflicts between the Directive and other provisions of Scots law?

We have no further comments

10. Are there any features not included in the Directive that should be considered for inclusion in possible legislation?

We have no further comments

11. In your view, are there any other relevant factors that Scottish Ministers should consider if EU alignment in this area is to be considered?

We have no further comments

12. Are you content with the provision on security for costs and damages set out in Section 4? If not, please give your reasons.

We have no further comments

13. Are you content with the remedies made available to defenders in Sections 5 and 7? If not, please give your reasons.

We have no further comments

14. Are you content with restricting SLAPP pursuer's entitlement to expenses as set out in Section 6? If not, please give your reasons.

We have no further comments

15. Are you content with imposing penalties on SLAPP pursuers as set out in Section 8? If so, what would be an appropriate penalty in Scots law? Please provide reasons for your view.

We have no further comments

16. Are you content with allowing public interest interventions as set out in Section 10? Please provide reasons for your view.

We have no further comments

17. Are Sections 11-12 sufficient to prevent cross-border SLAPPs?

Please provide reasons for your view.

We have no further comments

18. Does the Model law give adequate expression to the EU Directive and Council of Europe recommendation while taking account of the specific character of Scots law? Please provide reasons for your view.

We have no further comments

19. Can you envisage any conflicts between the Model law and other provisions of Scots law? Please provide reasons for your view.

We have no further comments

20. Are there any features not included in the Model law that should be considered for inclusion in possible legislation? Please provide reasons for your view.

We have no further comments

21. (a): Do you prefer the definition of “public participation” as set out in Article 4 of the Directive or Section 1(4) of the Model law or neither? Please provide reasons for your view.

We have no further comments

(b): Do you prefer the definition of “matter of public interest” as set out in Article 4 of the Directive or Section 1(4) of the Model law or neither? Please provide reasons for your view.

We have no further comments

(c): Do you prefer the definitions of “abusive court proceedings against public participation” as set out in Article 4 of the Directive or Section 1(4) of the Model law or neither? Please provide reasons for your view.

We have no further comments

22. Do you prefer the approach to early dismissal of proceedings as set out in the Directive or the Model law or neither? Please provide reasons for your view.

We have no further comments

23. Should there be a time limit for an expedited hearing on a motion for early dismissal of proceedings? If so, is 90 days sufficient?

We have no further comments

24. Do you have any views on whether this guidance should be extended to include other civil society actors, for example authors, academics, environmental campaigners? If so, please provide any comments on how it might be extended?

We have no further comments

25. What more, if anything, could be done outwith legislation to tackle SLAPPs?

We have no further comments

26. Question 26: Does Article 19 and sections 13 and 14 of the Model law provide an adequate legislative basis for the Scottish Government to bring in additional supports for someone who is the subject of a SLAPP? If not, please provide reasons.

We have no further comments



For further information, please contact:

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