

Scottish Human Rights Commission Response to Scottish Government Consultation on Strategic Lawsuits Against Public Participation

May 2025

Introduction

The Scottish Human Rights Commission (SHRC) is a public body created by the Scottish Commission for Human Rights Act 2006.

We are an independent, expert body that works with and for the people of Scotland; we monitor, listen, speak up for all of our rights and respond when things go wrong.

The SHRC is also part of the international human rights system. It is accredited by the United Nations as its trusted organisation to provide impartial evidence on the enjoyment of human rights in Scotland.

Summary

The SHRC welcomes the opportunity to comment on the Scottish Government's consultation on possible legislative reform to create protections against strategic lawsuits against public participation (SLAPPs).¹ This response considers the international human rights framework as it relates to SLAPPs, and addresses some key considerations when considering SLAPPs, human rights, and the role of the SHRC.

SHRC believes that action to create protections against SLAPPs in Scotland is a positive development. The key considerations are below;

- SLAPPs interfere with the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), however, when developing anti-SLAPP measures, due consideration must be given to ensuring the right to a fair trial under Article 6 ECHR, the right to privacy under Article 8 ECHR, and the right to effective remedy under Article 13 ECHR are also protected.
- International commentary and leading rule of law organisations such as the Council of Europe are highly concerned about the proliferation of SLAPPs, and urge States to take steps to ensure that the right to freedom of expression is adequately protected from them.
- Other jurisdictions across Europe are actively developing anti-SLAPP legislation, and it is the requirement of an EU directive. If Scotland does not keep pace, there is a risk that Scotland will become an attractive jurisdiction for SLAPPs, which are often filed in multiple jurisdictions at once. This would be at odds with the Scottish Government's stated intention of being an exemplar in respect of developing a human rights based legal framework.

- Any legislative measure taken to prevent SLAPPs will need to be supported by other measures, including adequate legal aid provision, to ensure that access to justice can be delivered.
- While the model law, which is referenced in the consultation document and was developed by academics, is not representative of Scottish Government proposals at this stage, consideration to the use of the third party intervention power must be given. If bodies such as the SHRC are intended to intervene in high volumes of SLAPPs, this will have resource implications.

Human Rights Framework

The key human rights requirements relating to SLAPPs stem from the European Convention on Human Rights (ECHR). There are equivalent obligations under the International Covenant on Civil and Political Rights (ICCPR).

SLAPPs engage the right to freedom of expression (Article 10 ECHR), the right to a fair trial (Article 6 ECHR), and in some cases the right to private and family life (Article 8 ECHR). Any measure taken to counter SLAPPs must balance these rights effectively.

Article 10 ECHR is set out as follows:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

Article 10 is not absolute, and may be limited where there is a legitimate aim to be protected, a legal basis for the restriction and the restriction is proportionate to its aim (Article 10(2).) Article 10(2) also states that the exercise of freedom of expression "carries with it duties and responsibilities".

SLAPPs interfere with Article 10 by preventing information or opinion from being expressed, either through legal challenge or the threat thereof. States have a positive obligation to take steps to protect unreasonable interference with expression,² as well as negative obligations to refrain from taking steps that would amount to an unreasonable interference with free expression. The European Court of Human Rights (ECtHR) has also ruled that even a "relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred" may pose a 'chilling effect' for free expression contrary to Article 10.³

People or entities who use the law to prevent others from expressing certain information may have legal means of suppressing these opinions or remedying the harm. These individuals' human rights must also be considered, such as their rights to privacy (Article 8 ECHR) and their right to fair trial (Article 6 ECHR). Anti-SLAPP measures must reflect obligations under the right to private life,⁴ which includes the right to reputation,⁵ and especially the positive obligations on the State to protect people's privacy and reputation. Article 8 and Article 10 each recognise the protection of the other as potentially a legitimate aim that could justify a restriction if proportionate.

When Article 8 and Article 10 issues are raised within the same case, both rights are accorded equal importance.⁶ However the European Court of Human Rights has repeatedly stressed that there is a high degree of protection provided to expression that is in the 'public interest', which may be capable of prevailing regardless of its impact of the reputation of the subject. The Court has established six criteria that underpin this balancing of Article 10 and Article 8 interests:

- (1) the contribution to a debate of public interest,
- (2) the degree of notoriety of the person affected,
- (3) the subject of the news report,
- (4) the prior conduct of the person concerned,
- (5) the content, form and consequences of the publication and
- (6) the nature of the interference with the right to freedom of expression at issue.⁷

Article 8 in combination with Articles 6 and 13 (fair trial and access to effective remedies) requires that people whose privacy and reputations are violated have access to sufficient safeguards, including courts. Article 6 protects the right to fair trial, including the right to access courts and tribunals. Article 6 rights of a SLAPP recipients are likely to be advanced by legislation introducing early dismissal processes, reducing the resource and expertise burden required to challenge such actions.

The Article 6 considerations in respect of somebody accused of a SLAPP are potentially more complex. In most cases, SLAPPs represent abusive action which is unlikely to succeed or takes advantage of potentially considerable resource imbalances.

The relevant challenge for Article 6 may lie in properly identifying what actions are SLAPPs, and at what stage in proceedings this identification can take place, especially when cases contain both legitimate and SLAPP claims. Applying the definition inevitably introduces some degree of merits consideration at early stages

of proceedings through a dismissal procedure. If the bar for dismissal is too low, Article 6 issues could be raised by party who feels their legitimate action has been unfairly characterised because the merits of the case were not adequately tested. On the other hand, if the bar for dismissal is too high, the purpose of the legislation in protecting public participation, including free expression, could be undermined.

International Human Rights Policy and SLAPPs

The consultation document recognises that the issue of SLAPPs has been of recent interest to a number of human rights organisations. Former UN High Commissioner for Human Rights, Michelle Bachelet identified the human rights dimensions of SLAPPs:

"When human rights defenders are afraid to question reports about wrongdoing and deficits they observe, it affects the entire society. Strategic lawsuits against public participation (SLAPPs) have exactly that effect: they can impose sometimes significant fines and criminal sanctions, and thus intimidate human rights defenders and stop them from shedding light on critical issues. It is our shared responsibility to prevent SLAPPs from undermining everyone's right to know."

Likewise, the Council of Europe (CoE) issued Recommendation CM/Rec(2024)2 of the Committee of Ministers in April 2024.⁸ This recommendation specifically situates SLAPPs in the context of human rights. The Recommendation advises a range of measures, including that: "Member States should put in place a comprehensive legislative framework that enables everyone to participate in public debate and public affairs effectively, in safety and without fear."

The CoE Recommendation on SLAPPs reiterates that "free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system and that there is accordingly little scope for restrictions on political expression or debate on questions of public interest;"

The European Network of National Human Rights Institutions (ENNHRI) has described SLAPPs as "a serious threat to the rule of law" noting that NHRIs and other Human Rights Defenders, including journalists and NGOs, can be and have been the target of SLAPPs.⁹ During passage of the EU Directive, ENNHRI advocated¹⁰ for;

- Cross border implications to be considered;
- Provisions relating to damages and costs;

- Strong early dismissal procedure so that they "apply to all abusive proceedings, not only those manifestly unfounded."

The Scottish Government's policy ambition to keep pace with EU law developments is also relevant. The EU directive must be transposed into national laws by May 2026.¹¹

Consultation

Evidence of need

The Commission has no evidence that SLAPPs are a significant issue in Scotland nor, conversely, evidence that SLAPPS are not a significant issue. As SLAPPs may arise at pre-action stage and are therefore unlikely to make it to the public domain,¹² it is difficult to monitor the scale of the issue in Scotland.

However, regardless of scale of need there may be a strong incentive to act to proactively protect the human rights associated with public participation, in line with the recommendation from the Council of Europe, and the UK's commitment to its overarching aims of democracy, human rights and the rule of law.

Based on the experiences of developing the EU directive and the Council of Europe Resolution, one preventative concern that legislating in the near-term could avoid is the risk of those seeking to use SLAPPs from seeing Scotland as a favourable jurisdiction; choosing a favourable jurisdiction is known as forum-shopping.¹³ For example, research by the Foreign Policy Centre and ARTICLE 19 found that in recent years many SLAPPs are instigated in the jurisdiction of England and Wales even where their effects are felt in other jurisdictions because of favourable libel laws.¹⁴ While the current UK Government has no plans to introduce further anti-SLAPP legislation,¹⁵ were England and Wales to legislate and Scotland not to, there is a risk that in such close legal jurisdictions with firms operating across the UK, a loophole could emerge.

There is also a risk that failing to act to tackle SLAPPs could leave human rights defenders open to the 'chilling effects' of potential SLAPPs, leading to self-censorship and other forms of reduced public participation.¹⁶

Impact for the Scottish Courts

While the Scottish Government articulates that some stakeholders desire a quick and effective dismissal procedure, this desire may conflict with human rights obligations, as described above. The more complex a dispute is, the more the line

between procedural issues and merits considerations can blur and in such complex cases, it may be harder to ensure due consideration of merits while ensuring the speedy identification of SLAPPs.

The EU Directive and the model law deliver on the ambition for expedited proceedings, though the Directive does not set out a specific time period for both the hearing for dismissal and the application for security of costs. The Model law suggests that hearings on dismissal should take place within 90 days of the application being lodged "unless the interests of justice require an extension of this period". The SHRC welcomes the certainty that the timeframe provides but also sees the merits of retaining flexibility in more complex cases.

Implications for Access to Justice

In recent years the SHRC has repeatedly highlighted concern that the access to justice system is complex and costly.¹⁷ The system is not easy for any human rights defender to navigate without legal representation, and the cost of legal advice can be prohibitive for some. In situations where an individual or body - even an established media body - receives a threat of future action, they may consider that the safest option is to comply without seeking legal advice because of the cost.

While legal aid is available for civil cases in Scotland, the SHRC and others have long noted concerns with the availability and funding of legal aid as we recently outlined to the Scottish Parliament's Inquiry into civil legal aid in Scotland.¹⁸ Legal Aid must be available in order for any legislative measure to prevent SLAPPs to be effective, and is vital for access to justice.

A further consideration is the lack of legal aid or other forms of assistance available to NGOs, whose campaign work is extremely likely to raise public interest / public participation concerns. Work by the Human Rights Consortium, JustRight Scotland, Environmental Rights Centre Scotland, the Poverty Alliance, Shelter Scotland, Clan Child Law and Justice highlights a range of difficulties NGOs face in public interest litigation, including non-availability of legal aid.¹⁹

Third Party Interventions

The model law proposes a broad third-party intervention right that the court 'shall grant' if the applicant agrees. This would be a significant change in the nature of third-party interventions in Scotland, that the SHRC suggests needs further consideration.

Section 13 of the model law provides:

"A court seised of court proceedings brought against natural or legal persons on account of their engagement in public participation shall grant leave to intervene to associations, organisations, trade unions and other entities which have a legitimate 38 interest in safeguarding or promoting the rights of persons engaging in public participation, where the applicant so approves"

In Scotland, third party interventions (TPIs) are comparatively rare, although have increased in recent years.²⁰ Courts can accept TPIs where they are satisfied that an intervention will help the court.²¹ If legislation was drafted on the basis proposes, court discretion to accept TPIs could be significantly narrowed for a particular type of court action.

The SHRC understands that the aim of this provision would be to ease the financial burden of litigation on those defending SLAPPs by allowing it to be taken on by third parties. If it were intended for the SHRC to take on significant numbers of interventions, this would have resource implications and require additional funding.

Conclusion

Overall, it is clear that SLAPPs present significant human rights concerns, and the SHRC is supportive of measures being taken to address them. If the decision were made to legislate, it would be important to ensure the correct balance between competing rights obligations. If the decision is not taken to legislate, Scotland risks becoming a favourable jurisdiction for SLAPPs, and seeing more use of them.

Any decision to legislate of course must be adequately resourced, and legal aid must be available for those who need it in the context of SLAPPs. Any expansion of third party interventions must also be resourced to allow the policy intention to be implemented effectively.

For further information

Contact; hello@scottishhumanrights.com

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- ¹ A Scottish Government Consultation on Strategic Lawsuits Against Public Participation
- ² Palomo Sánchez and Others v. Spain [GC], 2011, § 59
- ³ [Nikula v. Finland, 2002, § 54](#)
- ⁴ respect for his private and family life, his home and his correspondence
- ⁵ [AXEL SPRINGER AG v. GERMANY](#) Application no. [39954/08](#))
- ⁶ [CASE-OF-VON-HANNOVER-v.-GERMANY-No.-2.pdf](#)
- ⁷ [AXEL SPRINGER AG v. GERMANY](#)
- ⁸ [Recommendation CM/Rec\(2024\)2 of the Committee of Ministers to member States on countering the use of strategic lawsuits against public participation \(SLAPPs\)](#)
- ⁹ [ENNHRI reaffirms call for strong EU safeguards to counter strategic lawsuits against public participation](#)
- [The Council of Europe and European Union strengthen protection against abusive lawsuits silencing critical voices](#)
- ¹⁰ [The EU has a key role in safeguarding human rights defenders from strategic litigation against public participation, ENNHRI submission to the consultation on the EU package against abusive litigation \(SLAPP\) targeting journalists and rights defenders](#)
- ¹¹ [L_202401069EN.000101.fmx.xml](#)
- ¹² See the scope of the guidance produced by the SRA, the English and Welsh Solicitor Regulatory Body: [SRA | Strategic Lawsuits against Public Participation \(SLAPPs\) - Warning Notice | Solicitors Regulation Authority](#)
- ¹³ [Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, "Libel Tourism", to Ensure Freedom of Expression \(Adopted by the Committee of Ministers on 4 July 2012\)](#)
- ¹⁴ [London-Calling-Publication-February-2023.pdf](#)
- ¹⁵ An early dismissal procedure does exist in respect of SLAPPs associated with economic crimes, as per the Economic Crime and Corporate Transparency Act 2023
- ¹⁶ [How to stop SLAPPs – the intentional silencing of critical voices - European Centre for Press and Media Freedom](#)
- ¹⁷ [State of the Nation report 2024: Civil and Political Rights in Scotland](#)
- ¹⁸ [Response 168221030 to Legal Aid Inquiry - Scottish Parliament - Citizen Space](#)
- ¹⁹ [HRCS Make Human Rights Justice A Reality](#)
- ²⁰ [Discussion Paper: Overcoming Barriers to Public Interest Litigation in Scotland](#)
- ²¹ See [Act of Sederunt \(Rules of the Court of Session 1994\) 1994](#) Rule 58(8) [Statutory Interveners](#)