

# Ireland Anti-SLAPP Network

## *Council of Europe*

### *Submission on the draft text of the Committee of Ministers Recommendation on Countering Strategic Lawsuits Against Public Participation (SLAPPs)*

#### Background

The Ireland Anti-SLAPP Network, convened by Index on Censorship, is an informal all-island coalition of civil society organisations, academics, and legal experts, whose work relates to protecting human rights and democracy. Members include: Index on Censorship, Article 19, Transparency International Ireland, Irish Council for Civil Liberties, National Union of Journalists, Amnesty Ireland, FP Logue, Friends of the Earth, Dentons, Irish PEN, LGBT Ireland, PILA, as well as individual academics, media experts and campaigners.

#### Progress in the Island of Ireland

##### Republic of Ireland

The Irish Government has said it will opt into the proposed EU Anti-SLAPP directive, but has not commented publicly on the compromise position published by the Swedish Presidency of the European Council. In March 2023, the Ireland Anti-SLAPP Network wrote to the ministers for Justice, and Foreign Affairs and Trade to raise the concern that the compromise waters down crucial protections and radically narrows the scope of the procedural safeguards proposed by the European Commission, while also failing to meet the expectations of the European Parliament.

At the same time, Ireland is currently reviewing the Defamation Act 2009 and the [report](#)<sup>1</sup> was published early in 2022. A substantial section of the report is dedicated to how defamation reform can address SLAPPs including an potential anti-SLAPP early dismissal mechanism. This would “allow a defendant to bring a motion to court seeking early dismissal of defamation proceedings against them which appear to be without merit and contrary to the public interest, using as a model the approach taken by Ontario’s Protection of Public Participation Act 2015.” Following the publication of the report, the Department of Justice announced a consultation as to what reform should look like, including specific questions related to the anti-SLAPP provisions outlined in the report. In summer 2023, the network

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<sup>1</sup> Department of Justice (2022), Report of the Review of the Defamation Act 2009, <https://www.gov.ie/pdf/?file=https://assets.gov.ie/217314/724d9faf-6793-4f2b-9438-cf1e381c0e4d.pdf#page=null>

provided both written<sup>2</sup> and oral evidence<sup>3</sup> to the Joint Committee on Justice in relation to the [General Scheme of the Defamation \(Amendment\) Bill](#).<sup>4</sup>

Northern Ireland

In July 2022, the UK Government put forward proposals aimed at tackling SLAPPs.<sup>5</sup> While these proposals are promising, they will only apply to England and Wales. Separate legislation to address SLAPPs will need to be enacted in Northern Ireland. The prospect of Northern Ireland Anti-SLAPP provision is remote due to the absence of a devolved executive, progress had been underway to address the country's defamation laws.

In June 2022, the Defamation (Northern Ireland) Act 2022 received Royal Assent, bringing key elements into harmony with England and Wales following the 2013 Act. The issue of SLAPPs was raised during the consultation process that preceded the enactment of the Defamation Act 2022, including in the joint response submitted by Index on Censorship and English PEN.<sup>6</sup>

While the Defamation (Northern Ireland) Act 2022 lacks key aspects such as a serious harm threshold and a single publication rule, it is a step in the right direction. After it passed, Mike Nesbitt, whose Private Member's Bill formed the foundation of the bill, [confirmed](#) that "more work needs to be done to eradicate the modern curse of so-called SLAPPs, Strategic Lawsuits Against Public Participation, where the wealthy bring forward cases with no legal merit, purely to stall or frustrate responsible journalism."<sup>7</sup>

## Response to the Draft Recommendation

### Scope and definitional approach

In Clause 1 of the Draft Recommendation's Appendix, SLAPPs are defined as "legal claims, proceedings and other actions brought in relation to public participation and expression on matters of public interest that have as their main purpose to prevent, restrict or penalize the exercise of rights associated with public participation." This use of 'main purpose' is also seen in Clause 5. The Ireland Anti-SLAPP Network supports this definition. However, the identification of purpose should not be required as part of any anti-SLAPP law, since such a

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<sup>2</sup> Ireland Anti-SLAPP Network (2023), Defamation (Amendment) Heads of Bill Submission, <https://www.iccl.ie/wp-content/uploads/2023/06/230504-Irelands-Anti-Slapps-Network-Submission-to-Justice-Committee-on-Defamation-Amendment-Bill.pdf>

<sup>3</sup> Joint Committee on Justice (Houses of the Oireachtas) (2023), General Scheme of the Defamation (Amendment) Bill: Discussion Transcript (4 July), [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_justice/2023-07-04/2/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_justice/2023-07-04/2/)

<sup>4</sup> Department of Justice (2023), Draft General Scheme of the Defamation (Amendment) Bill, <https://www.gov.ie/pdf/?file=https://assets.gov.ie/251457/c05b57f5-8ad7-4a5f-872b-ed710368183.pdf#page=null>

<sup>5</sup> Ministry of Justice (2022), Crackdown on corrupt elites abusing UK legal system to silence critics, <https://www.gov.uk/government/news/crackdown-on-corrupt-elites-abusing-uk-legal-system-to-silence-critics>

<sup>6</sup> Index on Censorship and English PEN (2022), Joint Response to the Committee For Finance in Relation to the Defamation Bill, <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/finance/defamation-bill/written-submissions/index-on-censorship-and-english-pen.pdf>

<sup>7</sup> News Media Association (2022), NMA Welcomes Defamation Law Reform In Northern Ireland, <https://newsmediauk.org/blog/2022/03/23/nma-welcomes-defamation-law-reform-in-northern-ireland/>

subjective inquiry into the mind of the filer would undermine the effective application of the law.

## Key Terms

The Network welcomes the Draft Recommendation's expansive definition of public participation (Clause 4 (i)) and public interest (Clause 4 (ii)) as a vital step towards tackling all SLAPPs, irrespective of target. In both jurisdictions (Northern Ireland and the Republic) there has been a significant number of SLAPPs aimed at journalists and media outlets, including the public service broadcaster RTÉ. The network is aware of others targeting environmental and transparency campaigners, academics, although these have proved more challenging to document.

The Network supports the inclusion of an indicative list in this Draft Recommendation so it does not limit interpretation by member states. However, it is important to keep this as broad as possible. Terms such as 'popular' (as currently used to describe social media users) should be avoided as they can further narrow the interpretation of this Clause by Member States in a manner that does not reflect the public interest nature of the statement communicated.

**Recommended action:** Amendment to Clause 4 (i):

*including environmental and anti-corruption associations and activists; unions; whistleblowers; academics; bloggers; human rights defenders; legal professionals; ~~popular~~—users of social media; cultural; creative industry actors and others.*

## Definitional Criteria

Clause 6 confirms that any anti-SLAPP legislative measure should include all causes of legal action. This is welcome as it acknowledges SLAPPs as an abuse of the legal process, not the use of specific substantive laws. While some laws (such as defamation or privacy) are more commonly used than others, it varies by jurisdiction. In some cases, several substantive laws are used simultaneously as the basis for a legal action.

The Network welcomes, and is engaging in the current reform of the Irish Defamation Act 2009, including its proposed anti-SLAPP provisions. However, we recognise the limitations as any such reform would only tackle SLAPPs deployed through defamation threats, leaving the broader legal structure vulnerable to abuse from SLAPPs. For the Draft Recommendation to be effective across the entire Council of Europe region and to encourage systemic change, it is vital that the recommendation focuses on identifying SLAPPs as opposed to specific causes of action. The section includes an indicative list of causes of action that can be deployed and it is important that this is not read as exhaustive. This technical amendment addresses this issue.

**Recommended action:** Amendment to Clause 6:

*Legal actions may entail the misuse, abuse or threatened use of all types of statutory or common law to prevent, inhibit, restrict or penalise*

*contributions to public debate, including, **but not limited to**, defamation, libel, insult, invasion of privacy, conspiracy, breach of intellectual property rights, economic interference or infliction of emotional harm.*

## SLAPP Indicators

Clause 8 outlines a number of indicators that tend to be present in SLAPP actions. This will help establish an objective test, which is preferable to a subjective test based on 'purpose'. However, it is vital that this list not be interpreted as exhaustive nor as a set of cumulative indicators that could encourage judges to prioritise only the legal actions that satisfy multiple indicators. While we agree that the Draft Recommendation should address cases that exhibit multiple indicators (as currently drafted), it should not miss those that exhibit behaviour captured by one indicator alone.

We recommend that the text be amended to ensure acute threats are addressed alongside those that satisfy multiple indicators. Judges must be empowered to analyse the quality, or acuteness, of the behaviour in question alongside a qualitative procedure across the indicators.

**Recommended action:** Amendment to Clause 8:

*While SLAPPs do not necessarily include all of these characteristics, **the more acute the behaviour or the more of them that are present, the more likely the legal action can be considered as a SLAPP. Such indicators include, **but are not limited to:*****

The indicator outlined in Clause 8 (v) states "The legal action targets individuals or organisations, or other individuals or organisations associated with them." While the Network supports an expansive definition to encapsulate all potential SLAPP threats, this indicator could be interpreted so expansively as to render it ineffectual.

The intention of this draft indicator may be to include SLAPP actions that target individuals or organisations not directly responsible for the challenged action to extend and broaden the intimidatory impact of the legal action. This is an issue that should be addressed in the Draft Recommendation as SLAPPs aimed at individuals are likely to be more effective as individuals are easier to isolate from potential networks of support. This concern has already been identified in Clause 5 of the Draft Recommendation, which includes, in the definition of a SLAPP, actions aimed at "draining the resources of the defendant".

This could also include a legal threat targeting an individual, such as a journalist, as opposed to the outlet that published the challenged statement. This must be seen as an explicit attempt to enhance the 'inequality of arms' between the parties. Other Council of Europe Member States, such as Sweden, have attempted to address this inequality, by preventing legal actions from being brought against journalists independent of their publication. If this is the intended goal of this draft indicator, we would recommend amending the indicator to address this legitimate concern.

**Recommended action:** Delete Clause 8 (v) or amend:

*The legal action targets individuals **as opposed to, or in addition to, the ~~or~~ organisations ultimately responsible for the challenged action, where there is no reasonable justification for their inclusion., ~~or~~ other individuals or organisations associated with them***

## Procedural Safeguards

In Clauses 22 and 23, the Draft Recommendation outlines the importance of courts being able “to dismiss a claim as a SLAPP early in the proceedings” and “make an assessment and fully or partly dismiss the claim if it is unfounded, abusive or would otherwise have a disproportionate impact.” This is a vitally important aspect of any anti-SLAPP mechanism to ensure SLAPPs can be disposed of at the earliest opportunity, without opening the targets to time-intensive and costly court proceedings.

In Ireland, as outlined in the Rules of the Superior Courts, and quoted in the review of the Defamation Act 2009, “the High Court or Circuit Court judge has an express power to strike out (terminate) a case where the pleadings (written statements by the plaintiff and defendant about the case) do not disclose a reasonable cause of action, or a case which appears from the pleadings to be frivolous (have no real content) or vexatious (seeking to exert leverage by causing annoyance). The judge may do so either on his/her own initiative, or on application of the defendant.” However, this is an incredibly high threshold, which is unlikely to be met by the majority of SLAPPs.

This process also has a direct bearing on the costs incurred for defending an action, which was highlighted in the Judgment in the 2022 case, *Somers –v- Kennedy & Ors*.<sup>8</sup> While the judge ultimately struck out the claimant’s case “on the grounds that they failed to disclose a reasonable or justiciable cause of action”, the judgment highlights the complex determinations that are at play as to the most cost effective manner by which the hearings can proceed. Most notably, Ms Justice Butler stated in the judgment: “given the very high cost of litigation, I think it is incumbent on both sides of a case to ensure that it is conducted in the most cost effective manner possible so that the ultimate costs burden - no matter who has to bear it - will be as low as possible.”<sup>9</sup>

[Section 34 \(2\)](#) of the Defamation Act 2009 includes a provision to summarily dispose of an action. It states that “[t]he court in a defamation action may, upon the application of the defendant, dismiss the action if it is satisfied that the statement in respect of which the action was brought is not reasonably capable of being found to have a defamatory meaning.”<sup>10</sup> While this is limited to defamation actions alone, not SLAPPs deployed through other causes of action, this would not be a viable tool to dispose of SLAPPs at an earlier stage.

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<sup>8</sup> BAILI High Court of Ireland Decisions (2022), *Somers v Kennedy & Ors* (Approved) (Rev1) [2022] IEHC 78 (08 February 2022), <https://www.bailii.org/ie/cases/IEHC/2022/2022IEHC78.html>

<sup>9</sup> Ibid.

<sup>10</sup> Irish Statute Book (2009), Defamation Act section 34, <https://www.irishstatutebook.ie/eli/2009/act/31/section/34/enacted/en/html#sec34>

This has been acknowledged by the Irish Government in its review of the 2009 act. However, head 26 in the draft reform bill<sup>11</sup>, which outlines a potential early dismissal mechanism, is partly formulated in line with the compromise draft EU Anti-SLAPP Directive authored by the Swedish Presidency, and so allows for cases to be dismissed using a subjective test of proceedings that are “manifestly unfounded”, which we, as a Network, would not support as it adds a great deal of complexity and uncertainty to the test. These concerns have also been highlighted by the Coalition Against SLAPPs in Europe (CASE).<sup>12</sup> Later sub-clauses in the draft include a more objective test, that of highlighting “features of concern” and the requirement that the “plaintiff’s claims are likely to succeed if the case proceeds to full hearing”, which support our responses earlier in this consultation.

Summary dismissal for cases that lack merit is available if the case is so lacking in substantive merit that it has no real (or realistic) prospect of success at trial. In Northern Ireland, the principles of summary dismissal for defamation actions, in line with similar rules in England and Wales, are present for all proceedings in front of the High Court outlined in Order 82, Rule 9 of the [Court of Judicature \(Northern Ireland\) 1980](#)<sup>13</sup>, which recognises [Section 8 of the Defamation Act 1996](#).<sup>14</sup> This uses the same threshold as the summary dismissal procedure in England and Wales, which enables courts to dismiss a plaintiff’s claim if it has “no realistic prospect of success”.

As outlined in the UK Anti-SLAPP Coalition’s submission to this call for evidence, and supported by the Ireland Anti-SLAPP Network, summary dismissal is an inadequate mechanism for the early disposal of SLAPP actions. Given the complexity and ambiguity of relevant laws (e.g. defamation, privacy) and the judicial culture of preferring issues to go to trial, that is an extremely high threshold for a defendant to meet and as a result, is only rarely met in SLAPP cases. Since a motion for summary judgement can already be filed at an early stage in proceedings, an early dismissal mechanism that uses the same test (i.e. a “real” or “realistic” prospect of success) will be redundant. The higher threshold introduced in Clause 24, that of “unlikely to succeed in trial” is therefore crucial.

Court of Judicature (Northern Ireland) 1980 also outlines the powers to strike out claims, where Order 18, Rule 19 states that courts can strike out proceedings, at any stage of proceedings, if they disclose no reasonable cause of action or defence, are scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial, or is otherwise an abuse of court process. However, outlined in Order 18, Rule 19 (1) (a), which allows for claims to be struck out if “it [the claim] discloses no reasonable cause of action or defence, as the case may be”, no evidence is permitted to support this strike out application and it must be determined on the face of the pleading. This means that the cause pleaded must be unarguable or contestably bad to be able to be struck out under this heading which is a very

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<sup>11</sup> Department of Justice (2023), Draft General Scheme of the Defamation (Amendment) Bill, <https://www.gov.ie/pdf/?file=https://assets.gov.ie/251457/c05b57f5-8ad7-4a5f-872b-ed710368183.pdf#page=null>

<sup>12</sup> Amnesty International (2023), European Anti-SLAPP Directive under threat, <https://www.amnesty.eu/news/european-anti-slapp-directive-under-threat/>

<sup>13</sup> Department of Justice (2021), The Rules of the Court of Judicature (NI) 1980, <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/the-rules-of-the-court-of-judicature-northern-ireland-1980-february-2021.pdf>

<sup>14</sup> UK Parliament (1996), Defamation Act section 8, <https://www.legislation.gov.uk/ukpga/1996/31/crossheading/summary-disposal-of-claim>

high threshold to overcome. The remaining headings in this Rule (Order 18, Rule 19 (1) (b) - (d)), are under the inherent jurisdiction of the court enabling the court to explore facts and grounds made out in affidavit evidence but the court approaches these interlocutory applications with caution and courts almost always proceed to a trial.

The limitations in both jurisdictions (Northern Ireland and the Republic of Ireland) for summary disposal of claims or the ability to strike out proceedings demonstrate the need for a robust early dismissal mechanism that can be brought to bear on SLAPP threats across the island. As a result the Draft Recommendation must be as strong and unequivocal as possible to establish a pathway for all member states and this is reflected in the below amendment.

**Recommended action:** Amendment to Clause 24:

*The conditions for the admissibility of applications for early dismissal should be determined by national law and could, for instance, include judicial consideration of the following ~~enumulative~~ criteria: (i) whether the claim is unlikely to succeed at trial, ~~and~~ **and/or** (ii) whether the proceeding amounts to abuse of process, in light of the SLAPP indicators set out in paragraph 8 (above).*

## Remedies

In 2018, openDemocracy was threatened with a lawsuit by the DUP politician, Jeffrey Donaldson in Northern Ireland. According to their [reporting on the issue](#), “[w]e were advised that if we went to court to defend our reporting, we risked bankrupting openDemocracy. We had staff worrying they would lose their homes. Reluctantly, we took the story off our website. But the legal threats did not stop there. Donaldson issued proceedings in Northern Ireland, where he stood a much higher chance of winning.”<sup>15</sup> Moreover, publicly speaking about the case also ended up costing the media outlet. During an [evidence session in the Northern Ireland Assembly](#) in December 2021, Jessica Ní Mhainín of Index on Censorship said that “for publishing that article and speaking about having faced a lawsuit, its [openDemocracy’s] insurance has gone up threefold this year.”<sup>16</sup>

As outlined in Clause 47 of the Appendix to the Draft Recommendation, “Member states should, in cooperation with relevant stakeholders, strive to ensure that natural and legal persons who are targets of SLAPPs, are able to obtain access to insurance for legal support under fair conditions”. Being able to depend on and access affordable insurance will, for many SLAPP targets, help them determine whether they are able to take part in costly legal proceedings, but more needs to be done across the island of Ireland to ensure that it remains truly accessible.

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<sup>15</sup> Geoghegan, Peter & Fitzgerald, Mary (2021), Jeffrey Donaldson sued us. Here’s why we’re going public, openDemocracy, <https://www.opendemocracy.net/en/opendemocracyuk/jeffrey-donaldson-sued-us-heres-why-were-going-public/>

<sup>16</sup> Northern Ireland Assembly (2021), Official Report: Minutes of Evidence, Committee for Finance, meeting on Wednesday, 8 December 2021, <https://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?&AgendaId=29643&evidId=15028>

In the same evidence session, Jessica Ní Mhainín told the committee that [s]ettling, retracting and apologising are very often the quickest means for publishers to get rid of a case that could end up taking years and costing thousands, if not hundreds of thousands, of pounds. It is often a strategic and commercial decision.”<sup>17</sup> She highlighted a conversation she had with a senior reporter who told her that the amount paid out in settlements by his publication every year is about the same as his salary. This trend also has wider implications in how such actions are monitored and known by the wider public. [Research](#) carried out by Dr Mark Hanna has shown that “[f]rom 2014 to 2020 there were a total of 140 defamation claims issued in Northern Ireland, only 17 of which resulted in a judgment.”<sup>18</sup>

The Irish public broadcaster, RTÉ has been hit with 29 sets of legal proceedings over the six years to 2022, costing €4.7 million (on average costing the outlet €160,000 per case), with some costs still accruing for those proceedings which are ongoing.<sup>19</sup> Analysis by the [International Press Institute](#) has demonstrated how the absence of caps for damages or costs, can result in very high cost implications for losing a legal action in Ireland. “[A] history of juries awarding vast damages to complainants is considered to have had a chilling effect on journalists’ ability to freely report, and the lack of transparency about how the level of compensation is determined has been criticised by Ireland’s Supreme Court,” their report said.<sup>20</sup>

Further to the costs for defending an action, as well as the potential for significant damages being lodged against SLAPP targets, Irish law currently excludes defendants to defamation actions from being able to access legal aid. The [Civil Legal Aid Act 1995](#) assigns defamation as a designated matter that is excluded from legal aid with limited exceptions.<sup>21</sup> As a result, a person is more likely to withdraw a statement rather than defend it without proper legal representation, creating a chilling effect on speech. This could undermine Article 6 rights, 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 v UK](#) (relating to the so-called “McLibel” lawsuit), the ECtHR found that the UK’s blanket exclusion of defamation proceedings from the remit of civil legal aid infringed Article 6 rights.<sup>22</sup> In the review on the Defamation Act 2009, it was recommended that the exclusion of defamation from the Civil Legal Aid Act be removed, with defamation also considered within the forthcoming overall review of civil legal aid.

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<sup>17</sup> Ibid.

<sup>18</sup> Hanna, Dr. Mark (2021), The ‘Chilling Effect’ of Defamation Law in Northern Ireland? A Comparison with England and Wales in Relation to the Presumption of Jury Trial, the Threshold of Seriousness and the Public Interest Defence, Northern Ireland Legal Quarterly 2021, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4060157](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4060157)

<sup>19</sup> Irish Examiner (2022), RTÉ hit with 29 separate sets of legal proceedings for defamation, <https://www.irishexaminer.com/news/arid-40893626.html>

<sup>20</sup> International Press Institute (2023), Ireland: How the wealthy and powerful abuse legal system to silence reporting, <https://ipi.media/ireland-how-the-wealthy-and-powerful-abuse-legal-system-to-silence-reporting/>

<sup>21</sup> Irish Statute Book (1995) Civil Legal Aid Act section 28, <https://www.irishstatutebook.ie/eli/1995/act/32/section/28/enacted/en/html>

<sup>22</sup> European Court of Human Rights (2005), Steel and Morris v. The United Kingdom (Application no. 68416/01) final judgement, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-68224%22%5D%7D>

In Ireland, there is no statutory cap on damages or costs. However, a Court of Appeal decision in the case [Higgins -v- IAA](#) outlined four potential categories of defamation outcomes paired with potential ranges of compensation that can be awarded. The judgement of Mr. Justice John MacMenamin outlined that these “observations ... might be of assistance to courts which must chart a course in what is difficult territory.”<sup>23</sup>

Severity of defamation	Compensation range
<b>Level 1</b> very moderate defamation	0 to €50,000
<b>Level 2</b> “a medium range of cases”	€50,000 to €125,000
<b>Level 3</b> “seriously defamatory material” with mitigating factors, such as limited publication	€125,000 to €199,000
<b>Level 4</b> very serious defamation	€200,000 to €300,000
<b>Exceptional cases</b> “very real damage to an individual’s reputation, where clearly the balance tilted decisively in favour of vindication of good name.”	More than €300,000

In relation to costs, limitation is only imposed if the parties refer the issue of costs to adjudication to be measured (i.e. when the parties don’t agree on the level of costs). In those cases, the costs adjudicator will effectively cap them as he or she will award costs for items of work indicated to have been done.

In determining defamation damages in Northern Ireland, the court takes into account a wide range of matters when arriving at the level of damages to be awarded. Whilst there is no express cap in Northern Ireland, judicial commentary accepts if such a cap were to exist it would be £550,000 (the caps are used as a general check on the reasonableness of a proposal award of damages for defamation). Awards of between £300,000 and £550,000 are accepted by the courts for exceptional cases. Like Ireland, a quantum award could be a violation of Article 10 of the ECHR and so must be proportionate as any award of damages must bear a reasonable relationship of proportionality to the injury to reputation as suffered.

<sup>23</sup> Supreme Court (2022), Higgins -v- Irish Aviation Authority, [https://www.courts.ie/acc/alfresco/c1f296f5-57cb-41d3-a818-0da3f19dd304/2022\\_IESC\\_13\\_\(MacMenamin%20J\).pdf/pdf#view=fitH](https://www.courts.ie/acc/alfresco/c1f296f5-57cb-41d3-a818-0da3f19dd304/2022_IESC_13_(MacMenamin%20J).pdf/pdf#view=fitH)

The situation in both jurisdictions demonstrates the need for meaningful reform, as outlined in the Draft Recommendation. However, the Recommendation itself can be amended to further improve the protections for public participation shared with Council of Europe Member States. Firstly, while Section 40 of the appendix caps immaterial damages, we do not believe this cap should be restricted to immaterial damages alone. Instead, a cap should incorporate all forms of damages to avoid creating financial incentives or chilling participation. If the Draft Recommendation is limited only to immaterial damages, it could water down the existing protections against high damages in defamation cases in both jurisdictions as they are not limited only to immaterial damages.

Further to this, the draft recommendation should include a similar cap, but this time for costs. Without any such cap, delaying tactics deployed by SLAPP claimants are persuasive enough tools to force targets from engaging in acts of public participation.

**Recommended Actions:** Amendment to Clause 40:

*Member states should, within the possibilities of their national legal systems, 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.*

Include a clause to include a cap on costs:

***Member states should, within the possibilities of their national legal systems, provide for the capping of costs, to ensure defendants are able to mount an effective defence and protect against court procedures being drawn out to exhaust the financial resources of defendants, which would cause a chilling effect on their public participation.***

For more information

If you have any questions about this submission or the Ireland Anti-SLAPP Network, please contact Jessica Ní Mhainín, Index on Censorship's Head of Policy and Campaigns on [jessica@indexoncensorship.org](mailto:jessica@indexoncensorship.org)