

Citizen Participation and Public Petitions Committee

14th Meeting, 2023 (Session 6), Wednesday
4 October 2023

PE1975: Reform the law relating to Strategic Lawsuits Against Public Participation (SLAPPs)

Petitioner	Roger Mullin
Petition summary	Calling on the Scottish Parliament to urge the Scottish Government to review and amend the law to prevent the use of Strategic Lawsuits Against Public Participation.
Webpage	https://petitions.parliament.scot/petitions/PE1975

Introduction

1. The Committee last considered this petition at its meeting on [18 January 2023](#). At that meeting, the Committee agreed to write to the Scottish Law Commission, the Law Society of Scotland, the National Union of Journalists, the Scottish Newspaper Society and the Scottish Government.
2. The petition summary is included in **Annexe A** and the Official Report of the Committee's last consideration of this petition is at **Annexe B**.
3. The Committee has received new responses from the Scottish Law Commission, the Minister for Community Safety, the Law Society of Scotland, the National Union of Journalists and the petitioner which are set out in **Annexe C**.
4. Written submissions received prior to the Committee's last consideration can be found on the [petition's webpage](#).
5. Further background information about this petition can be found in the [SPICe briefing](#) for this petition.
6. The Scottish Government's initial position on this petition can be found on the [petition's webpage](#).

7. Every petition collects signatures while it remains under consideration. At the time of writing, 130 signatures have been received on this petition.
8. The Committee has also received submissions from Graeme Johnston, the UK Anti-SLAPP Coalition, the Anti-SLAPP Research Hub and the Campaign for Freedom of Information in Scotland. These can be found in **Annexe D**.¹

Action

The Committee is invited to consider what action it wishes to take.

Clerk to the Committee

¹ Under the Committee's current policy, unsolicited submissions are not normally accepted. However, these submissions were received before the current policy (agreed in December 2022) was brought into effect.

Annexe A

PE1975: Reform the law relating to Strategic Lawsuits Against Public Participation (SLAPPs)

Petitioner

Roger Mullin

Date Lodged

22/09/22

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to review and amend the law to prevent the use of Strategic Lawsuits Against Public Participation.

Previous action

I wrote to the Scottish Government on 29 April 2022 detailing my concerns and asking what plans exist to review the law in relation to SLAPPs. I received a letter in reply on 5 May, the opening of which read.

"Dear Roger,

At this time, the Scottish Government does not plan to undertake a review of SLAPPs." It went on to show some awareness of actions at EU and UK level, but made no commitment to act.

I have also discussed the situation of SLAPPs with Michelle Thomson MSP.

Background information

There is an increasing use or threatened use of legal action involving SLAPPs.

SLAPPs are abusive defamation or privacy cases, often initiated by mega-rich individuals with the intention to intimidate and harass individuals and publishers, and prevent them from publishing information of wide public interest.

Those particularly at risk are investigative journalists and their news outlets. Given the cost of defending actions, the mere threat of action can prevent publication.

Such has been the growth in SLAPPs, the UK government launched a consultation on 17 March 2022 (closed 19 May) with a view to reforming the law in England and Wales. On 27 April 2022 the European Union published a draft directive to deal with SLAPPs across all 27 member states. Other countries have previously acted.

Scotland should act too. If we do not, it is likely we will become the chosen destination for defamation and privacy SLAPPs, providing succor to oligarchs.

Annexe B

Extract from Official Report of last consideration of PE1975 on 18th January 2023

The Convener: The second of our new petitions, PE1975, calls on the Scottish Parliament to urge the Scottish Government to review and amend the law to prevent the use of strategic lawsuits against public participation—SLAPPs. The petition has been lodged by Roger Mullin, who joins us in the public gallery and is a former member of an alternative elective legislative body that sits elsewhere in the United Kingdom. I welcome him to the gallery.

The SPICe briefing explains that SLAPPs is a term to describe court action taken by rich and powerful interests with the intention of silencing critical views. Court action can include defamation and data protection claims. The briefing highlights the Justice Committee's stage 1 scrutiny of what is now the Defamation and Malicious Publication (Scotland) Act 2021. That committee noted a proposal to create an unjustified threats court action and recommended that the Scottish Government consider the issue further. Currently, both the UK Government and the European Commission are working to strengthen legislation in order to tackle SLAPPs.

The Scottish Government's response to the petition states that it does not intend to undertake a review of SLAPPs, adding that the 2021 act "goes some way towards" addressing concerns.

The petitioner, Roger Mullin, has provided a written response, stating that there has been a lack of recognition of the scale of the problem. He raises concerns about the potential for "defamation tourism" if Scotland does not keep legislative pace with England, Wales and the EU.

We have also received written submissions from our colleague Michelle Thomson MSP, the anti-SLAPP research hub at the University of Aberdeen, and Ekklesia, all of which support the petition. The written submissions echo Roger Mullin's concerns and raise some additional issues, such as the importance of investigative journalism and the impact of frivolous litigation on the court system. Ekklesia's submission highlights the model anti-SLAPP law drafted by the UK anti-SLAPP coalition and its key features, and it urges the Scottish Government to enact similar measures.

It is an interesting petition and there is an interesting variation in how the matters are being pursued. Do members have any comments or suggestions for action?

David Torrance: I welcome Roger Mullin, who is one of my constituents.

I wonder whether the committee could write to key stakeholders, including the Law Society of Scotland, the National Union of Journalists and the Scottish Newspaper Society, seeking their views on the action that is called for in the petition.

The Convener: Does anyone have any further thoughts?

Fergus Ewing: I am aware of Michelle Thomson's interest in the petition. In fact, she would have liked to have been here, but she is across the corridor in another committee meeting.

It seems a little inconsistent that the Scottish Government is not planning to do more than it has said, in the light of the fact that the UK Government is doing more, as is the European Union. I would like a more specific response from the Scottish Government on how it feels that the defamation law that was passed fairly recently covers the issue. The petitioner is plainly of the view that the Scottish Government does not recognise the scale of the problem.

The scenario that we are concerned about is that the UK passes legislation, leaving Scotland as the jurisdiction of choice of very rich people who, basically, wish to attack the freedom of the press using the courts as a shield. I do not think that we want that to happen in Scotland. Therefore, I find the lack of any obvious enthusiasm from the Scottish Government disappointing. However, if it argues that the law that was passed last year is a sufficient shield, we need a lot more information and a lot more of a specific response than we have had at the moment.

If we do not get that specific information, as I think might happen—I struggle to be an optimist in life, convener, and I hope that I am wrong—there is a case to have a hearing at which the petitioner and the University of Aberdeen academics who have submitted a written response, particularly Professor Borg-Barthet, who has been a key adviser to the European Union, along with the Law Society of Scotland and a Government minister might give evidence. If we are not satisfied by the initial responses, it might be helpful to indicate in the letters to everybody that we are contemplating holding an inquiry and therefore we hope that, again, the pencil will have a high lead content when we get the response.

The Convener: Well, if your glass is usually half empty and mine is usually half full, therein is a full glass that we can hope to achieve.

Fergus Ewing: I am working on it.

The Convener: I might be less surprised—he said, trying not to be party political—that the Scottish Government is not rushing to follow the UK Government. However, the fact that the European Union is pursuing a similar legislative solution leaves us as a bit of an outlier and potentially open as the source of comfort to those whom we least want to potentially assist.

Moreover, I take Mr Ewing's point that it is one thing for the Scottish Government to assert that the 2021 legislation will have dealt with matters here. We would like to understand how that is to be achieved, rather than it just being asserted that it is the case. I agree with Mr Ewing that this is an important issue and that the committee could pursue it further in the light of the evidence that we receive. It would be useful for the people whom we contact to know that we are minded so to do if we feel that the answers that we receive are in the first instance less than persuasive.

Mr Sweeney, you look like you are seeking to intervene.

Paul Sweeney: I am sympathetic to the petition and the public interest in it, and I agree with the recommendations and proposed actions thus far. It might also be

prudent to inform the Delegated Powers and Law Reform Committee of the petition, because that committee has a locus in this area of work. We should also perhaps invite the Scottish Law Commission to give its view and ask it whether it has done any projects in this area. Changes in this area would usually come through in a Law Commission bill.

As the petitioner is present, I point out that it might be worth exploring the member's bill route and engaging a sponsoring member of Parliament to pursue the issue. That would also involve engaging the non-Government bills unit, and it might be an opportunity to drive the agenda further. Certainly, the petition could help in that regard. That is just another avenue by which Parliament can give effect to such changes.

The Convener: I am happy to pursue those things. I hesitate in relation to the member's bill point, simply because, as a member of the Scottish Parliamentary Corporate Body, I know that we already have a record number of members' bills before us in this session of Parliament, and I struggle to see how we are going to get round to considering them all before 2026. However, we would certainly want to pursue Mr Sweeney's other suggestions in the first instance.

Paul Sweeney: Although I note the point about parliamentary time, the ideal solution would be to do the groundwork through the member's bill route. The Government might adopt the legislation and take time to progress it if we cajole it a bit.

The Convener: As Mr Ewing's glass is half empty and mine is half full, maybe that will mean a successful outcome. I think that we agree that we want to pursue the issues raised in the petition, and we have detailed the ways in which we will do so. The petitioner will have heard all that.

Annexe C

Scottish Law Commission submission of 24 February 2023

PE1975/H: Reform the law relating to Strategic Lawsuits Against Public Participation (SLAPPs)

Thank you for your letter of 24 January. Petition PE1975 calls on the Scottish Parliament to urge the Scottish Government to review and amend the law to prevent the use of Strategic Lawsuits Against Publication (SLAPPS). The Committee seeks the Scottish Law Commission's views "on the action called for in the petition and information on its current work relevant to the petition".

To answer the Committee's query we do not have any current work ongoing that is relevant to the petition in our 10th Programme of Law Reform.

However, in terms of previous work relevant to the petition, the Commission undertook a review of the law of defamation in Scotland as part of our earlier 9th Programme of Law Reform.

As part of that project we issued a Discussion Paper on Defamation (DP No 161) in March 2016: [Discussion Paper on Defamation \(DP No 161\) \(scotlawcom.gov.uk\)](https://www.scotlawcom.gov.uk/discussion-paper-on-defamation-dp-no-161/). This Discussion Paper was consulted on and we subsequently published a Report on Defamation (Scot Law Com No 248): [Report on Defamation \(Report No 248\) \(scotlawcom.gov.uk\)](https://www.scotlawcom.gov.uk/report-on-defamation-report-no-248/) with recommendations for Scottish Ministers and an accompanying draft Bill in December 2017. The publication of our final Report marked the end of our review of the area of law.

These papers and more on our project can be found on our website at: <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/defamation/>.

The Scottish Government subsequently carried out their own consultation on many of the matters covered in our Report before introducing the Defamation and Malicious Publication (Scotland) Bill in December 2019 to implement our recommendations. After Parliamentary consideration the Bill became law on 21 April 2021 as the Defamation and Malicious Publication (Scotland) Act 2021, an Act the

Committee will be aware of from their consideration of the petition to date.

I trust this is of assistance.

Minister for Community Safety submission of 2 March 2023

PE1975/I: Reform the law relating to Strategic Lawsuits Against Public Participation (SLAPPs)

Thank you for your letter of 07 February 2023 asking for further information about the protection afforded by the Defamation and Malicious Publication (Scotland) Act 2021 (“the 2021 Act”) against the use of strategic lawsuits against public participation (“SLAPPs”).

The Scottish Government recognises that other types of civil proceedings may be used to silence or intimidate, but as the submissions received by the Committee recognise, raising, or threatening to raise, defamation proceedings is the most common route to silence or intimidate.

The reforms introduced by the 2021 Act enhance the legal protections of our freedom of expression and rebalances the law more towards free speech by removing the presumption of damage, providing robust and modern defences, and preventing libel tourism.

They include introducing –

- a test of serious harm: a pursuer must now prove that their reputation has been seriously harmed by the statement published;
- a defence of publication in the public interest: an individual (such as an investigative journalist) who has published allegations, even if they are defamatory, will have a defence if they can show that the statement was on a matter of public interest and that the defender reasonably believed that publishing the statement was in the public interest; and,
- a jurisdictional threshold preventing “libel tourism”: this limits the circumstances in which an action for defamation may competently be brought in a court in Scotland, and overcomes the problem of courts readily accepting jurisdiction simply

because a pursuer frames their claim so as to focus on damage which has occurred in Scotland only.

Respondents also mentioned that an important component of anti-SLAPP legislation is the means to dismiss early unfounded proceedings through an accelerated procedure. This is already possible in defamation proceedings. Whether the defamatory statement complained of has caused serious harm can be dealt with at an early procedural hearing in relevant circumstances

Respondents to the petition point out that part of the aim of a SLAPP is to use the cost of legal proceedings to chill free speech. However, as pointed out by the Scottish Law Commission when it published its recommendations for reform that became the 2021 Act:

“Legal costs in Scottish litigation are substantially lower than those generated in the English courts. This is particularly so in the field of defamation work; the highly specialised nature of London defamation practice means that large fees can be commanded there. In Scotland legal costs in defamation cases are undoubtedly lower than in London and there is no equivalent of a specialist defamation bar.”¹

One solicitor, with significant experience of defamation litigation in Scotland, told the Justice Committee in evidence during the last Parliamentary session, that the estimated cost of raising defamation proceedings and obtaining a final determination in the Sheriff Court would be in the region of £25,000.²

It would be helpful to understand if there is any data that supports the concerns of the petitioner and respondents that Scotland will become the ‘jurisdiction of choice’ if it does not implement anti-SLAPP legislation. After England and Wales implemented law reforms in 2013, I am aware that some stakeholders in Scotland made a similar argument in respect of defamation proceedings – that failure to introduce the same reforms in England and Wales would lead to Scotland becoming the jurisdiction of choice for libel tourists. In the years following, however, the general view has been that there was no significant rise in the number of defamation proceedings raised in Scottish courts.

Finally, in the submissions received by the Committee, respondents identify some specific cases as an example of a SLAPP, but none of these proceedings were raised in Scotland. One of the cases mentioned

involved proceedings raised by Arron Banks against Carol Cadwalladr. In her written judgment, the Hon. Mrs Justice Steyn writes:

“Ms Cadwalladr has repeatedly labelled this claim a SLAPP suit, that is a strategic lawsuit against public participation, designed to silence and intimidate her. I have set out a summary of my conclusions in paragraph 416 below. Although, for the reasons I have given, Mr Banks’s claim has failed, his attempt to seek vindication through these proceedings was, in my judgment, legitimate. In circumstances where Ms Cadwalladr has no defence of truth, and her defence of public interest has succeeded only in part, it is neither fair nor apt to describe this as a SLAPP suit.” ([2022] EWHC 1417 (QB), at paragraph 9.)

This may help to illustrate to the Committee that what may be considered by some as a strategic lawsuit against public participation, is, from the view of others, an attempt to restore damaged reputation (or, in other circumstances, to protect their privacy). It is vitally important when considering the law in this area that we take full account of the right to freedom of expression, access to justice, and the right to privacy, which all need to be carefully balanced.

Law Society of Scotland submission of 28 February 2023

PE1975/J: Reform the law relating to Strategic Lawsuits Against Public Participation (SLAPPs)

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 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 appreciate the concerns expressed in the petition and by the 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 in 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.

There are requirements on solicitors to act at all times with trust and personal integrity (Rule B1.2) and to refuse improper instruction by a client (Rule B1.5). 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. These include, for instance, under section 11 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 the ability of courts to make an award of expenses against a legal representative, where that representative “has committed a serious breach of that representative’s duties to the court.” We would defer to the judiciary on whether current court powers are adequate to address current or future issues around SLAPPs.

We add two further points, first, about developments in Europe and, second, about legal aid. The committee noted in its discussions the draft Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings, which would affect EU Member States. There is also work being undertaken by the Council of Europe, to which the UK remains a member, towards the development of a draft Recommendation on strategic lawsuits against public participation. The working group considering this draft will conclude by December 2023, and there may be issues emerging from that work that may ultimately require consideration in the UK to ensure that action against SLAPPs is effective and coordinated across jurisdictions.

Second, 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 [ECHR] 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.

We hope that this information is helpful and if we can assist further in consideration of this petition, we will be very happy to do so.

National Union of Journalists submission of 30 March 2023

PE1975/L: Reform the law relating to Strategic Lawsuits Against Public Participation (SLAPPs)

This submission expands upon our letter of 26th October 2022 to Jackson Carlaw MSP in his role as Convener of the Citizen Participation and Public Petitions Committee.

The National Union of Journalists (NUJ) is the voice for journalism and journalists in the UK and Ireland and has more than 24,000 members working in broadcasting, newspapers, news agencies, magazines, book publishing, public relations, photography, videography and digital media. The NUJ is not affiliated to any political party.

The NUJ is a member of the UK Anti-SLAPP coalition, actively campaigning for an end to the use of SLAPPs, and for stronger legislation to ensure protections for those targeted in efforts to shut down public participation. This submission is made as a member of the Scotland Anti-SLAPP sub-working group.

A free media is vital to the functioning of a democracy. That freedom is severely curtailed when those with deep pockets are allowed to use the law to threaten the very future of media organisations.

Whilst the abuse of legislation by those in powerful positions is not new, the union is concerned about the increasing use of SLAPPs to deter and stymie journalists in their reporting. Well-known cases including Roman Abramovich’s against Catherine Belton for publication of her book *Putin’s People*, or Eurasian Natural Resources Corporation against Tom

Burgis and the Financial Times over Kleptopia – both of which the union condemns, raised awareness about the impact these lawsuits have on freedom of expression and public interest journalism.

High profile SLAPPs cases in the public domain are simply the tip of the iceberg, which do not reflect the volume of threatening letters and interference that takes place pre-publication. Members have told us of the significant financial and emotional distress caused by receiving legal threats including in the form of emails and letters. Journalists ensuring they offer a right of reply, an important step ahead of publication, are then faced with threatening correspondence that fails to answer the questions posed, and is designed to deter and stymie publication. Law firms often send these letters on behalf of their clients, in a manner designed to make the publisher and individual journalist back off. This abuse of process can be drawn out and often goes unreported. Again, this means its true scale cannot easily be captured.

The NUJ has recognised the growing trend of journalists directly receiving threats of legal action. Previously, such threats/lawsuits were targeted at publishers considered responsible for publication of content. The impact of this shift in the use of SLAPPs, is to ensure a chilling effect and no doubt instil fear that deters any future journalistic content on an issue. For small publishers and freelance journalists without the backing of large legal teams, financial resources, or support structures, avoiding publication can seem the most appropriate course of action to prevent bankruptcy. Where publication proceeds, reports may be watered down in fear of legal action. This means stories, including those about financial misuse and corruption in the public interest, go untold. Post publication in SLAPPs cases, it is not uncommon for journalists to be targeted in lawsuits, named as defendants without any case being brought against their publisher. By singling out individuals without resources, powerful oligarchs and wealthy individuals/institutions aim to bury journalists under legal costs for prolonged periods of time. Many if not all Scottish media organisations are facing financial challenges, and can find it increasingly difficult to justify the huge costs involved in defending a claim. Doing so redirects time and resources away from stories and reporting that would otherwise have been pursued. Freelances have the added burden of legal action inhibiting their ability to carry out other paid work.

The changes brought to the Defamation legislation in Scotland were welcome and overdue, but do not, in themselves, form a comprehensive anti-SLAPP approach. Any statutory definition of SLAPPs must be broad and consider the tactics deployed in their use, alongside the characteristics that feature across cases. These include threats against

individuals instead of those they work for; a review of previous history of legal intimidation using the same law firms; issuance of legal threats at right to reply stage and lengthy and complex communication prior to publication. A rigid definition could mean cases fall outside scope, increasing threats to journalism as loopholes are found.

The NUJ has long campaigned for low-cost arbitration solutions to settle genuine disputes and would welcome any moves to ensure journalists and media outlets no longer face prohibitive costs and deliberate intimidation by wealthy litigants with the deepest of pockets. For too long the super-rich have got away with abusing the law to bully journalists and undermine media freedom.

High legal bills involved in bringing a SLAPPs case do not currently act as a deterrent to wealthy individuals. As the truth defence in defamation cases means the burden of proof falls on those subject to SLAPPs action, cases are able to move forward with little pressure on claimants. Instead, the ability to tie journalists in knots, recognising cases can often proceed for years, is a tactic used. A focus on reducing costs throughout the process, and a costs cap on the damages claimants can seek would be positive reform.

Reform to legislation and any consideration of anti-SLAPP law should include a clause that enshrines the right of journalists to publish information in the public interest. Enshrining a statutory public interest defence would be cross-cutting and a major advance in protecting journalists and public interest journalism.

The appropriate jurisdiction test requires reform to ensure a reversal in the current view of the UK as an attractive place to file SLAPPs suits. If the situation in England and Wales were to change, Scotland would be seen as an appropriate legal haven. Journalists around the world are defending themselves against lawsuits filed in the UK and face not only daunting legal costs and lengthy process times, but must also attempt to gain an understanding of UK and Scottish law.

SLAPPs cases in the UK have also been linked to financial crime. Previous investigations into how cases have been financed have found links to corruption and 'dirty money'. Used to prevent publication of stories, such cases negatively impact media freedom. A survey by the Foreign Policy Centre in 2020, found "63 journalists working on financial crime and corruption in 41 countries identified the UK as the leading international jurisdiction for legal threats. More than 60% of respondents were working on corruption investigations with a direct or indirect link to the UK."

Without Scottish Anti-SLAPP legislation, those wealthy enough to bring lawsuits in will continue to restrict media freedom, inhibit the work of journalists, and damage the media industry in Scotland. Public interest journalism is a vital service and adequate reform will ensure better protection for journalists and others who seek to report on such matters.

Petitioner submission of 5 April 2023

PE1975/O: Reform the law relating to Strategic Lawsuits Against Public Participation (SLAPPs)

I write to follow up on written submissions made to the Petitions Committee and published on its website by April 5, 2023.

As the petitioner, I have been asked to restrict my comments to areas where I can offer new testimony in response to the submissions of others.

I am grateful that most submissions are supportive of my petition. I am perplexed however that the Scottish Government's responses are complacent with regards to the future dangers to Scotland.

Of the new submissions since the committee first discussed my petition, I would draw attention to the submission of Mr Graeme Johnston [Annexe D, PE1975/K] who brings a number of new insights based on extensive expertise.

The government's most recent response in my judgment is entirely blind to a key issue, namely the fact that SLAPPs cannot be judged solely on the basis of those cases that come to court. The chilling effect of SLAPPs is created by the mere threat of expensive private prosecutions, using any legal device of choice (and not restricted to defamation law). I know from personal experience how chilling such threats can be. The use of threats to prevent publication of matters in the public interest, however, seems of little concern to the government.

There is an imbalance in the government's response as it gives little weight to issues of free speech, and there is no evidence in any of the government responses that issues regarding the impact on free speech have ever been properly researched by the government.

The government response also expresses doubts on what constitutes SLAPPs. However, rather than supporting the petition which would provide an opportunity for the government to refine its own understanding it would seem the Scottish Government prefers to be a laggard in the face of moves in other legal jurisdictions to tackle the problem. I refuse to believe that the Scottish Government is uniquely incapable of following good practice from other jurisdictions.

In summary, I am disappointed to conclude the Scottish Government does not take the threats to free speech seriously and indeed prefers to continue with a system heavily weighted in favour of oligarchs and other extremely powerful individuals at the expense of the wider public interest.

Petitioner submission of 13 September 2023

PE1975: Reform the law relating to Strategic Lawsuits Against Public Participation (SLAPPs)

This update provides additional comment to that previously submitted.

Since the last consideration by the committee, further activity has or is shortly to take place indicating increasing engagement on the call for Scottish Anti SLAPP legislation by an increasing range of credible bodies. This activity included/s the following:

1. The University of Aberdeen's Anti-SLAPP Research Hub within the School of Law ran a full day workshop in June 2023 on the theme "Developing a Model Anti-SLAPP Law for Scotland". The petitioner was an invited participant, with other participants including stakeholders from civil society, academia, Journalism, politics and the legal profession. It included participants from elsewhere in the UK and Europe. Key points included:
 - a. All agreed on the need for action in line with the petition.
 - b. The workshop considered a wide range of issues ranging from the "chilling effect" of SLAPPs to their threat to human rights requirements.

- c. There was considerable goodwill towards assisting in the drafting of legislation and a commitment to development of a model law.
2. On September 19 2023, the petitioner will be a speaker at a Transparency Task Force (TTF) workshop on SLAPPs and why they are the “enemy of truth and transparency”. Amongst other roles, TTF is the secretariat to the APPG on Personal Banking and Fairer Financial Services in the Westminster parliament.
3. On November 27-28 2023 in London, the petitioner will be a keynote speaker on the UK Anti-SLAPP Conference being held to address “Tackling Implementation of SLAPP Solutions”. The conference is jointly organised by The Foreign Policy Centre, the International Bar Association’s Human Rights Institute and the Justice for Journalists Foundation. The petitioner has been invited as a keynote speaker on the opening day of the conference to address delegates on “Progress towards Anti-SLAPP legislation in Scotland”.

The above are indicative of growing interest in the current vulnerability of Scotland to SLAPPs. In addition to such formal events, the petitioner continues to engage with academics, journalists and others.

My appeal to the committee is to hold an oral evidence session and allow deeper discussion of the serious issues involved.

Annexe D

Graeme Johnston submission of 20 March 2023

PE1975/K: Reform the Law Relating to Strategic Lawsuits Against Public Participation (SLAPPs)

I am submitting this evidence as a member of the Scotland Anti-SLAPP sub-working group of the UK Anti-SLAPP Coalition.

I was formerly a partner at Herbert Smith Freehills in London and Asia specialising in commercial litigation, arbitration and investigations. A publication by me relevant to this topic is Johnston and Harris, *The Conflict of Laws in Hong Kong* (3rd edition, 2017), which I understand to be the leading Hong Kong law textbook on the topic known in Scotland as international private law.

These days, I live in Dundee and am CEO of Juralio, a software company which I co-founded.

Based on my practical experience and interest in cross-border litigation, I am writing to support Roger Mullin's petition on SLAPPs. This is because I believe it is likely that Scotland risks becoming a haven for SLAPPs if it falls behind the active steps promised by the EU and UK authorities to address the SLAPP problem in the EU, and south of the border.

The reasons for this belief are:

1. While I am a commercial litigator by background, I believe it is likely that wealthy people and organisations considering legal action to close down inconvenient information are likely to approach it in the way they do commercial litigation, that is, as a rational business decision in which costs, risks and impacts on the other party are carefully considered.
2. Part of such a decision will, rationally from such a perspective, involve looking at the "pros and cons" of threatening or bringing a lawsuit in different places. Sophisticated help is readily available on this.

3. Sometimes this can be benign, for instance when jurisdictions are compared on the quality of their commercial adjudication.
4. However, there are scenarios in which laws and processes are legitimately tightened in some places but not in others. Legal work may then flow into the latter as a result of what is sometimes called arbitration or (in litigation, specifically) forum shopping.
5. The pros and cons which someone will rationally take into account in shopping for a forum include:
 - a) The content of the substantive laws which will be applied - in this context, not only those of defamation but also privacy / data protection, confidentiality, copyright and more.
 - b) The process, including – crucially in the SLAPP context, where the objective is most likely to stifle rather than to come to trial – the capacity for dragging things out at great expense and financial risk (including costs orders) for the defendant.
6. The realities are illustrated in England by the fact that, despite reforms to defamation law a decade ago (Defamation Act 2013) similar to those recently introduced in Scotland's 2021 Act:
 - a) It is very common these days to rely on claims other than defamation. Evidence from other jurisdictions – including England & Wales and various countries in Europe – makes clear that claimants will look to privacy and data protection and various other laws. The combination of different types of claim is often seen in a single case.
 - b) Various troubling cases have still been brought in London since the 2013 Act, illustrating that the problem has not been resolved by that Act.
7. I would add that, in my experience, considerations of process and cost are often more important than those of substantive law. Outcomes at trial are never entirely predictable, especially when faced with opponents who are well-financed and have few scruples in providing false or incomplete evidence to their own lawyers and to the court. It can be entirely rational for defendants to back down when threatened with years of expensive, stressful, uncertain,

scary litigation, even when they are in the right and could objectively defend themselves at trial, given sufficient resources.

8. It is readily foreseeable that, if Scotland falls behind as other nearby jurisdictions make it easier to dismiss SLAPPs, the logic of arbitrage and forum shopping will lead to an increase in such lawsuits here. There are obvious reputational and other consequences for this jurisdiction.
9. I endorse what Aberdeen University have already said on this topic in their 14 December 2022 submission, but wanted to add my own thoughts based on having seen the logic of cross-border litigation, and the underlying motivations and pressures, work out in practice.

I would be happy to discuss or expand if useful.

UK Anti-SLAPP Coalition submission of 30 March 2023

PE1975/M: Reform the law relating to Strategic Lawsuits Against Public Participation (SLAPPs)

This submission is written in support of Roger Mullin's petition² calling for anti-SLAPP measures in Scotland.

The UK Anti-SLAPP Coalition³ brings together leading experts and organisations to call for meaningful protections against the use of SLAPPs. The coalition acknowledges the importance of a four-nation

² Mullin, R. (2022). PE1975: Reform the law relating to Strategic Lawsuits Against Public Participation (SLAPPs). Scottish Parliament Petition: <https://petitions.parliament.scot/petitions/PE1975>

³ The UK Anti-SLAPP Coalition is an informal working group established in January 2021, co-chaired by the Foreign Policy Centre, Index on Censorship and English PEN. It comprises a number of freedom of expression, whistleblowing, anti-corruption and transparency organisations, as well as media lawyers, researchers and academics who are researching, monitoring and highlighting cases of legal intimidation and SLAPPs, as well as seeking to develop remedies for mitigation and redress.

approach to this issue to ensure all legal jurisdictions are protected against the use and abuse of relevant laws targeting public participation.

While Scottish courts have not seen the influx of SLAPPs actions that English courts have, that is no reason to leave Scots Law and Scottish courts open to abuse. As evidenced by the legal letter sent to journalist Oliver Bullough by a Scottish law firm calling for his book, *Moneyland* to be withdrawn from sale even though the pursuer and defender have no presence in Scotland⁴, if the Scottish Parliament doesn't act, Scotland risks becoming a safe haven for those seeking to shut down public scrutiny as other jurisdictions move to establish more robust protections.

Defamation and Malicious Publication (Scotland) Act 2021

Much has been made in regards to the 2021 reform of defamation in Scots Law. While it is an improvement on the previous law – last meaningfully amended in 1996 – the impact of the Bill to protect free expression is unclear. In a 2022 study into cyber security, surveillance and journalism in Scotland⁵ led by academics at the University of Dundee, a number of the interviewees highlighted concerns about legal threats: “The theoretical or actual possibility of surveillance did not deter journalists from pursuing stories, and instead defamation law was viewed as a more immediate threat in that regard.”

A number of experts, including the University of Aberdeen's Anti-SLAPP Research Hub⁶, have persuasively identified the shortcomings of the Act in the context of SLAPPs as it “does not respond to the procedural mechanisms that SLAPP pursuers use to frustrate freedom of expression and public oversight.” The UK Anti-SLAPP Coalition supports this interpretation and calls for procedural protections to be introduced as the best approach to tackle SLAPPs.

⁴ For more information relating to the legal threat against Oliver Bullough:

<https://go.coe.int/WQKHO>

⁵ Daly, A., Robinson, E., & McMenemy, D. (2022). Cyber security, surveillance and journalism in Scotland. (Science, Policy and Law Series; No. 1). University of Dundee:

https://discovery.dundee.ac.uk/ws/portalfiles/portal/81462869/CyberSecurity_Digital_Report_1.0.pdf

⁶ Anti-SLAPP Research Hub, University of Aberdeen (2022). Submission of 14 December 2022. PE1975/D: Reform the Law Relating to Strategic Lawsuits Against Public Participation (SLAPPs): https://www.parliament.scot/-/media/files/committees/citizen-participation-and-public-petitions-committee/correspondence/2022/pe1975/pe1975_d.pdf

SLAPPs are not the result of any one cause of action. They represent abuse through the litigation process, invoking whichever cause of action can best bring about the desired outcome i.e. the restriction of public participation, such as through press articles or the activities of campaign or local groups, through the threat of expensive and time-intensive litigation.

Approaching SLAPPs solely through individual legislative amendments would result in incomplete reform, as pursuers will be free to choose other laws to fulfil their purpose. At a time of increased legislative pressures, bringing forward robust anti-SLAPP measures to ensure there are protective measures in place represents an effective and efficient response to a systemic issue.

Structural Responses

As outlined in the Model UK Anti-SLAPP Law,⁷ any anti-SLAPP law should, as a matter of urgency, advance these three conditions:

1. SLAPPs are disposed of as quickly as possible in court
2. Costs for SLAPP targets are kept to an absolute minimum
3. Costs for SLAPP filers are sufficiently high to deter further SLAPPS

While the legislative responses in Scots Laws will differ to any made by Westminster for the England & Wales jurisdiction, these conditions will establish robust protections against SLAPPs, irrespective of the causes of action deployed.

Existing civil procedural rules do not currently allow for quick disposal of SLAPPs. Summary Decrees, as outlined in Scots Law, do not consider the merits of a case. Instead they can be granted if a party successfully persuades the Court of Session that there is no real defence to an action (or a counterclaim). This would be insufficient for those targeted by SLAPPs.

⁷ The Model Anti-SLAPP Law, drafted by the UK Anti-SLAPP Coalition in consultation with leading media lawyers and industry experts and published in November 2022, is designed to provide robust protection against SLAPPs, building on the framework proposed by the Ministry of Justice in July 2022, when the UK Government committed to anti-SLAPP legislative reforms.

<https://www.indexoncensorship.org/wp-content/uploads/2022/11/Model-UK-Anti-SLAPP-Law-Final-Version.docx.pdf>

Further to this, there are limited procedural rules for pre-action protocol and those that do exist would not be relevant for the majority of SLAPPs. Much of the chilling effect of SLAPPs emanates before any court proceedings have been commenced, with a significant number of SLAPPs never making it to court. This process is open to abuse and further skewed by an ‘inequality of arms’ between parties. Law firms instructed by pursuers are able to demand significant changes, including the removal of content or commitments to step back from certain topics or parties, while threatening potential court proceedings. There are few protections to ensure this process is carried out in a manner that protects free expression.

As commitments have been made to address this issue by the UK Government and on a European level by both the European Commission and the Council of Europe, Scotland should not be left behind. We echo the sentiment of the Committee’s convener⁸, when the Committee first scrutinised Mr Mullin’s intervention, to call on the Scottish Parliament to take action to protect against Scotland being seen as an outlier and a “source of comfort to those whom we least want to potentially assist”.

Anti-SLAPP Research Hub, University of Aberdeen submission of 30 March 2023

PE1975/N: Reform the Law Relating to Strategic Lawsuits Against Public Participation (SLAPPs)

Further to our previous submission (PE1975/D), we write to provide clarification on two points of interest: the insufficiency of (A) the Defamation and Malicious Publication (Scotland) Act 2021 (the “2021 Act”) and (B) existing Scottish civil procedural rules to tackle strategic litigation against public participation (SLAPP). We explain the key points in outline here within the constraints of this procedure and would

⁸ Citizen Participation and Public Petitions Committee (2023). Wednesday 18 January 2023 Official Report (Session 6): <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=14106>

welcome the opportunity to fully engage with these issues through an oral session.

A. Defamation

While the substantive changes introduced by the 2021 Act are important and welcome, they do not constitute an anti-SLAPP measure comparable to those proposed in the European Union and adopted elsewhere. The 2021 Act is limited to defamation claims, does not address the mischief of lengthy and costly proceedings, does not confer on courts general powers to penalise or remedy abusive court proceedings, and does not deter abusive proceedings outwith Scotland.

First, SLAPPs may take various forms. While defamation is commonly used to suppress public participation on matters of public interest, SLAPP cases are often framed with reference to negligence, trespass, trademark infringement and other delicts.

Second, the insufficiency of similar provisions to deter SLAPP in the Defamation Act 2013 (the “2013 Act”) in England and Wales is instructive. The [UK government’s consultation on SLAPP](#) observed that the protection afforded by a serious harm test, or a public interest defence came too late in proceedings to deter abusive litigation. It cautioned that the cost and length associated with mounting a defence may outweigh the strength of the defence, and pressure defenders into settling.

Third, the 2021 Act does not provide for exemplary damages or penalties. Model anti-SLAPP legislation⁹ provides for a general power to penalise or remedy abusive court proceedings in matters concerning public participation. This powerful deterrent mechanism is absent from the 2021 Act, and of course, would be limited in material scope even if it were to form part of Scots defamation law.

Fourth, the insufficiencies of s.19(2) of the 2021 Act were noted in some detail in [our previous submission](#). In brief, contesting jurisdiction is itself costly and time-consuming. Nor does the 2021 Act provide for any

⁹ [UK Anti-SLAPP Coalition: Model Anti-SLAPP Law](#) and [CASE Model Anti-SLAPP Directive](#).

power to dissuade the initiation of international proceedings against defenders domiciled in Scotland.

In sum, the 2021 Act is insufficient to deter SLAPPs. SLAPPs are an abuse of process and not necessarily concerned with the strength of defensive arguments but with overwhelming, intimidating and ultimately silencing an opponent. A robust anti-SLAPP measure requires amendments to civil procedural rules.

B. Civil Procedure

Scots civil procedure provides for summary decrees and vexatious litigation orders. Because these rules are not bespoke measures to address suppression of public participation, their utility to deter SLAPPs is limited.

Vexatious litigation orders may only be made where a person has habitually and persistently, without any reasonable grounds for doing so, instituted vexatious civil proceedings. This is a very high threshold and requires a pattern of behaviour to be established. Many SLAPP cases would fail to meet this high threshold, particularly if litigation is dispersed across jurisdictions.

Summary decrees may be applied for where the defence (or in some circumstances the claim or counterclaim) has no real prospect of success *and* there exists no other compelling reason why a summary decree should not be granted. The courts have adopted a restrictive interpretation and apply a high threshold. Typically, summary decrees have been awarded where it is “almost certain”¹⁰ that there is no defence to the action,¹¹ the question of law admits of a clear and obvious answer,¹² or there is evidence of a settlement.¹³

In contrast, and drawing on emerging international consensus,¹⁴ a robust anti-SLAPP measure would apply to any civil action, empower the court

¹⁰ *Stephen and Crooks as Joint Liquidators of Payroller Limited v. Thompson* [2019] SC LIV 44.

¹¹ *Henderson v. 3052775 Nova Scotia Limited* (Scotland) [2006] UKHL 21.

¹² *McKays Stores Ltd v City Wall (Holdings) Ltd* 1989 S.L.T 835.

¹³ *Arthur J Gallagher Insurance Brokers Limited and ors v. Graham Hudson and ors* [2017] SC BAN 2.

¹⁴ see note 1.

or *any* party to an action to bring a motion to dismiss, apply in clearly defined circumstances (i.e., when the action concerns a communication on a matter of public interest), place the burden of proof on the party opposing the motion to satisfy the court that their claim is not a SLAPP, and provide remedies and penalties for SLAPP victims.

Conclusion

In conclusion, we submit that Scots law does not currently provide for a robust anti-SLAPP mechanism either in its current defamation laws or civil procedural rules. Further reform is needed.

The Campaign for Freedom of Information in Scotland submission of 10 April 2023

PE1975/P: Reform the law relating to Strategic Lawsuits Against Public Participation (SLAPPs)

Introduction

CFoIS supports petition PE1975 to reform the law in Scotland relating to strategic lawsuits against public participation (SLAPPs)¹⁵, given the evidence which warrants an integrated four nation approach¹⁶. SLAPPs prevent the disclosure of public interest information and analysis.

Anti-SLAPP legalisation should be part of Scotland's architecture on transparency, accountability and scrutiny along with FoI and human rights law. Each of these rights and duties must fit with the increasing role of the private and third sectors in the delivery of public services. Parliament can act to enable independent scrutiny of business dealings, contract performance and outcomes.

CFoIS is a member of the **UK anti-SLAPP Coalition** and commends **its UK Model Anti-SLAPP Law**¹⁷, tailored to Scotland. A Scottish

¹⁵ [PE1975 Reform the law relating to Strategic Lawsuits Against Public Participation SLAPPs | Scottish Parliament Website](#)

¹⁶ ['London Calling': The issue of legal intimidation and SLAPPs against media emanating from the United Kingdom - The Foreign Policy Centre \(fpc.org.uk\) and The Coalition against SLAPPs in Europe \(the-case.eu\)](#)

¹⁷ [Model UK Anti-SLAPP law \(nuj.org.uk\)](#)

law can also draw on the work of the Council of Europe’s Committee of Experts on SLAPPS.¹⁸

FoISA Reform

Reforming the Freedom of Information (Scotland) Act 2002 (FoISA) is urgent. CFoIS supports Katy Clark MSP’s approach to reform FoISA¹⁹, rooted in the CFoIS ‘FoISA Reform Bill’²⁰, which extends rights and duties to fit all public service providers and strengthens enforcement powers. The PAPLS Committee’s Inquiry Report, published in May 2020, recommended legal reform²¹ too.

Business and Human Rights

The UN’s 31 Guiding Principles on Business & Human Rights (UNGPs) prompted the UK to adopt a voluntary ‘National Action Plan on Business and Human Rights’ (NAP), in 2013²². There is no Scottish version despite a baseline assessment²³ and a Scottish Government commitment that it “will form the basis for a participative process to develop a national action plan in Scotland ...”²⁴ In March 2023, Scotland’s second National Action Plan on Human Rights (SNAP 2) was published which recognised this outstanding action from SNAP 1, and said *“If Scotland continues with developing a Business and Human Rights Action Plan, it is important that this is coordinated with SNAP as the national human rights action plan.”*²⁵

¹⁸ [MSI-SLP Committee of Experts on Strategic Lawsuits against Public Participation - Freedom of Expression \(coe.int\)](#) ‘Discussion of the draft Recommendation on SLAPPS’ - 3rd meeting of the Committee of Experts on SLAPPS at the Council of Europe 18-19th April 2023.

¹⁹ [consultation issued by Katy Clark MSP](#)

²⁰ [2022 – CFoIS](#)

²¹ [Post-legislative Scrutiny : Freedom of Information \(Scotland\) Act 2002 - Parliamentary Business : Scottish Parliament](#)

²² At [UK National Action Plan on implementing the UN Guiding Principles on Business and Human Rights: progress update, May 2020 - GOV.UK \(www.gov.uk\)](#)

²³ Advertised in May 2015 at [National Baseline Assessment on Business and Human Rights \(government-online.net\)](#) and progress at [Business and Human Rights – Scotland’s National Action Plan for Human Rights \(snaprights.info\)](#)

²⁴ [Business and Human Rights – Scotland’s National Action Plan for Human Rights \(snaprights.info\)](#) and [Human rights and business - Human rights - gov.scot \(www.gov.scot\)](#)

²⁵ Pg 42 [Scotland’s second National Human Rights Action Plan – SNAP 2 \(snaprights.info\)](#)

The UN Committee on Economic, Social and Cultural Rights in its 'List of Issues' on the UK published on 23rd March 2023 seeks information on the results achieved in implementing the updated NAP (2016), is requesting information on “compliance mechanisms and means of enforcement”²⁶ and “measures taken to reduce tax avoidance and illicit financial flows and to ensure transparency in all jurisdictions of the State party serving as major financial centres”²⁷.

Established concerns led to the UK Government introducing a “package of transparency and anti-corruption measures to address the abuse of Scottish Limited Partnerships that has been linked to money laundering.”²⁸ However it is not clear what impact this has made²⁹. Delivery of the UNGPs through the new Human Rights Bill for Scotland, promised in May 2021³⁰, is an option.

SDGs

The UN’s Sustainable Development Goals (SDGs) provide an integrated framework for making the UK, and Scotland, fairer and more accountable on public procurement and on transparency³¹. Anti-SLAPP legislation helps the SDGs to fulfil their purpose.

Conclusion

A strategic approach to delivering transparency, accountability and scrutiny requires anti-SLAPP legalisation, enforcement of the UNGPs, SDGs plus reforming FoISA³².

²⁶ Available on CFoIS website at [CFoIS – The Campaign for Freedom of Information in Scotland](#)

²⁷ Para 8(h) Ibid.

²⁸ [New measures to tackle international money laundering - GOV.UK \(www.gov.uk\)](#)

²⁹ The ICESCR Committee has issued General Comment No. 24 (2017) on State obligations in the context of business activities which emphasises the importance of an explicit regulatory regime.

³⁰ [New Human Rights Bill - gov.scot \(www.gov.scot\)](#) pub 12th March 2021.

³¹ See 4, 5 and 6 and 8, 15(b) and 31(e)

³² [Human rights - gov.scot \(www.gov.scot\)](#)