

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

¹ As stated in the Business and Regulatory Impact Assessment, available at [https://www.scotlawcom.gov.uk/files/2415/1316/5437/BRIA - Report on Defamation Report No 248.pdf](https://www.scotlawcom.gov.uk/files/2415/1316/5437/BRIA_-_Report_on_Defamation_Report_No_248.pdf)

² See Column 7, <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11599>.

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.