

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.