

# 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 arbitrage 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.