

UK Anti-SLAPP Coalition submission of 30 March 2023

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

This submission is written in support of Roger Mullin's petition¹ calling for anti-SLAPP measures in Scotland.

The UK Anti-SLAPP Coalition² 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 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by the legal letter sent to journalist Oliver Bullough by a Scottish law firm calling for his book, *Moneyland* to be withdrawn from sale even though the pursuer and defender have no presence in Scotland³, if the Scottish Parliament doesn't act, Scotland risks becoming a safe haven for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

¹ Mullin, R. (2022). PE1975: Reform the law relating to Strategic Lawsuits Against Public Participation (SLAPPs). Scottish Parliament Petition: <https://petitions.parliament.scot/petitions/PE1975>

² 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.

³ For more information relating to the legal threat against Oliver Bullough: <https://go.coe.int/WQKHO>

and journalism in Scotland⁴ 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 Hub⁵, 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.

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,⁶ any anti-SLAPP law should, as a matter of urgency, advance these three conditions:

⁴ 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_DigitalReport_1.0.pdf

⁵ 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

⁶ 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

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.

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

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.indexonensorship.org/wp-content/uploads/2022/11/Model-UK-Anti-SLAPP-Law-Final-Version.docx.pdf>

the sentiment of the Committee’s convener⁷, 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”.

⁷ 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>