

# 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 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 legislation<sup>1</sup> 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 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”<sup>2</sup> that there is no defence

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<sup>1</sup> [UK Anti-SLAPP Coalition: Model Anti-SLAPP Law](#) and [CASE Model Anti-SLAPP Directive](#).

<sup>2</sup> *Stephen and Crooks as Joint Liquidators of Payroller Limited v. Thompson* [2019] SC LIV 44.

to the action,<sup>3</sup> the question of law admits of a clear and obvious answer,<sup>4</sup> or there is evidence of a settlement.<sup>5</sup>

In contrast, and drawing on emerging international consensus,<sup>6</sup> a robust anti-SLAPP measure would apply to any civil action, empower the court 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.

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<sup>3</sup> *Henderson v. 3052775 Nova Scotia Limited (Scotland)* [2006] UKHL 21.

<sup>4</sup> *McKays Stores Ltd v City Wall (Holdings) Ltd* 1989 S.L.T 835.

<sup>5</sup> *Arthur J Gallagher Insurance Brokers Limited and ors v. Graham Hudson and ors* [2017] SC BAN 2.

<sup>6</sup> see note 1.