

Citizen Participation and Public Petitions Committee

1st Meeting, 2023 (Session 6), Wednesday 18
January 2023

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

Petitioner	Roger Mullin
Petition summary	Calling on the Scottish Parliament to urge the Scottish Government to review and amend the law to prevent the use of Strategic Lawsuits Against Public Participation.
Webpage	https://petitions.parliament.scot/petitions/PE1975

Introduction

1. This is a new petition that was lodged on 22 September 2022.
2. A full summary of this petition and its aims can be found at **Annexe A**.
3. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe B**.
4. While not a formal requirement, petitioners have the option to collect signatures on their petition. On this occasion, the petitioner elected to collect this information. 120 signatures have been received.
5. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered. A response has been received from the Scottish Government and is included at **Annexe C** of this paper.
6. A submission has been provided by the petitioner. This is included at **Annexe D**.
7. The Committee has also received submissions from Michelle Thomson MSP, Anti-SLAPP Research Hub, Ekklesia. These can be found in **Annexe E**.

Action

8. The Committee is invited to consider what action it wishes to take.

Clerk to the Committee

Annexe A

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

Petitioner

Roger Mullin

Date Lodged

22/09/22

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to review and amend the law to prevent the use of Strategic Lawsuits Against Public Participation.

Previous action

I wrote to the Scottish Government on 29 April 2022 detailing my concerns and asking what plans exist to review the law in relation to SLAPPs. I received a letter in reply on 5 May, the opening of which read.

"Dear Roger,

At this time, the Scottish Government does not plan to undertake a review of SLAPPs." It went on to show some awareness of actions at EU and UK level, but made no commitment to act.

I have also discussed the situation of SLAPPs with Michelle Thomson MSP.

Background information

There is an increasing use or threatened use of legal action involving SLAPPs.

SLAPPs are abusive defamation or privacy cases, often initiated by mega-rich individuals with the intention to intimidate and harass individuals and publishers, and prevent them from publishing information of wide public interest.

Those particularly at risk are investigative journalists and their news outlets. Given the cost of defending actions, the mere threat of action can prevent publication.

Such has been the growth in SLAPPs, the UK government launched a consultation on 17 March 2022 (closed 19 May) with a view to reforming the law in England and Wales. On 27 April 2022 the European Union published a draft directive to deal with SLAPPs across all 27 member states. Other countries have previously acted.

Scotland should act too. If we do not, it is likely we will become the chosen destination for defamation and privacy SLAPPs, providing succor to oligarchs.

Annexe B

The logo for SPICe, consisting of the letters 'SPICe' in a white, sans-serif font on a dark purple background.

The Information Centre
An t-Ionad Fiosrachaidh

Briefing for the Citizen Participation and Public Petitions Committee on petition [PE1975](#): reform the law relating to Strategic Lawsuits Against Public Participation (SLAPPs), lodged by Roger Mullin

Brief overview of issues raised by the petition

Strategic lawsuits against public participation (SLAPPs) refer to court action taken by rich and powerful interests (both individuals and businesses) with the intention of silencing critical views. The intention may be to weaken the party defending the claim personally or financially. It can also be to divert resources away from the activities generating the criticism because of the necessity of fighting legal action.

Defamation claims are a common tool to take forward SLAPPs but other types of legal action can also be used – for example data protection legislation.

The petitioner has been told that the Scottish Government is not currently planning any legal reforms to deal with SLAPPs. He is concerned that Scotland could become a focus for the powerful interests who wish to raise SLAPPs.

- The Scottish Parliament scrutinised reforms to defamation law via the Defamation and Malicious Publication (Scotland) Bill. In its [Stage 1 Report on the Bill](#), the Session 5 Justice Committee recognised the “chilling effect” that defamation claims could have on freedom of expression.
- The results in defamation cases relate closely to the specific facts of the situation. It is therefore difficult to predict the likelihood of success. In addition, defamation action can be expensive. This may mean that people are unwilling to take the risk of defending their position.

- The Justice Committee heard that many more journalists are self-employed than in the past. Traditional news organisations were also struggling to maintain their financial viability. In this financial environment, the threat of legal action could be sufficient to get an investigation dropped.
- The Defamation Bill proposed reforms that would strengthen protections for freedom of speech. These included codifying the law to make it clearer and requiring that someone must have suffered “serious harm” before they could bring a defamation claim. The Bill became the Defamation and Malicious Publication (Scotland) Act 2021.
- The Justice Committee touched on SLAPPs in its Stage 1 Report. It noted a proposal from Scottish PEN (defending literary freedom) to create an “unjustified threats” court action. This would give someone targetted in a defamation case the right to ask the court to dismiss the action as an unjustified threat. Ultimately, the Committee thought there were advantages and risks to the proposal, so it recommended further consideration of this issue by the Scottish Government.
- The UK Government has published its response to a recent consultation on SLAPPs. This recognises that SLAPPs are happening and are having an impact on freedom of expression. The intention is to legislate for a new process to allow early dismissal by the courts of SLAPPs. The UK Government also plans to change rules about the costs that can be claimed by the parties to court action for SLAPPs-type actions.
- The European Commission has proposed European Union legislation to tackle SLAPPs. The proposals would allow the courts to dismiss “manifestly unfounded” court action. There would also be the ability to award expenses to the defending party and financial penalties against the party who raised the unfounded action.

Abigail Bremner
Senior Researcher
13 October 2022

The purpose of this briefing is to provide a brief overview of issues raised by the petition. SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at spice@parliament.scot Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

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Annexe C

Scottish Government submission of 6 October 2022

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

At this time, the Scottish Government does not plan to undertake a review of SLAPPs.

The Scottish Government recently laid regulations that has brought into force the substantive provisions of the Defamation and Malicious Publication (Scotland) Act 2021. This includes provisions that introduce a threshold test of serious harm that means a statement is not defamatory unless its publication has caused (or is likely to cause) serious harm to the reputation of the pursuer. The pursuer will need to show evidence of serious harm, although it can be inferred in certain circumstances. The 2021 Act also introduces a new defence of publication on a matter of public interest.

Overall, the 2021 Act goes some way to move the balance in defamation law towards to freedom of expression.

The Scottish Government keeps the law under constant review, however, and is closely monitoring the UK Government's intention to introduce a new statutory early dismissal process to strike out SLAPPs and the recent EU-level draft Directive concerning SLAPPs.

Annexe D

Petitioner submission of 16 November 2022 PE1975/B: Reform the law relating to Strategic Lawsuits Against Public Participation (SLAPPs)

The SPICe briefing is an excellent summary of matters but with two important omissions. These omissions are also evident in the Scottish Government response. In addition, the Scottish Government response lacks clarity in one key area. My responses are as follows:

- 1. There is a lack of recognition of the scale of the problem.** For example, a report from the Foreign Policy Centre (FPC) published in November 2020, which surveyed 63 investigative journalists in 41 countries working to uncover financial crime and corruption, found the UK to be by far the most frequent international country of origin for legal threats; indeed significantly more than EU members combined and about three times the scale of SLAPPs in the USA. Scotland is part of such vulnerability.
- 2. Neither the briefing nor the Scottish Government response deals with the important observation in my petition that “*Scotland should act too. If we do not, it is likely we will become the chosen destination for defamation and privacy SLAPPs*”.** With the prospect of tightening of laws throughout the EU and also in England and Wales, Scotland will become increasingly vulnerable to so-called ‘defamation tourism’. At present defamation tourism is not restricted to the UK. For example, there is currently a case where the author Oliver Bulloughⁱ has been pursued by a Scottish law firm on behalf of their client, a senior political figure in Angola, but where the case is being pursued in the courts in Portugal, despite the fact the author has never been to Portugal. With the coming tightening of EU law, Scotland becomes even more vulnerable to such action.
- 3. The Scottish Government response claims to keep such matters “under constant review” but fails to specify how.** For example, I can find no record of there having been any recent consultation on the specific issue of SLAPPs. Furthermore, in my own researches amongst journalists, including journalists subject to SLAPPs, I am not aware of any recent research amongst the affected communities of professionals by the Scottish Government, nor does their response

indicate they have any plans to conduct such research. As it stands therefore the claim of keeping this matter “under constant review” is lacking in any supporting evidence.

Annexe E

Michelle Thomson MSP submission of 5 December 2022

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

For approximately seven years I have been active, first as a Westminster MP and latterly as an MSP in speaking out on a range of areas involving high level corruption. As an MP I was involved in both the APPGs for Fair Business Banking and Corporate Governance and have written for publications such as International Banker on the need for reforms in the financial system.

I have encouraged, and at times worked alongside the petitioner to increase awareness of various corrupt practices in the public domain. This has included a focus on the abuse of Scottish Limited Partnerships (SLPs) and Mini Umbrella Companies (MUCs) for criminal purposes.

Over the last year or so, I have discussed the issue of SLAPPs with the petitioner and others, such as the author Oliver Bullough. I am therefore fully supportive of both the petitioner and the petition.

It is entirely fitting that the focus on SLAPPs is being brought to the Scottish Parliament via the Petitions Committee. One of the first recorded cases of what we would now call SLAPPs was in the USA in 1802 in the case of Harris v Huntington. Harris was a powerful justice of the peace in Vermont, who sought to bring a case of libel against five ordinary citizens for petitioning the state against his reappointment. He lost and the freedom to petition won.

Attempts by very rich individuals to abuse the legal system is nothing new. However, what has become particularly disturbing in recent years is the increasing use of threats of legal action by oligarchs and some other very rich individuals to suppress matters in the public interest. The scale of such activity has been increasing over the last 20 years, particularly within the UK.

Scotland is particularly exposed because other legal jurisdictions either have acted or are acting to address the problem of SLAPPs. This

includes the USA, the European Union, and early moves by the UK government in relation to England and Wales.

The scale of the problem and suggested actions is set out in the recent letter by distinguished lawyers, publishers and others sent to Dominic Rabb MP and copied to the Prime Minister Rishi Sunak:
Letter to Justice Secretary: Adoption of a UK Anti-SLAPP Law - Index on Censorship Index on Censorship.

Although there is much in the letter with which I agree, the letter assumes there is only one legal system in the UK. If the reforms being sought are enacted only in England and Wales, it could greatly expose Scotland to defamation tourism.

This is an area where Scotland can and should act with some urgency. It cannot be left to others and nor can we claim we don't have the powers to act. We do - and it would be a profound dereliction of duty if we do not. Furthermore, there is no reason why Scotland should not seek and indeed lead the highest international standards in preventing SLAPPs.

It is already known that several threats of SLAPPs have stopped publication of matters in the public interest within Scotland. I know the petitioner has firsthand experience of how such threats work.

Finally, as a society we are heavily reliant on investigative journalism to expose some of the worst corruption and criminality in our society. For example, the many cases of criminality and money laundering on a massive scale fronted by SLPs have only come to light because of journalists being willing to pursue cases where the authorities have failed to do so. Such work needs continued support in the public interest.

I therefore ask the Petitions Committee to treat this petition with the utmost seriousness.

Anti-SLAPP Research Hub, University of Aberdeen submission of 14 December 2022 PE1975/D: Reform the Law Relating to Strategic Lawsuits Against Public Participation (SLAPPs)

We write with reference to Petition PE1975, noting the Scottish Government's response which stated that the Defamation and Malicious

Publication (Scotland) Act 2021 (the “2021 Act”) rebalances Scots law of defamation in favour of freedom of expression. We welcome the amendments to the law introduced by the 2021 Act, particularly the establishment of threshold requirements for serious harm, as well as limitations placed on forum shopping. However, we submit that the 2021 Act is insufficient to deter misuse of Scottish courts by pursuers wishing to engage in strategic litigation against public participation (“SLAPPs”). This is especially concerning in the context of the development of anti-SLAPP legislation in the European Union and in England and Wales; failing adoption of similar Scottish legislation, Scotland risks becoming a haven for pursuers wishing to misuse court proceedings to suppress freedom of expression. In addition, SLAPPs have the potential to impact the efficient functioning of the judicial system by overburdening the court system with vexatious or frivolous litigation.

We submit that the 2021 Act is insufficient to deter SLAPPs in four fundamental ways. First, defamation claims are a common route to silence or intimidate activists. However, SLAPPs take various forms including economic torts/delicts, data protection, or nuisance actions. It follows, therefore, that the 2021 Act could not resolve the problem of misuse of court proceedings as its material scope is limited to one of several routes through which SLAPPs are instituted.

Second, the 2021 Act does not respond to the procedural mechanisms that SLAPP pursuers use to frustrate freedom of expression and public oversight. SLAPPs are by nature vexatious and lacking legal merit; SLAPP pursuers are not reliant on substantive laws that are favourable to their claim. Indeed, SLAPPs are commonplace in jurisdictions with varying degrees of protection of freedom of expression. Rather SLAPPs are characterised by an abuse of judicial process, including exaggerated or unfounded claims for damages, amending or withdrawing claims or pleadings, misuse of jurisdictional rules, and exploitation of appeals procedures. These tactics are designed to increase the defender’s legal, personal, and financial costs. Therefore, SLAPP pursuers rely on the procedural costs associated with defending an action and the threat of disproportionate damages to frustrate the defender’s genuine exercise of their right to public participation.

Third, often, engaging in jurisdictional pleadings is prohibitive. SLAPPs frequently engage in “forum shopping” to increase the financial and psychological cost of defending litigation or to access a more favourable jurisdiction, whether in terms of damages awardable or the cost of bringing proceedings. While the introduction of a requirement that

Scotland is clearly the most appropriate place to bring the defamation proceedings under s.19(2) of the 2021 Act is a welcome intervention, contesting jurisdiction is itself prohibitive and requires burdensome litigation concerning factual tests. In the absence of mechanisms which would enable courts to dismiss claims summarily and dissuade vexatious claims through exemplary damages and fines, pursuers remain able to deploy jurisdictional litigation in Scotland to chill criticism, even if they had no prospect of persuading a court to hear the substantive claim.

Finally, the 2021 Act does not give the judiciary a general power to penalise or remedy abusive court proceedings, and there needs to be a defensive mechanism for proceedings instituted outwith Scotland. It is further submitted that bespoke rules comparable to Article 24 of the Coalition Against SLAPPs in Europe (CASE)'s Model Law would dissuade the initiation of international proceedings against defenders domiciled in Scotland. Such measures could include provision for the summary award of damages in Scotland, alongside the imposition of effective, proportionate, and dissuasive penalties.

In view of the foregoing, we submit that the Scottish Parliament should proceed to consider the introduction of bespoke anti-SLAPP legislation which draws on international best practice, particularly the EU's proposed anti-SLAPP Directive. In the absence of legislative intervention, the policy underpinnings of the 2021 Act risk being undermined by misuse of legal procedure. In line with the EU's proposed anti-SLAPP Directive any anti-SLAPP measures should, at a minimum:

- a) be general in nature and not apply solely to a specific area of law
- b) provide for a request for security to cover the defender's procedural costs,
- c) provide for early dismissal of unfounded proceedings through an accelerated procedure,
- d) place the burden of proof on the claimant to prove the claim is not manifestly unfounded
- e) provide for remedies and penalties against abusive court proceedings,
- f) provide defensive mechanisms to deter the institution of proceedings outwith Scotland.

We thank you for considering this submission. We would be pleased to discuss further if we can be of assistance.

Ekklesia submission of 15 December 2022

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

As an Edinburgh-based thinktank addressing the intersections of ethics, beliefs, politics and public policy, we are writing to endorse [PE1975: Reform the law relating to Strategic Lawsuits Against Public Participation \(SLAPPs\)](#), submitted by Mr Roger Mullin. We thereby join the call on the Scottish Parliament to urge the Scottish Government to review and amend the law to prevent the use of SLAPPs. We do so in knowledge of some of the individuals and organisations impacted by SLAPPs or the threat of their use.

As legal scholars at the University have pointed out to you in [their submission](#), SLAPPs, unlike litigation to enforce legitimate rights, “are abusive lawsuits in which the pursuer seeks to use the cost of legal proceedings to chill free speech on matters of public interest.” We are aware of the wide range of circumstances in which such abusive lawsuits have been issued within the UK and beyond. These include such high-profile cases as those targeting Catherine Belton, Tom Burgis and Elliot Higgins, as well as openDemocracy and the Bureau of Investigative Journalism (BIJ). Such cases have been well documented by, among others, Index on Censorship, whose [29 November 2022 letter to the UK Justice Secretary](#) points out that these are emblematic of a long-term problem impacting the media on these islands.

People issuing SLAPPs against journalists in the UK rely on the potential legal bills involved in defending such actions being so large and intimidating that they will probably not be able to afford to respond to such threats.

We naturally welcome moves towards addressing the issue of SLAPPs at UK level, effecting England and Wales. But this is not sufficient. If only English law is reformed, then libel tourists will simply migrate north of the border. The legal jurisdiction in Scotland is therefore critical, and the role the Scottish Parliament and Government can play is correspondingly very important. This is why we back PE1975 and regard it as so vital.

As the legal scholars in Aberdeen have noted, draft anti-SLAPP legislation has now been introduced in the European Union, and the UK Government has indicated that it proposes to introduce similar legislation

in England and Wales. Such anti-SLAPP laws will rightly empower courts to dismiss unfounded claims at an early stage and will include deterrent measures such as penalties and fines to dissuade such claims being made.

However, without corresponding legislation in Scotland, Scottish courts risk becoming the preferred legal route for powerful economic and political actors seeking to suppress public scrutiny and intimidate legitimate investigative journalists and researchers – including academics – from doing their job.

In terms of how the Scottish Parliament and Government may act, we believe that there is much to commend in the Model Anti-SLAPP Law that has been drafted by the UK Anti-SLAPP Coalition in consultation with respected media lawyers and acknowledged industry experts. This is designed to offer robust protection against SLAPPs. Its major features include:

- A filter mechanism which empowers courts to dispose of SLAPPs swiftly, without the need for a subjective enquiry into the state of mind of the SLAPP filer. This mechanism would subject claims that exhibit features of abuse to a higher merits threshold.
- Penalties which are sufficient to deter the use of SLAPPs and to provide full compensation for those targeted by abusive lawsuits. Such penalties would consider the harm caused to the defendant(s), as well as the conduct of, and the resources available to, the claimant(s).
- Protective measures provided towards SLAPP victims – including cost protections, safeguards, and measures to reduce the ability of SLAPP claimants to weaponise the litigation process against public watchdogs.

We would urge the Scottish Parliament to encourage the Scottish Government to look to enact similar measures. As the petitioner says, “SLAPPs are abusive defamation or privacy cases, often initiated by mega-rich individuals with the intention to intimidate and harass individuals and publishers, and prevent them from publishing information of wide public interest.”

We regard this to be an ethical and public interest matter of the highest regard.