

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.