



University of Aberdeen
School of Law

Anti-SLAPP Research Hub

Briefing Note:

Workshop on Developing a Model Anti-SLAPP Law for Scotland

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This briefing note summarises the discussions and findings of the June 2023 workshop on ‘Developing a Model Anti-SLAPP Law for Scotland’ hosted by the Anti-SLAPP Research Hub at the University of Aberdeen. The Hub is grateful for funding supplied by the University of Aberdeen’s Impact Award scheme and the School of Law.

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Summary

On 2 June 2023, the University of Aberdeen's [Anti-SLAPP Research Hub](#) hosted a workshop on 'Developing a Model Anti-SLAPP Law for Scotland.' The workshop brought together key stakeholders from civil society, academia, journalism, politics, and the legal profession to discuss legal reform in Scotland to address strategic lawsuits against public participation (SLAPPs).

SLAPPs are unfounded or otherwise abusive legal claims which have the purpose or effect of chilling freedom of expression. In addition to imposing significant financial, legal, and personal costs on the individuals who are forced to defend meritless claims, SLAPPs are also used to prevent publication of information in the public interest. Currently, there is no dedicated anti-SLAPP legislation in Scotland. Unlike the European Union and the UK government (in its capacity as government of England and Wales), the Scottish Government's position is that legal reform is not needed as freedom of expression is sufficiently protected by the Defamation and Malicious Publications (Scotland) Act 2021. Therefore, much of the workshop discussion was dedicated to examining whether anti-SLAPP legislation is needed in Scotland and identifying the steps towards legal, political, and cultural change to prevent Scotland from becoming a haven for SLAPPs.

This briefing report summarises the key points arising from the workshop discussion. It is separated into seven thematic areas: (1) experiences of SLAPPs; (2) identifying SLAPPs; (3) the current status of SLAPPs in Scotland; (4) the role of the regulators; (5) SLAPPs and human rights; (6) advocacy strategies; (7) developing a model anti-SLAPP law for Scotland. The report uses the terms 'SLAPP targets' to refer to victims of SLAPPs (including threats of legal action) and the term 'SLAPP instigators' to refer to those who instigate SLAPP claims or issue threats of legal action.

1. Experiences of SLAPPs

Are SLAPPs a problem in Scotland? This question underpinned the discussion, with workshop participants largely in agreement that SLAPPs are a problem in Scotland and could potentially become a larger one if plans to introduce anti-SLAPP legislation in England and Wales go ahead, as Scotland could be seen as an alternative forum by SLAPP instigators. Participants also recognised that SLAPPs are perceived as only a minor issue in Scotland, in part because relatively few SLAPP claims have reached the courts. Nevertheless, participants spoke of a ‘chilling effect’ that has a serious impact on journalism. Participants recounted instances in which multiple contributors have reported the same information to journalists but are reluctant to go on record due to the legal risks. In other cases, non-disclosure agreements (NDAs) prevent information-sharing and publication. Even where NDAs are not present, publishers have declined to publish stories or watered down their reporting due to fear of litigation. Participants agreed that lawsuits are only the ‘tip of the iceberg’ when it comes to SLAPPs, as even the threat of litigation can prevent individuals from speaking out or publishers from running stories.

Although the discussion at times focused on media freedom and the experiences of journalists, participants recognised that journalists are not the only targets of SLAPPs. However, due to the social watchdog function journalists perform, the chilling effect in respect of journalism is especially noteworthy in that this can have a tremendous impact not only on the immediate target, but also on the public’s right to know. If SLAPPs or even the threat of litigation prevents publication, this will limit the information in the public domain. This, combined with structural changes in journalism that have greatly weakened local investigative journalism, means that there are stories of public interest that are simply not being told.

Overall, participants agreed that SLAPPs are a problem in Scotland, but challenges remain in measuring the scale of the problem, particularly the impact of the ‘chilling effect.’ with a view to explaining the nature and scale of the problem to a broader audience. Empirical research would facilitate advocacy efforts and inform the design of appropriate legal responses which would capture the diversity of SLAPP targets and the various causes of legal action on which claims are brought.

2. Identifying SLAPPs

Participants discussed the need for a legal definition of SLAPPs. There was some discussion on whether the problem is one of definition or of identification (i.e. the need for consistent criteria to identify SLAPPs), but in general participants agreed that clarity is needed, both when discussing the details of any proposed law and in communicating the problem of SLAPPs to a broader audience.

One of the main problems with the lack of legal definition in Scotland is that judges do not have any

criteria to use to identify putative SLAPP claims. Moreover, activists do not have clear criteria with which to identify SLAPP claims, which in turn makes it more difficult to measure and communicate the scale of SLAPPs in Scotland (which is necessary for further advocates efforts, as discussed in Section 1).

Participants noted that the criteria for identifying a SLAPP should not be too narrow (i.e. focusing only on journalists as targets, or on specific causes of action like defamation) as this would limit their scope. However, a definition that is too broad would be difficult to implement in practice (and could even lead to falsely categorising a legitimate claim as a SLAPP). Scotland can look to the European Commission's draft Anti-SLAPP Directive, the UK model Anti-SLAPP law, and the Council of Europe's approach as examples in identifying SLAPPs. Rather than relying exclusively on a fixed definition, a selection of indicators can be used to identify likely SLAPPs (e.g. the SLAPP instigator has a history of legal intimidation or harassment; the instigator seeks remedies that are disproportionate to the claim initiated).

3. The Current Status of SLAPPs in Scotland

Scotland does not currently have any legislation specifically addressing SLAPPs. The Scottish Government position is that the Defamation and Malicious Communications (Scotland) Act 2021 strikes an appropriate balance between the needs of pursuers and defendants in defamation claims. However, as participants noted, SLAPPs can be brought on a range of legal grounds and are not limited to defamation. Even where SLAPP claims are brought under defamation, the 2021 Act does not provide for early dismissal. Nor does Scots procedural law provide remedies for early dismissal which are comparable to those available in existing anti-SLAPP legislation and model laws. This means that even when a SLAPP target can demonstrate that they have not defamed the instigator, it is often too late in the process as they have already expended considerable costs to support their defence. As the goal of a SLAPP is to put its target through the financial and emotional strain of defending the claim, and not necessarily to win the case, participants believed that the reforms to defamation law are insufficient to address SLAPPs in Scotland.

Moreover, complicated civil procedure rules can make it difficult for SLAPP targets to defend against claims. Measures like vexatious litigation orders, which prevent vexatious litigants from abusing court procedures to harass their targets, can potentially be useful tools in combatting SLAPPs, but they can only be used when there is a pattern of behaviour by the litigant. Moreover, they do not recognise the broader chilling effect that can occur from even just one threat against a SLAPP target. In short, whilst there are some useful legal mechanisms that can be used to challenge SLAPPs and other vexatious claims in Scotland, they are not sufficient to capture the variety of potential SLAPP claims, nor are they able to adequately address the threats SLAPPs pose to democracy and to public participation.

It was also noted that Scots private international law does not address the problem of SLAPPs with

connections to more than one legal system. Scottish rules of jurisdiction enable Scottish courts to be seised of a non-contractual claim where other courts are far better suited to hear the claim in whole or in part. Participants noted that, notwithstanding the reforms in respect of defamation in the 2021 Act, there remain significant opportunities to use Scottish courts as part of a strategy of vexatious jurisdictional litigation. Choice of law rules in respect of defamation also merit attention insofar as their complexity lends itself to costly and lengthy litigation to the potential detriment of SLAPP victims. Moreover, Scots law does not include adequate bespoke mechanisms to protect Scottish domiciled defenders from the misuse of proceedings in other jurisdictions.

Participants also discussed the need for greater public education, as well as education journalists (as potential SLAPP targets) and legal practitioners (who might be instructed by SLAPP instigators). At the moment, the Scottish regulators are not convinced that SLAPPs are a problem (see Section 4 below), and legal practitioners are not given formal guidance on identifying SLAPPs. There was some debate at the workshop on how much attention to devote to education versus legislative and/or systemic change, but in general it was agreed that whilst a model law is a necessary step, legislative change on its own is unlikely to be sufficient to address SLAPPs in Scotland. Cultural and institutional change is needed along with legal change.

4. The Role of the Regulators in Scotland

Participants expressed the need for greater involvement with Scotland's legal regulators (the Law Society of Scotland and the Faculty of Advocates). At present, the regulators have not recognised SLAPPs as a problem in Scotland and therefore have declined to issue formal guidance to practitioners on how to identify SLAPP claims and how to proceed when faced with a potential SLAPP claim. This is in contrast to the approach taken by the Solicitors Regulation Authority (SRA), which issued a warning notice to solicitors in England and Wales in 2022, explaining what SLAPPs are and reminding legal practitioners of their duties to the profession and the wider society, along with their duties to their clients.

However, participants also noted that the SRA has not always been proactive on SLAPPs. Until recently, they were unconvinced that SLAPPs were a problem in England and Wales, but they changed their views and their official guidance after being presented with evidence of the problems. Therefore, an important first step to engaging with the Law Society and the Faculty of Advocates will be gathering evidence to document the scope and impact of SLAPPs in Scotland. An ongoing dialogue with the regulators as additional research on SLAPPs in Scotland is carried out could lead to a change in position, as it did with the SRA. Participants also considered whether there might be more support amongst individual legal practitioners.

In addition, some participants pointed out that SLAPP instigators often use reputation management firms

to pursue their targets. Reputation management firms are tasked with managing a powerful individuals' or companies' reputations to ensure that public information about their clients is presented positively. Their activities include contacting journalists or politicians to 'encourage' them not to publish negative information or opinions. Significantly, reputation management firms operate outwith traditional legal frameworks and are not overseen by the law regulators. Therefore, even with increased involvement of the regulatory bodies, this would remain as another gap in protection.

5. SLAPPs and Human Rights

Throughout the workshop, participants noted that SLAPPs are not only a threat to their immediate targets, but also to the wider society. Because SLAPPs can be brought against targets for voicing their opinions (and not simply reporting facts), they inhibit the free expression of opinions and exchange of ideas. SLAPPs have been brought against civil society actors advocating for, inter alia, increased protections for human and labour rights abuses, or for stronger environmental regulation. SLAPPs inhibit journalism, which negatively impacts public participation and the right to know. In short, SLAPPs are a threat to democracy.

Within the European Convention on Human Rights (ECHR) system, proposals for the introduction of early dismissal of SLAPP claims require careful consideration of the balancing exercise that must be carried out between qualified rights. For example, the Article 10 right to freedom of expression is a qualified right that must be balanced with other rights, including the Article 6 right to a fair trial, the Article 8 right to respect for private life, and the Article 13 right to an effective remedy. Anti-SLAPP legislation must not do violence to the balance between these rights. It was noted, however, that anti-SLAPP legislation has survived constitutional challenge in the United States, and that it is possible to craft legislation which preserves the procedural and substantive rights of both parties.

6. Advocacy Strategies

As discussed in Section 2, one of the current challenges is in identifying what makes a SLAPP claim and how to communicate what SLAPPs are to others. There is a perception that SLAPP targets are primarily journalists and SLAPP claims are primarily defamation claims. However, participants noted that in Scotland, journalists do not appear to be the primary targets of SLAPPs (the phrase 'appear to' is used here as a comprehensive mapping exercise has not been carried out). Therefore, an important advocacy strategy is to build narratives on SLAPPs. The general public might not have heard the term SLAPPs, but many will have read stories of high-profile journalists being sued (as one example). By connecting these apparently isolated examples to the broader context can help people to understand what SLAPPs are, why they should be wary of them, and how to identify them when they are brought.

Stronger narratives with evidence can also be used to inform politicians and other key stakeholders.

Participants reiterated that SLAPPs are not only a threat to their immediate targets, but also to society and to Scotland's reputation. Scotland should not become a haven for SLAPP claims (as some fear it could become, particularly as movements towards legal reform are being made in England and Wales).

The Scottish Government's current position is that there have only been a handful of SLAPP cases and therefore it does not see the need for legislative intervention. The workshop discussions and the insights shared by participants demonstrated that whilst the number of SLAPP claims to reach the courts in Scotland has been relatively low to date, this does not capture the full impact of SLAPPs, where even the threat of legal action can lead to the silencing of public participation. Therefore, an important advocacy strategy will be to map these impacts to demonstrate the scope and scale of the chilling effect. Furthermore, as SLAPPs are a threat to human rights, the government is, arguably, required to take appropriate steps to respect, protect, and fulfil human rights.

7. Developing a Model Anti-SLAPP Law in Scotland

Developing anti-SLAPP law within Scotland will involve a multifaceted approach, and participants noted that several steps can be taken before and in addition to legislative reform.

Participants noted that more evidence and data on SLAPPs in Scotland is needed. Currently, the lack of concrete data and the difficulties in measuring the 'chilling effect' contributes to the (mis)perception that SLAPPs are not a problem in Scotland.

A model anti-SLAPP law will include the following:

1. Early dismissal mechanism.
2. Remedies for the victim.
3. Cost caps for SLAPP targets.
4. Private international law mechanisms to address cases with an international dimension.

Additional measures to counter and/or deter SLAPPs could include the following:

1. Additional penalties for SLAPP instigators, e.g. a register to show who has brought SLAPP suits.
2. Legal aid.
3. Specific provision for third-party intervention.