



Response to the Ministry of Justice’s SLAPPs Consultation Joint Submission by the UK Anti-SLAPP Coalition¹ - May 2022

This joint response by members of the UK anti-SLAPP Coalition focuses on addressing the consultation’s questions as they relate to anti-SLAPP solutions. Some of our members have also provided individual submissions based on their own research or experience. Also attached to this submission are:

- [UK anti-SLAPP Coalition Briefing Note: On Countering Legal Intimidation and SLAPPs in the UK](#) (updated as of May 2022 with cases bearing the hallmarks of SLAPPs)
- [Draft Model UK anti-SLAPP Law](#) (please note this is a working draft)

Supporting Organisations:

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| 1. ARTICLE 19: Global Campaign for Free Expression | 10. Global Witness |
| 2. Blueprint for Free Speech | 11. Index on Censorship |
| 3. Campaign for Freedom of Information in Scotland (CFoIS) | 12. Justice for Journalists Foundation |
| 4. Client Earth | 13. National Union of Journalists |
| 5. The Cyrus R. Vance Center for International Justice of the New York City Bar Association (Affiliate Member) | 14. PEN International |
| 6. The Daphne Foundation | 15. Protect |
| 7. The European Centre for Press and Media Freedom (ECPMF) | 16. Rights and Accountability in Development (RAID) |
| 8. English PEN | 17. Reporters Without Borders (RSF) |
| 9. Foreign Policy Centre | 18. Rory Peck Trust |
| | 19. Spotlight on Corruption |
| | 20. Transparency International UK |
| | 21. Whistleblowing International Network (WIN) |

¹ Prepared by the UK anti-SLAPP Coalition co-chairs Charlie Holt, UK Campaign Manager at English PEN, Susan Coughtrie, Project Director at the Foreign Policy Centre (FPC), and Jessica Ní Mhainín, Policy and Campaigns Manager at Index on Censorship with input from other coalition members. The UK Anti-SLAPP Coalition is an informal working group comprising a number of organisations as well as media lawyers, researchers and academics who are monitoring and highlighting cases of legal intimidation and SLAPPs, as well as seeking to develop remedies for mitigation and redress. The FPC’s contribution to the working group is based on the findings of the Unsafe for Scrutiny research programme and any views expressed are those of Susan Coughtrie.

Impact on SLAPPs recipients

- *Question 1: Have you been affected personally or in the conduct of your work by SLAPPs? If so, please provide details on your occupation and the impact SLAPPs had, if any, on your day to day activity including your work and wellbeing.*
- *Question 2: If you have been affected by SLAPPs, please provide details on who issued the SLAPP (for example, a legal or public relations professional), the form (for example, an email or letter) and the content. Was legal action mentioned? If yes, please provide details on the type of action.*
- *Question 3: If you have been subject to a SLAPP action how did it proceed? For example, a pre-action letter or a formal court claim resulting in a hearing. Did you settle the claim and what was the outcome of the matter?*
- *Question 4: If you are a member of the press affected by SLAPPs, has this affected your editorial or reporting focus? Please explain if it did or did not do so, including your reasons.*
- *Question 5: If you have been affected by SLAPPs, did you report this to anyone? Please explain if you did or did not do so, including your reasons. What was the outcome?*
- *Question 6: If you have been affected by SLAPPs, please provide details on the work you were undertaking at the time, including the subject matter referred to by SLAPPs.*

We have not responded to these questions as they relate to personal experiences. The below resources however highlight cases of legal intimidation and SLAPP linked to the UK:

- **UK anti-SLAPP Coalition, Briefing Note: On Countering Legal Intimidation and SLAPPs in the UK**, May 2022, <https://fpc.org.uk/wp-content/uploads/2022/05/Briefing-Note-On-Countering-Legal-Intimidation-and-SLAPPs-in-the-UK.pdf>
- **‘London Calling’: The issue of legal intimidation and SLAPPs against media emanating from the United Kingdom**, by Susan Coughtrie, Foreign Policy Centre and ARTICLE 19 staff, April 2022, <https://fpc.org.uk/publications/london-calling-the-issue-of-legal-intimidation-and-slapps-against-media-emanating-from-the-united-kingdom/>

Legislative reforms

Statutory definition for SLAPPs

- *Question 7: Do you agree that there needs to be a statutory definition of SLAPPs?*

There does **not need to be a statutory definition of SLAPPs**.

Indeed, since SLAPPs are abusive lawsuits filed with the *purpose* of shutting down acts of public participation, making protective anti-SLAPP measures conditional on identifying a lawsuit as a SLAPP would drastically weaken the application of these measures.

This is due to the difficulties in identifying an improper purpose. As we have explained in our answer to Question 33, this has meant that existing mechanisms to tackle such lawsuits - such as the motion to strike under CPR 3.4(2)(a) or the tort of bringing proceedings for an improper purpose - have had very little application. The same criticism has been levelled at those anti-SLAPP laws overseas, such as the Australian Capital Territory’s Protection Against Public Participation Act 2008, that require an improper purpose to be established before protective measures can take effect.

A better approach, therefore, would be to establish an early dismissal mechanism that subjects claims targeting public participation to a **higher threshold** than a standard motion to strike. We propose that this higher threshold requires such claimants to show the court at the earliest possible stage that their claim is likely to prevail at court. More details on this proposed new mechanism can be found in our answer to Question 34.

The only thing that *needs* to be defined for the purposes of an anti-SLAPP law is therefore “public participation”. This should be defined broadly to encompass the various democratic rights the concept entails (see our answer to Question 8 below). This should explicitly include public interest litigation, which is itself an important form of public participation - and which could otherwise itself be threatened by an abusive application of the anti-SLAPP law. Additional protection in this regard could be provided by clarifying the purpose of the law (i.e. to protect the ability of the public to advance accountability and engage in public debate) and instructing courts to interpret the law broadly enough to advance this purpose.

It would be helpful, however, for a non-exhaustive list to be provided of the forms of abusive conduct associated with SLAPPs: e.g. disproportionate or otherwise unreasonable claims for damages; efforts to use the litigation process to harass or intimidate the defendant (or third parties); the existence of multiple proceedings related to the same subject matter. This can help guide the Court when imposing sanctions under the anti-SLAPP law (see our answer to Question 45).

- *Question 8: What approach do you think should be taken to defining SLAPPs? For example, should it be to establish a new right of public participation? What form should that take?*

Affirming a new **right to public participation** could be an effective way of guiding the interpretation of laws in a way that protects public watchdogs. Ultimately, however, there is no single “right to public participation” – the concept refers to a composite of rights (freedom of expression, freedom of association, and freedom of assembly in particular) that together empower individuals to participate in their government. It might make sense, therefore, to define the right in relation to rights protected under existing law – specifically, Articles 10 and 11 of the European Convention on Human Rights (as protected by the Human Rights Act). The most important thing is to define public participation to encompass *all* ways in which individuals and civil society organisations can challenge those in power and engage in public debate: this should include, for example, peaceful protest, direct action, whistleblowing (both internal/workplace and external disclosures), and public interest litigation.

- *Question 9: If a new right of public participation were introduced, should it form an amendment to the Defamation Act 2013, or should it be a free-standing measure, recognising that SLAPP cases are sometimes brought outside of defamation law?*

Any new right of public participation must be a free-standing measure, since defamation is only one of a number of laws used to pursue SLAPPs. Other laws that are commonly abused to pursue SLAPPs include data protection, privacy, and copyright.

- *Question 10: Do you think the approach should be a definition based on various criteria associated with SLAPPs and the methods employed?*

No. See Question 7.

- *Question 11: Are there any international models of SLAPP legislation which you consider we should draw on, or any you consider have failed to deal effectively with SLAPPs? Please give details.*

Anti-SLAPP laws around the world differ widely in the provisions they contain and the threshold tests they use. It does not make sense to look to any one single law to shape a law. Our **model UK anti-SLAPP law** is built upon a rigorous comparative analysis of the laws existing around the world, and borrows from many of the most robust provisions that these laws contain.

- *Question 12: Would you draw any distinction in the treatment of individuals and corporations as claimants in drawing up definitions for SLAPP type litigation? Reforms stemming from there being a defined cohort of SLAPPs cases*

Corporations and other public figures must be willing to tolerate a higher level of public scrutiny and criticism than private citizens. We would therefore support efforts to make it harder for corporations to sue public watchdogs for reputational damage (a model in this regard might be the Model Defamation Amendment Provisions adopted in Australia in 2020, which provides that a corporation will have no cause of action for defamation unless it has fewer than 10 employees and is not an associated entity of another corporation, or the objects for which it is formed do not include obtaining financial gain for its members or corporators). Since this relates to substantive law, however, the appropriate place to address this would be in the context of defamation reform (see below in Question 28). Since *anyone* can abuse the litigation process to harass and intimidate their critics, anti-SLAPP mechanisms designed to protect defendants from this abuse should apply irrespective of the status of the claimant.

- *Question 13: Which other reform options for tackling SLAPPs would you place on a statutory footing? Please give reasons.*

While not all SLAPP cases relate to financial crime and corruption, many connected to the UK are. The role that London plays as a global hub for the super wealthy appears to have compounded the SLAPPs problem. There has been insufficient recognition from the UK Government and law enforcement agencies of the connection between protecting free speech and countering corruption. In lieu of effective law enforcement, which would see successful criminal convictions and civil actions such as seizures of illicit or unexplained wealth, public watchdogs such as journalists, NGOs, and activists are often the ones making information about wrongdoing public first, if they are not in fact the only ones uncovering it. If they are sued in response, they have no official criminal or civil enforcement case on record that can support their allegations and underpin their available legal defences. There is moreover a considerable risk that the funds used to pay for SLAPPs are the proceeds of crime. One practical reform would be to extend anti-money laundering regulations to cover legal advice given to claimants in civil cases taken against those speaking out in the public interest.

- *Question 14: Are there additional reforms you would pursue through legislation? Please give reasons.*

The UK Government should ensure the effective funding and enforcement of anti-corruption measures and include anti-SLAPP initiatives within its strategies to tackle corruption - thereby recognising the role that public watchdogs such as journalists, NGOs, whistleblowers and activists play at the frontline of exposing corruption.

Legislative measures should also be introduced more broadly to create an environment that is conducive to public participation. This should include, for example, strengthening measures that protect whistleblowers who raise a concern that is in the public interest - whether that is internally to an employer or externally to a regulator, Parliament, or the press. More broadly, an affirmative right to public participation (see our answer to Question 8) should extend to all those who contribute to public debate and advance accountability, including activists and NGOs as well as journalists and their sources.

Defamation (libel) laws

The Serious Harm Defence

- *Question 15: Does the serious harm test in defamation cases have any effect on SLAPPs claims?*

In theory, the serious harm test can help to filter out frivolous claims. In practice, this depends on the ability of the test to be applied at a preliminary hearing.

Preliminary hearings are, however, the exception and not the norm. Court of Appeal guidance remains that evidential disputes arising from the serious harm test should be resolved as part of the ultimate trial and not by preliminary issues trials, if not suitable for summary judgement. This guidance can and should be countered through judicial training and amendments to Practice Direction 53B(4).

In any event, however, the serious harm test would not filter out most SLAPPs. Serious harm might well have been suffered by the SLAPP litigant - e.g. if the publication targeted had exposed serious wrongdoing - and would not therefore be considered frivolous by the standards of Section 1. It's important to emphasise therefore that even an amended serious harm test would have a limited impact in tackling SLAPPs. It is also, of course, important to note that defamation is just one of a number of laws abused by SLAPP litigants.

- *Question 16: Are there any reforms to the serious harm test that could be considered in SLAPPs cases?*

As always, it is important to reiterate the need for such a filter to be extended to claims beyond defamation. Privacy actions, for example, should be subject to this same threshold requirement of serious harm.

As discussed above under Question 12, corporations - as public figures - should be willing to tolerate a higher level of scrutiny than private citizens. This is particularly important in SLAPP cases, since the power

imbalance inherent in the relationship between a wealthy corporate claimant and its critics can be easily exploited (e.g. by stretching out proceedings and driving up costs) to force the defendant to concede.

Section 1(2) should therefore be amended to bar corporations of any kind from suing for defamation unless they can show *actual* serious financial loss. “Likely” loss should not be enough, and nor should a company be able to rely on some nebulous “devaluation of goodwill” to pass the serious harm threshold.

The defence of Truth

- *Question 17: Does the truth defence in defamation cases have any effect on SLAPPs claims?*

It’s important to emphasise that **SLAPPs operate through the litigation process**. Even if defendants are sure of the truth of their statements and have strong evidence in support they will not be emboldened to fight a SLAPP unless:

1. That process is kept to an absolute minimum
2. They are guaranteed *full* recovery of costs after the lawsuit has been disposed of; and
3. They have the necessary financial support to pay for legal representation prior to dismissal

Serious harm can potentially be tested in a preliminary hearing, in which case it may help advance the first of these. Truth, however, can only be tested at trial and so does not shorten the process.

That said, the harder it is for the defendant to build a truth defence, the easier it will be for a potential SLAPP claimant to intimidate their target with the prospect of a defamation lawsuit. Truth defences can be costly to mount and thereby help to advance one of the objectives of SLAPPs - to ramp up costs to the point that it becomes financially untenable to fight the case. That is why the current burden of proof is so problematic from the perspective of SLAPPs (see Question 18).

- *Question 18: Are there any reforms to the defence of truth that could be considered in SLAPPs cases? For example, should we reverse the burden of proof in SLAPPs cases, so that claimants have to demonstrate why a statement is not true?*

Yes, **the burden of proof should be reversed in SLAPP cases**. For the reasons given above, the current burden raises the costs involved in building a defence and creates uncertainty which can be exploited by a SLAPP litigant to invoke the prospect of defeat at trial. This could be done, for example, by amending Section 1 of the Defamation Act 2013 to establish a presumption of truth for statements made on a matter of public interest. Insofar as possible this principle should also be extended to other laws used as a vehicle for SLAPPs.

For the same reasons, **any anti-SLAPP early dismissal mechanism should ensure that the burden lies on the claimant to satisfy the threshold test**. As we have proposed in our model anti-SLAPP law, this would require the claimant to show that their claim is *likely to prevail at trial*.

The defence of Honest Opinion

- *Question 19: Does the honest opinion defence in defamation cases have any effect on SLAPPs claims?*

Certain remaining problems in the defence of honest opinion (see below) mean that ambiguities remain that can be exploited by SLAPP litigants. As with the truth defence, however, any substantive defamation reform

will only be of limited application to SLAPPs, given the ability of SLAPP litigants to weaponise the litigation *process*. This is why, for example, the US remains such fertile territory for SLAPPs, despite enjoying the protection of the First Amendment.

- Question 20: Are there any reforms to the honest opinion defence that could be considered in SLAPPs cases?

According to Dr Andrew Scott and Dr Mark Hanna, the defence of honest opinion has proven less effective in promoting free speech than had been hoped. It should be possible, in particular, for a publisher to rely not only on underpinning facts or privileged statements as the basis of his or her opinion, but also on facts that he or she reasonably believed to be true at the time the opinion was published. This should allow publishers to rely on facts communicated by reputable publications, thereby minimising the problems caused by the rule in *Dingle v Associated Newspapers [1964]*. See below in Question 22. Expanding the defence in this way would address, among other things, the position of social media commentators

The defence of honest opinion should also be reformed to allow publishers to rely on factual conclusions or inferences arrived at on the basis of other facts. While the need to protect such reasoned conclusions was recognised in the Explanatory Notes of the Defamation Act 2013 (“as an inference of fact is a form of opinion, this would be encompassed by the defence”) case law has developed in such a way as to limit the extent to which the defence of honest opinion protects factual inferences. This protection should therefore be explicitly extended in a reformed Section 3.

The defence of Public Interest

- *Question 21: How far does the public interest defence in defamation cases provide a robust enough defence in SLAPPs claims?*

Section 4 of the Defamation Act 2013 went some way to help SLAPP targets by providing greater clarity and certainty in the use of the public interest defence, previously known as the *Reynolds* defence (which was abolished in the new Section 4).

Current evidence, however, suggests that the public interest defence remains underused, with the test of “reasonable belief” - while providing more certainty than that of “responsible journalism” - still considered too ambiguous for a SLAPP target to rely upon. This problem can be attributed in part to the issue of costs (see our response to Question 45). Given the expense involved in building a public interest defence, few defendants have been willing to test the scope of Section 4. As such, those sued for speaking out in the public interest still lack the certainty they need to pursue such a defence.

Greater clarity in the law could help embolden those engaging in acts of public participation to speak out in the public interest. Note, however, its limitations. First of all it does little to help dispose of cases early, and therefore does not stop SLAPP litigants from stretching out proceedings to drive up costs. Secondly it applies only to defamation, which is only one law abused for the purposes of shutting down public participation. For the same reason, it only applies to *statements* made in the public interest, and not to other acts of public participation. As such, it can only ever be of limited use in tackling SLAPPs.

- *Question 22: Are there any reforms to the public interest defence that could be considered in SLAPPs cases?*

One possibility to address the above would be to make the public interest defence applicable beyond defamation to *all* laws that can be abused by SLAPP litigants (including privacy and data protection). This could, for example, be done by establishing that it is a defence to *any* action that the defendant was engaging in an act of public participation - a defence that would then be defeated if the claimant is able to establish malice on the part of the defendant.

As discussed above under Question 21, the main problem with Section 4 is that it has not provided enough certainty for defendants to feel they can rely on the defence to successfully counter a claim. As we have said above, this is as much attributable to the problem of costs as it is to the law itself. The more fact-sensitive way the “reasonable belief” test has increasingly been applied - with a range of factors beyond the conduct of the defendant being considered - is to be welcomed.

At the same time, the power of aggressive legal threats against acts of public participation would have less power if there was greater clarity in the law. In particular, the law could be amended to clarify that reliance on news stories from reputable sources will not prevent a belief being considered “reasonable” for the purposes of Section 4, even if these subsequently turn out to be erroneous. At the very least, the rule in *Dingle* should be reversed to allow unsuccessful defendants to reduce damages on the basis of previous publications.

Reports protected by Privilege

- *Question 23: Does the privilege defence in defamation cases have any effect on SLAPPs claims?*
- *Question 24: Are there any reforms to the privilege defence that could be considered in SLAPPs cases?*
- *Question 25: Do you have any views on whether qualified privilege should be extended in relation to reporting of Parliamentary debate of SLAPPs.*

We do not have a position on the defence of privilege in SLAPP cases.

Libel Tourism

- *Question 26: To what extent does the appropriate jurisdiction test assist as a defence to defamation in SLAPPs claims?*

Section 9 of the Defamation Act (2013) was intended as a check on international claimants using England and Wales as a legal jurisdiction. That Section explicitly excludes claimants domiciled in EU member states or contracting parties to the EU’s Lugano Convention, which meant that prior to the UK leaving the EU it was more straightforward to bring cases against defendants domiciled in those jurisdictions (when the Brexit transition period ended on 31st December 2020, the UK was no longer subject to the Lugano Convention and as of yet its request to rejoin has not been granted by the EU).

We are concerned that libel tourism remains an issue in the UK, with the bar to bring a case problematically low. English courts have appeared to allow libel cases to proceed so long as a foreign claimant can show a reputation in the UK, for example owning a home, business dealings, children in school in this jurisdiction or some other personal or business interest can suffice. This does not fully take into account how easy that is for those with ample funds to effectively buy residency and citizenship via investment visas. Moreover the

proliferation of the internet, the extent of which could not be envisioned even a mere decade ago, also appears to play a role.

There are several recent cases that highlight concerns around jurisdiction shopping, including:

- In November 2020, a Swedish business publication, Realtid, which is published in Swedish, became the subject of legal action filed in the UK. Under Swedish law it is not possible to sue journalists individually - only the responsible editor can face legal action. However, by bringing the case to London, Svante Kumlin, a Swedish businessman domiciled in Monaco, has not only been able to sue Realtid's editor-in-chief, Camilla Jonsson, but also the two freelance journalists, Per Agerman and Annelie Östlund, who were behind the investigation into Kumlin's business dealings. The justification put forward for the libel claim, estimated to be worth more than £13 million, to be heard in the UK is that Kumlin resides in the UK part-time, while his company Eco Energy World (EEW), listed as a second plaintiff, is registered in London (since 2019). A hearing to decide the jurisdiction admissibility was held in March 2021. In May 2022, fifteen months after the jurisdiction hearing took place, the judge ruled that the courts of England and Wales do not have jurisdiction over ten of the thirteen defamation claims. EEW was precluded from bringing its claim over five different articles on the basis that it did not show that it suffered serious financial loss stemming from Realtid's publications. Kumlin, may proceed with the case as an individual on only three of the eight articles he sued over, but these actions have been restricted to claiming for any harm he suffered in England and Wales. This case once again underlines the need for a filter mechanism capable of rooting out SLAPPs at the earliest possible stage of proceedings, especially given the lengthy process of defending a libel claim in the UK.
- On 21st December 2021, the Court of Appeal gave a UK based Israeli businessman Walter Soriano permission to bring a data protection claim, together with libel and misuse of private information, against Forensic News, a US-based news website, and four US-based journalists. The court held that 6 subscriptions to Forensic News' website, facilitated through the Patreon platform – which could be paid in sterling or euros – amounted to 'stable arrangements' to satisfy article 3(1) of the GDPR. Between June 2019 and June 2020, Forensic News had published six articles and a podcast about the business affairs of British-Israeli security consultant and businessman Walter Soriano, after he was summoned by the US Senate Intelligence Committee. The Committee was reportedly interested in Soriano's connections to several people of interest, including the Russian oligarch Oleg Deripaska, who had been a former business associate of Donald Trump's campaign chairman Paul Manafort. In evidence given to the US Congress in April 2022, Stedman noted that US based lawyers for Mr Deripaska initially wrote to him and threatened legal action while also demanding that Stedman provide information about his sources and any documentation (public or otherwise). Legal action against Stedman and Forensic News which is based in California where strong anti-SLAPP legislation is in place, never materialised. Soriano launched his ongoing lawsuit in London against Forensic News and four of its journalists as individuals in July 2020.
- *Question 27: Are there any reforms to the appropriate jurisdiction test that could be considered in SLAPPs cases?*

First of all, it is important that any jurisdictional hurdle for those targeting overseas defendants apply beyond defamation to other laws abused by SLAPP claimants, including data protection, privacy, and copyright law.

As the cases above show, however, the hurdle introduced by Section 9 has proven insufficient to filter out abusive lawsuits filed by overseas SLAPP claimants. Such a hurdle needs to be extended to *claimants* who do not have strong connections with the jurisdiction, and not just claims targeting non-domiciled defendants. This should mean that claimants who do not have habitual or regular residence in the jurisdiction should be barred from bringing claims that target acts of public participation.

More broadly, courts must consider whether there is a legitimate reason why the case is being heard in England and Wales - or whether claimant is, instead, pursuing the case in the jurisdiction in order to drive up costs and compound the harm caused to the defendant. This could be acknowledged as a form of abusive conduct subject to dissuasive sanctions, as described in our answers to Question 7 and Question 45.

Other Possible Defamation reforms on SLAPPs

- *Question 28: Do you consider that the Government should consider reforming the law on actual malice to raise the threshold for defamatory statements made against SLAPP claimants? Please give reasons.*

Yes. Raising the threshold for cases targeting acts of public participation would provide much-needed protection to claims made in the public interest. This is particularly important with statements directed at public figures, who - as mentioned in our answer to Question 12 - must be willing in a democratic society to tolerate a higher level of public scrutiny and criticism than private citizens. The extension of the actual malice standard to such cases would provide a powerful means of protecting those who seek to hold the powerful to account and should therefore be considered.

Note, however, two limitations with such a reform:

1. If it were to apply only to defamation it would be of no utility to those targeted by the many other laws that are weaponised to shut down acts of public participation.
2. It is unlikely that the question of malicious intent would be settled at a preliminary hearing or in the context of a motion to strike, and it would therefore be of minimal help in minimising the length (and therefore the costs) of SLAPP proceedings,

One notable aspect within English and Welsh libel law is that the burden of proof is on the defendant: i.e. rather than the claimant having to prove the *falsity* of the challenged statement, the defendant must put forward an affirmative defence that the statement is *true*. This is in contrast to other jurisdictions, such as the United States and Germany, where the burden of proof largely rests on the claimant (see Question 30).

- *Question 29: If you agree the Government should pursue actual malice reforms, what form should these take?*

One way to institute such a reform would be to amend the Defamation Act 2013 to include a new requirement that any claimant targeting acts of public participation show malicious intent on the part of the defendant. This would be presumed where the publisher either knew the statement was false or acted with reckless disregard as to the truth.

Other Possible Reforms

- *Question 30: Are there any other areas of defamation law that you consider may be reformed to address the problems SLAPPs cases give rise to?*

While substantive law can be important in promoting certainty and reducing the threat of spurious letters, it is important to emphasise that SLAPPs operate through the litigation process. Substantive laws such as defamation are, in this sense, just a vehicle through which SLAPP claimants are able to weaponise the legal process. Indeed, the UK Working Group has seen a range of different laws being abused in this way: the Copyright Act 1988, the Protection from Harassment Act 1997, and the Data Protection Act 2018 among others. The best way to tackle SLAPPs is therefore by building up procedural safeguards that apply irrespective of the law abused by the claimant.

That said, there is a single reform that could go a long way to reducing the potency of defamation law as a vehicle for SLAPPs. One of the main sources of uncertainty exploited by would-be SLAPP litigants is the so-called single-meaning rule: the rule that requires the Court to determine a single meaning of the challenged words and rule on the claim accordingly. The rule is intended to simplify the task before the court, but the process of fixing a single meaning is perplexing to non-lawyers. As Dr Andrew Scott has written, “cases where the meaning of the impugned publication is ambiguous or multifarious, the abstraction from reality involved in applying the single meaning rule must always result in a measure of injustice”.

As Dr Scott has argued, disputes about meaning are usually central to defamation actions. If a court is able to determine meaning early in proceedings, very often the dispute will be settled. While this is of course one of the goals of anti-SLAPP legislation, these benefits are countered by the uncertainty generated by the rule. Since it is difficult for a public watchdog (particularly one that does not benefit from the assistance of legal counsel) to know exactly what interpretation is going to be adopted by the court, it is easier for a SLAPP litigant to draft a plausible-sounding legal threat on the basis of an accurate statement in the public interest.

As a means of addressing this problem, Dr Scott has proposed a bipartite approach: withdrawing the single meaning rule and then introducing a jurisdictional bar on claims based on meanings of publications that had been corrected, retracted, or clarified promptly and prominently. If such a correction is not possible, the claim would then proceed with the meaning having been narrowed down through the initial iterations between the parties.

This proposal would help filter out SLAPPs at the earliest possible stage by preventing SLAPP litigants from disingenuously advancing an interpretation of the challenged text that departs from the established facts. While this would only address one particular category of SLAPPs, it would reduce the opportunity for these SLAPPs to advance in court and should therefore be considered.

As discussed above, one of the reasons our defamation law is considered so claimant-friendly - and therefore so amenable to SLAPPs - is that the burden lies on the defendant to establish the truth of their statements. One reform that could address this problem in the context of SLAPPs is to provide that in claims targeting acts of public participation the truth be *assumed*, so that it then falls on the claimant to prove the *falsity* of the challenged statements. This would ensure that our defamation law doesn't create an unfavourable environment for participation in public debate.

Procedural reforms

Pre-Action Protocols

- *Question 31: Do you have any views or experience on how the Pre-Action Protocol for Media and Communications operates in SLAPPs cases? If so, to what extent does it help to regulate the conduct of SLAPPs claims? Please explain your response*

It is important to emphasise first that the Media and Communications List, to which the Pre-Action Protocol for Media and Communications applies, does not cover all acts of public participation. Protests and other non-verbal forms of activism, for example, are crucial forms of public participation that are indispensable to a healthy democracy, but would likely not be covered by the Pre-Action Protocol for Media and Communications. It would, for example, not apply to the lawsuits that have abusively applied the Protection from Harassment Act 1997 to enjoin peaceful protest.

The Pre-Action Protocol does theoretically help to address SLAPPs in one small respect: by creating an expectation of alternative dispute resolution (ADR). Since SLAPPs operate through the litigation process, this helps test the seriousness of the proposed claim and potentially (via CPR 44(5)(a)) impacts the costs the claimant will be ordered to pay.

Beyond the other limitations (see below), however, such a provision cannot be considered a substitute to the sanctions that an anti-SLAPP law would provide. This is because:

- It lacks the **certainty** that costs on a full indemnity basis will be recoverable;
 - It does not provide a means of **sanctioning SLAPP claimants** beyond the recovery of costs (and since most SLAPPs will not prevail on their merits, the default rule will be that the claimant will be liable for the defendant's costs anyway)
 - It only penalises a failure to engage in ADR - one of a number of ways a SLAPP purpose can be inferred.
- *Question 32: Do you have any views or suggestions on amendments to Pre-Action Protocols which would improve upon existing pre-action conduct in SLAPP cases? Please explain your response.*

In its [Proposals for Procedural Reform](#), the UK Working Group on SLAPPs proposed the establishment of a new Pre-Action Protocol for Claims Targeting Public Participation. This could:

- Extend the expectation that parties pursue ADR to *all* claims concerning acts of public participation.
- Require would-be claimants to reply to good-faith pre-publication letters enquiring on matters of public interest and, if a reasonable period is given, engage in any fact-finding process before commencing civil proceedings.
- Require claimants to pursue claims that are reasonably understood to be under £10,000 in the small claims court (see our answer to Question 45 below)
- Prohibit other aggressive tactics used in pre-action letters intended to intimidate or harass.

Such a Pre-Action Protocol would neatly complement an anti-SLAPP law, by providing a means to guide the imposition of sanctions. It would, of course, be limited to pre-action protocol, and could not therefore address many of the abusive litigation tactics used in SLAPPs (e.g. efforts to stretch out proceedings or drive

up costs). It would also not be able to establish the needed new mechanisms that an anti-SLAPP law would provide.

Strike-Outs

- *Question 33: To what extent do you consider that SLAPP type litigation represents an abuse of process, and should be considered by courts for strike-out action?*

We believe SLAPPs **do represent an abuse of process**.

CPR 3.4 allows courts to strike out a claim not only if it discloses no reasonable grounds for bringing a claim, but also where the statement represents an “abuse of the court’s process”. A Practice Direction for such motions already exists, which explains that an abuse of process includes claims that are “vexatious, scurrilous or obviously ill-founded”.

There is no established legal definition for vexatious (or indeed scurrilous), but in *Attorney General v Barker Lord Bingham* set out characteristics of ‘vexatious conduct’, including that ‘whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process by the court, meaning by that a use of the *court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process*’ [emphasis added].

There are two problems with relying on this case law:

1. Courts have adopted a very restrictive understanding of what constitutes an “improper” purpose. In the case of *Kings Security Systems Ltd v King & Anor* [2021], for example, the court explicitly said that “the bringing of legal proceedings for the purpose of achieving... the defendant's financial ruin is not an improper purpose”. Without statutory underpinning there is therefore little prospect that the courts will themselves filter out such claims.
2. It is, in any event, difficult to identify and establish any particular “purpose” behind a lawsuit. SLAPP claimants will always claim that they are pursuing litigation to redress wrongs or vindicate rights, and those with the money to hire decent lawyers will find ways to disguise the true purpose of the SLAPP. This is why it is better to rely on a more objective test to filter out tests, with a higher threshold for cases targeting public participation (as per our model anti-SLAPP directive).

- *Question 34: How would you propose to reform or strengthen the use of strike-out in addressing SLAPP type litigation?*

One simple way to strengthen the use of CPR 3.4 in relation to SLAPPs would be to incorporate Lord Bingham’s criteria into Practice Direction 3A, thereby making clear that “vexatious” here includes SLAPPs. This could be accompanied by certain indicative qualities of a SLAPP, so as to assist the Court in inferring the presence of an improper purpose. This would, however, still run into the problems described in Question 33.

It is, therefore, important to **establish a new mechanism for disposing of SLAPPs** at the earliest possible point in proceedings, involving a **heightened threshold for claims** targeting public participation. This would not be without precedent - Section 8 of the Defamation Act 1996, for example, introduced a new summary disposal mechanism - but would have three core components:

1. The threshold would be sufficiently high to filter out meritless claims targeting acts of public participation. This would be set higher than that of a motion to strike (“no reasonable grounds for bringing the claim”) and a motion for summary judgement (“no real prospect of success”).
2. The burden would be on the claimant to meet this threshold test. In our model anti-SLAPP law we propose that the claimant must show that the claim is *likely to prevail at trial*.
3. Upon filing the motion, all other proceedings would be suspended until the motion, including any appeal against the motion, has been finally disposed of. This would prevent resource-intensive processes (such as disclosure) driving up costs in the period between filing and disposal.

Ideally, courts would also be empowered to separately dismiss claims that exhibit abusive conduct: e.g. cases that are clearly being used to drive up costs or otherwise intimidate and harass the target.

An example of how this and the other components listed above would look can be found in the model anti-SLAPP law linked at the top of to this submission.

Civil Restraint Orders

- *Question 35: Are Civil Restraint Orders currently an effective procedure against SLAPPs litigants? If not, what reforms do you propose?*

We are not aware of any Civil Restraint Orders (CROs) being imposed in response to the use of SLAPPs.

In order for Civil Restraint Orders to be used against SLAPPs, the Court’s understanding of an abusive “improper purpose” would first need to be broadened to the point that Section 42 of the Senior Courts Act 1981 could be applied to SLAPPs.

This could potentially be achieved by amending Section 42 to explicitly acknowledge SLAPPs as a form of vexatious proceedings, though this would run into the problems described in Question 33. A potentially easier way would be for claims that have been dismissed pursuant to any new statutory anti-SLAPP mechanism to be understood, for the purposes of Section 32, as vexatious. An amended provision would then allow for CROs to be imposed, without the need for application from the Attorney General, against those who have pursued multiple SLAPP cases.

This would enable repeat SLAPP litigants to be included in the MOJ’s registry of vexatious litigants - providing an important deterrent against those routinely relying on the use of SLAPPs.

- *Question 36: Should the court consider anything beyond the current issues of number of applications and merits of a case when considering whether to issue a CRO?*

See Answer to Question 35.

Other procedural reforms

- *Question 37: Do you have any other suggestions for procedural reform to be pursued either by the Government or considered by the judiciary or Civil Procedure Rule Committee in relation to SLAPPs cases? Should a permission stage be applied to SLAPPs cases?*

A permission stage could be applied to SLAPPs in a way that would be similar to the early dismissal mechanism envisioned in our model anti-SLAPP law. This would be triggered if the claim in question targets public participation and could potentially filter out SLAPPs as effectively as an early dismissal mechanism if: a) the threshold for such claims is sufficiently high (we propose the test of *likely to prevail at trial*), and b) the burden is on the claimant to show their claim reaches this threshold.

Regulatory reforms

Solicitors Regulation Authority Guidance on SLAPPs

- *Question 38: If you are a solicitor, does the SRA guidance provided on SLAPPs help you understand your professional duties in conducting disputes? Please explain your answer.*

The WG will not be responding to this question as it relates to personal experiences

Reporting SLAPPs

- *Question 39: If you have been affected by SLAPPs, did you report the issue to a professional regulator? Please explain and give reasons for your decision. If you did so, what was the outcome?*

We cannot provide direct experience, but from interviews conducted by some of our coalition members with individuals targeted by SLAPPs we are aware of the following issues:

- Guidance is unclear on SRA's website, and geared towards complaints in a different context (regarding a solicitor you have hired for example). This led to at least a couple of the SLAPP targets interviewed feeling the need to complain first to the law firm involved (which they might not wish to do, given the law firm's behaviour is what they would be complaining about).
- SLAPP targets are also worried about complaining to SRA as the SRA states they will inform the law firm involved. While it is understood that law firms should have a right to reply to accusations made against them, there are concerns from journalists that complaining could provoke new legal problems or compound existing ones
- If SLAPP targets have managed to see off a legal threat - either by standing their ground or by complying in some way - they often want to simply move on, rather than spend more time complaining.
- Many SLAPP targets have expressed little confidence in the SRA's ability to effectively regulate law firms or take any action to reprimand solicitor's behaviour.
- Complaints we are aware of having been made have resulted in no sanctions against the law firms involved.
- There was particular concern regarding the SRA's inability to check law firms due diligence around anti-money laundering measures, given legal advice is not covered by AML regulations.

It is encouraging that the SRA have now recognised SLAPPs as an issue for the first time in their most recent guidance on Conduct in Disputes, published in March 2022. We also understand that the SRA is seeking to take more active steps towards encouraging reporting of legal intimidation and SLAPPs. However, we would strongly recommend that AML regulations are explicitly extended to cover legal advice provided by law firms in civil cases, where the claimant is seeking to pursue defamation, privacy and/or GDPR claims. This is important to ensure that corrupt money is not being used to finance legal tactics to suppress information into the source of the corruption.

It is important for the Bar Standards Board (BSB) follows the lead of the SRA and updates its own guidance to recognise SLAPPs. This is particularly important in light of the perceived tension between a barrister's obligations to the court and their obligations to their client, as well as confusion as to how the principle of non-discrimination (the so-called "cab rank rule") can be adhered to without facilitating SLAPPs.

Defamation costs reforms

- *Question 40: How was your SLAPP funded (private funding, CFA, other (please specify))?*
- *Question 41: How were adverse costs addressed (private funding, ATE, other (please specify))?*
- *Question 42: Please give details of the costs of the case, broken down (i) by stage and (ii) by which party had to pay them.*

The WG will not be responding to these questions as they relate to personal experiences

- *Question 43: Do you agree that a formal costs protection regime (based on the ECPR) should be introduced for (i) all defamation cases, or (ii) SLAPPs cases only – please give reasons?*

The problem of costs has long been the elephant in the room when it comes to defamation reform. Dr Andrew Scott noted in the context of NI defamation reform that *"the key imbalance in this area is arguably not that in favour of reputation over free speech or vice versa ... [but rather] that between litigants who can afford to defend their publications or to vindicate their reputations, and those who cannot."* If you have money, the truth may embolden you to fight a claim. If you do not – or if you're a media organisation having to make cutbacks or dealing with multiple cases at once - you are unlikely to allow a case to go to court, regardless of the truth of the statement or its value to public debate.

Any costs protection regime must extend to all SLAPP targets, and not only those sued for defamation. We do not take a position on whether a regime based on the ECPR should be applied to all defamation cases, but would note that it is the exorbitant costs of defending a defamation cases that allow a power imbalance to emerge between a wealthy claimant and a defendant. This can create an injustice that extends beyond SLAPPs (e.g. to purely private matters), forcing individuals into silence irrespective of the accuracy of their speech.

Given the huge costs involved in civil proceedings, cost-capping measures would help to reduce the potency of aggressive pre-action legal threats. That said, we believe a model based on the ECPR would be an **inadequate means of addressing the problem of costs**. There are two main reasons for this:

1. The ECPR applies to unsuccessful claimants or defendants. Since SLAPPs are generally (though not always) meritless claims, a costs protection regime based on the ECPR would **rarely be used by SLAPP defendants**. Given the need for dissuasive sanctions against SLAPP claimants to deter the use of SLAPPs (see below), such a cost capping regime should obviously not be applicable to claimants in SLAPP cases.
2. Since **SLAPPs operate through the litigation process**, measures to reduce the impact of costs awards will - in any event - be of limited impact to SLAPP defendants. By the time the case gets to the point where a costs award is made, the damage of a SLAPP will have already been made. This is why costs must be recoverable on a full indemnity basis, and why measures must be put in place to ensure SLAPP defendants have the financial means to dispose of a SLAPP in court (see our answer to Question 45 below).

A cost capping regime would therefore be of marginal utility to a SLAPP defendant. It may reduce the threat of a large costs order in the event of an unsuccessful defence, but it will not reduce the more immediate threat facing a SLAPP defendant - **their own legal costs**. Most SLAPP defendants do not have the resources to mount a full legal defence, which is what gives SLAPPs such potency as means of shutting down speech. It is this, therefore, which needs to be prioritised in any costs reform. See our answer to Question 45 below.

- *Question 44: If so, what should the default levels of costs caps be for (i) all defamation cases, or (ii) SLAPPs cases only – please give reasons?*

See above.

- *Question 45: Do you have any other suggestions as to how costs could be reformed in (i) all defamation cases, or (ii) SLAPPs cases only – please give reasons?*

We believe there is a straightforward way to address the problem of costs, and that is through a simple amendment to Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

Schedule 1 of LASPO sets out the specific types of civil disputes that will be eligible for legal aid. This currently does not include defamation or other laws, such as privacy or data protection, that are used as a vehicle for SLAPPs. A simple way to ensure SLAPP defendants are not squeezed out of court due to legal costs would be to **extend eligibility to cases targeting public participation**. This could be based on the same definition of “public participation” used for other anti-SLAPP measures (e.g. an early dismissal mechanism) and could be included as a new section in Schedule 1.

In addition, any anti-SLAPP law should provide for the **full recovery of costs** (i.e. on a full indemnity basis) from the SLAPP claimant. Since SLAPPs operate through the litigation process, this is a crucial means of ensuring that a SLAPP - even if unsuccessful on its *merits* - does not succeed in advancing its real purpose: i.e. to drive up costs and make the litigation process as painful as possible for the defendant. It must, however, be seen as a *supplementary* measure alongside reform of LASPO. For SLAPP targets with minimal resources, the possibility that they will recover costs *at the end* of the litigation process will not be enough for them to fight the claim. Given the high costs of litigation in the UK, in many cases they will simply not have the resources to provide a defence in the first place.

A measure that should be introduced alongside this is the use of **security for costs** in SLAPP cases. Courts should be empowered under a new anti-SLAPP law to require security for costs in line with CPR 25.13(b)(ii). This would serve three purposes:

1. It would **test the seriousness of the claim** and lead, in some cases, to SLAPP litigants abandoning frivolous lawsuits. This is what happened in the case filed by Charles Taylor in response to the publication of *The Mask of Anarchy*.
2. Given how many SLAPPs are filed by foreign claimants, it would help minimise the risk that a losing SLAPP claimant leaves the country and refuses to pay any cost awards. This is what happened in the lawsuit filed by Pavel Karpov against Bill Browder.
3. It could potentially be used to sanction abusive conduct that is found to fall short of the threshold set in any anti-SLAPP law. This would not be without precedent - the use of security for costs was, for example, imposed as a sanction in the case of *Alba Exotic Fruit*.

Another way to minimise costs is to **remove the restriction on County Courts dealing with libel or privacy claims**. Claims should only go into the Media and Communications List in the High Court when the harm caused is especially serious - as judged by the gravity of the allegations made, and not the profile of the person involved. Any efforts by the claimant to deliberately inflate damage claims in order to avoid the County Court, and thereby drive up costs, should be sanctionable via a new pre-action protocol (as per our answer to Question 32).

Finally, it's important to emphasise the need for dissuasive sanctions that go beyond full recovery of costs. These sanctions should be responsive to the abusive conduct of the claimant (including any efforts to drive up costs or otherwise intimidate and harass the defendant) and, crucially, must be proportionate to the wealth of the claimant so as to ensure they operate as a deterrent.