



Ministry  
of Justice

# Strategic Lawsuits Against Public Participation (SLAPPs)

## Government Response to the Call for Evidence

20 July 2022

A decorative graphic in the bottom right corner consisting of a grid of light blue triangles of various sizes and orientations, with a dark blue line that starts horizontally from the left edge and then zig-zags upwards through the triangle grid.



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of Justice

## **Strategic Lawsuits Against Public Participation (SLAPPs)**

Government response to the Call for Evidence

**Response to consultation carried out by the Ministry of Justice.**

**This information is also available at <https://consult.justice.gov.uk/>**

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# Introduction and contact details

This document is the post-consultation report for Strategic Lawsuits Against Public Participation (SLAPPs) – A Call for Evidence.

It covers:

- the background to the Call for Evidence
- a summary of the responses
- a detailed response to the specific questions raised in the Call for Evidence
- the next steps following this consultation.

Further copies of this report and the consultation paper may be obtained by contacting the SLAPPs team at the address below:

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This report is also available at <https://consult.justice.gov.uk/>

Alternative format versions of this publication can be requested from [slapps.evidence@justice.gov.uk](mailto:slapps.evidence@justice.gov.uk).

## **Complaints or comments**

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

# Foreword



Strategic Lawsuits Against Public Protection, or SLAPPs, are a growing threat to freedom of speech and a free press – fundamental liberties that are the lifeblood of our democracy.

Typically used by the super-rich, SLAPPs stifle legitimate reporting and debate. They are at their most pernicious before cases ever reach a courtroom, with seemingly endless legal letters that threaten our journalists, academics, and campaigners with sky-high costs and damages.

SLAPPs pile on the pressure until investigations into corruption are shut down, and some individuals or corporations are regarded as ‘no go’ zones, because of the risk of legal retaliation.

It’s especially concerning that – with the war raging in Ukraine – these baseless legal claims are being made by oligarchs and corporations who bankroll the Putin regime, exploiting our laws and jurisdiction to muzzle free speech, and prevent journalists and campaigners from shining a light on corruption.

In March, we launched a Call for Evidence on reforms to tackle SLAPPs and protect those who speak out in the public good.

My thanks to all who gave us their expert opinion and shared experiences, some of them nothing short of harrowing.

Our Call for Evidence makes clear that this issue goes far beyond the rough and tumble of ordinary litigation.

Those who responded told us about the personal and professional toll of these claims – careers put on hold, soaring anxiety, and fear of financial ruin. And, most worryingly, we heard of the chilling effect of SLAPPs, with media and others intimidated into abandoning critical stories in the face of crippling legal costs.

That is why we are moving decisively to stamp out SLAPPs.

At the heart of our reforms is a new statutory early dismissal process to stop these cases in their tracks – allowing judges to throw out claims that lack merit. This will include a three-part test – with clear criteria to help courts determine whether a case is a SLAPP.

First, it will assess if the case is against activity in the public interest – for example investigating financial misconduct by a company or individual. Then, it will examine if there's evidence of abuse of process, such as whether the claimant has sent a barrage of highly aggressive letters on a trivial matter. Finally, it will review whether the case has sufficient merit – specifically if it has a realistic prospect of success.

Where relevant cases are identified and do not meet the merit test, they will be thrown out.

We believe this strikes the right balance – properly identifying SLAPPs, while allowing genuine claims to continue, and deterring those who seek to exploit our courts with action deliberately designed to ramp up costs and waste time.

Our Call for Evidence shows that huge costs are the single greatest factor in intimidating and silencing opponents in SLAPPs cases – especially when cynically targeted at individual journalists and campaigners, rather than the organisations they work for.

So, we are also moving to cap costs. Working with the Civil Procedure Rule Committee, we will introduce a formal costs protection scheme, to stop costs from racking up and address the stark inequality of arms in SLAPPs cases.

These reforms are just the opening salvo against SLAPPs.

SLAPPs continue to evolve. While our Call for Evidence shows that our defamation laws are currently working as intended, we will keep this under review, and be ready to act if needed.

We will also explore financial penalties for those who bring SLAPPs – punishing those who seek to abuse our legal system.

These changes will help to uphold our fundamental liberties of free speech and a free press, end the abuse of our courts, and defend to the hilt those who bravely speak out in the public interest.



**Rt Hon Dominic Raab MP**

Deputy Prime Minister, Lord Chancellor, and Secretary of State for Justice

# Background

‘Strategic Lawsuits Against Public Participation (SLAPPs) – A Call for Evidence’ was published on 17 March 2022. It invited evidence about the use of SLAPPs in England and Wales and sought views on reforms to address the perceived problems arising from this field of civil litigation.

For the purposes of the Call for Evidence, SLAPPs were described as having both of the following features:

- They target acts of public participation. Public participation can include academic research, journalism and whistle-blowing activity concerned with matters of societal importance, such as illicit finance or corruption.
- They aim to prevent information in the public interest from being published. This can be by threatening or bringing proceedings which often feature excessive claims.

The Call for Evidence noted that while these actions are often brought in defamation cases they may be pursued in other fields of law, including data protection and privacy claims.

The Call for Evidence recognised that SLAPPs have a wide range of characteristics and behaviours and as such a many-faceted approach to reform would be required to meet the challenges they present.

To that end, reform options were set out, and views sought, in a range of areas:

- Reforms in legislation designed to classify SLAPPs so that they could be subjected to particular case and cost management regimes
- Reforms to defamation (libel) law
- Reforms to court procedure, practice and processes
- Reforms to the approach to costs in defamation law
- Regulatory reforms

The Government also welcomed any wider suggestions on how to address SLAPPs, recognising that this form of litigation is many faceted and that providing an effective response was likely to need to be varied over time.

The consultation period closed on 19 May 2022. This report summarises the responses, including how the consultation process influenced the final shape and further development of the proposals consulted upon.

A Welsh language summary can be found at: <https://consult.justice.gov.uk/digital-communications/strategic-lawsuits-against-public-participation>.

A list of respondents is at Annex A.



## Summary of responses

1. A total of 120 responses to the Call for Evidence were received. Of these, there were a large number of responses from law firms, legal practitioners specialising in media and defamation law, media organisations, publishers, interest groups and academics. A wide spectrum of views was provided in the responses, including from those with experience and expertise as either Claimants or Defendants in SLAPP-type litigation or defamation and privacy suits more widely.
2. As may be expected, the assessment of the nature and scale of SLAPPs as a problem varied dramatically between the different groups and individuals responding. Media organisations, publishers and Defendant legal interests set out concerns and examples of SLAPP-style behaviour and materials. Claimant legal interests and a number of specialist barristers considered that either SLAPPs did not exist as a distinct problem away from the normal rough and tumble of adversarial litigation or had been exaggerated.
3. Views also varied greatly in terms of what it was felt the Government's response to SLAPPs should be, and the form that this response should take. For many Claimant respondents the appropriate course was not to pursue any reforms, while many media and Defendant legal respondents put forward a wide range of proposals.
4. A great deal of valuable and thoughtful material was submitted. The Government is very grateful to all respondents for the care and expertise with which views were submitted. We also benefitted from responses from some overseas experts with longer experience of SLAPP-type litigation and who were able to relate their experiences of reforms which had been made in other jurisdictions to deal with such lawsuits.
5. A short series of informal roundtable events were held with a range of stakeholders. These allowed discussion of issues in more detail, and enabled comments and concerns to be raised ahead of the preparation of this Call for Evidence response. We are grateful to all those who gave their time at short notice to take part.
6. The following sections briefly summarise the responses thematically. More detail on the views expressed and evidence submitted can be found in the 'Responses to Specific Questions' segment of this document.

## Evidence and Impact of SLAPPs litigation

7. The Call for Evidence produced robust evidence of SLAPPs behaviour pre-action and through court proceedings. This includes numerous pre-action letters issued by law firms, containing quite aggressive and intimidatory language, most often in response to fact-checking or to 'right to reply' requests from journalists. The Call for Evidence material also supports the notion that SLAPPs-style action is taking place post-publication.
8. Individual journalists, media organisations, civil society actors and Defendant lawyers repeatedly spoke of an increase in the frequency of SLAPPs behaviour over the last few years, wherein wealthy and influential individuals and corporations use legal means to intimidate and silence individuals publishing on issues in the public interest. They also highlighted emerging features of SLAPPs, including the targeting of individuals, clustering of claims, and bringing of claims in multiple jurisdictions.
9. Respondents spoke about the personal and professional ramifications of SLAPPs. Many respondents detailed the stress of dealing with legal threats and costs associated with responding to letters and proceedings and the consequent damage to their wider personal and professional lives, as well as the accompanying chilling effect on matters in the public interest as a result of the threat of these costs.
10. This view was however not unanimous amongst respondents. A number of law firms and barristers questioned this claimed increase in SLAPPs behaviour and the existence of SLAPPs at all. Their view was that lawyers do not tend to bring spurious or meritless claims and, on the rare occasions where these types of cases do arise, there already exist legislative and procedural mechanisms to stop them from reaching the courts.
11. These respondents also questioned the evidence for SLAPPs reform advocacy, which they felt influenced the Call for Evidence narrative. There were further concerns that cases widely considered as SLAPPs had not been determined to be so by a court, and that it was therefore inappropriate to make reform proposals on the basis of what these respondents considered to be arbitrary judgement. These respondents tended to be of the view that courts were best equipped for dealing with the issue of meritless and abusive claims.
12. There were further concerns that the concept of SLAPPs was being used by the media to evade accountability and, in some instances, was even being used to prevent those with legitimate interests defending their reputations.
13. We have carefully considered these views but on balance we believe that the case is made for reforms which address the particular challenges of SLAPPs.

## Legislative reforms

14. A broad range of considered views from both Claimant and Defendant interests were provided on the prospect of legislative reform. Most focused on the form and extent of any definition, the advantages and disadvantages of the different approaches that could be taken, and their link with possible procedural reforms including early dismissal and costs controls.
15. For a number of Defendant respondents, effective reform hinged primarily on being able to understand how SLAPPs work. Responses outlined the way in which SLAPPs purposely misuse the legal system to turn it into a threat, whereby the prospect of costly and time-consuming litigation forces those acting in the public interest to either limit or abandon their work. These respondents were clear that the foundation of this strategy is the extreme power imbalance and inequality of arms between, on the one hand, media organisations, advocacy groups, academics, and journalists and, on the other, Claimant corporations or wealthy individuals who typically bring these cases.
16. There was overwhelming consensus on both sides that a definition in some form would bring clarity and help to establish the parameters of what constitutes a SLAPP. Compelling evidence was also presented by publishers and journalists to show that SLAPPs are not limited just to defamation but also include and exploit other areas of law including data protection, privacy, and trademark law.
17. A clear dichotomy emerged between those respondents who argued that a definition should be broad, so as to encompass the different areas of law involved and tactics used in SLAPPs, and those who felt that a broad definition risked undermining access to justice and the effective resolution of legitimate claims. Some respondents argued that a definition was unnecessary as the courts already possessed sufficient tools to weed out unmeritorious claims, including through recourse to the Civil Procedure Rules (CPR) and common law authorities such as court judgements which provide precedents for dismissing abusive claims.
18. There was similar divergence over the degree to which any definition should be based on indicative criteria. Many Defendant respondents expressed the view that a non-exhaustive list would distinguish SLAPPs from normal litigation by flagging the procedural and behaviour abuses employed in these claims. This could include, among other features, multiple aggressive pre-action legal letters, misuse of legal processes to deliberately waste time and rack up costs, and intimidatory, harassing or threatening actions. Many emphasised that such procedural and behavioural abuses often go hand in hand.
19. In contrast, some legal practitioner respondents noted that a criteria-based approach could be subjective and hard to prove, and risked unintended expansion of scope. A

small number of media organisations supplemented these views by arguing that too extensive an approach could ultimately encompass some of the legal defences currently used to protect journalistic investigations and free speech. There was also a fear expressed by some Claimant interests that this approach could lead to SLAPPs being invoked for almost any claim designed to protect one's reputation.

20. There was, nonetheless, broad agreement that any definition, irrespective of its extent and the criteria involved, would need to be accompanied by an effective early dismissal mechanism that would allow the judiciary to identify and dispose of unmeritorious claims at the earliest opportunity, before prohibitive costs were incurred. Central to this would be a public interest test, which the courts would use as a first order barrier to determine whether or not a claim should proceed. A number of respondents praised the draft EU Model Directive that advocates this public interest approach.
21. Other international comparators referenced included SLAPPs legislation in common-law jurisdictions such as the United States of America, while others endorsed the 'Ontario model' in Canada which sets straightforward conditions that must be met before a claim in the public interest is allowed to proceed. On the other hand, some respondents questioned the applicability of legislation from other jurisdictions to the legal system of England and Wales, and noted that some features of, for example, Australian and Canadian anti-SLAPPs measures may have gone too far without limiting costs or saving time in proceedings.

## **Defamation law reforms**

22. The Call for Evidence generated a number of informed responses on defamation law, particularly from media organisations and lawyers with considerable experience and expertise. A wide range of possible reforms were discussed, but some common themes emerged and there were often opposing views on some of the questions.
23. Across nearly all of the defamation law questions, the fundamental difference of opinion between respondents was whether existing statutory defences and measures were working well and would work as well for SLAPPs as for other claims; and a contrary view that the current law was not providing sufficient deterrence or safeguards for SLAPPs. The point was also made that the relevant legislation is quite recent and while cases had tested the meaning and interpretation of the law following the Defamation Act 2013, it was still evolving.
24. Another area of fundamental difference was whether a SLAPP was a distinct form of litigation that existed in such a way that warranted reforms to address its characteristics. The point was made that for many Defendants the legislative defences were theoretically good but tended to be put to the core test towards the

end of the litigation process. As such, Defendants said, the costs and potential further costs exposure meant that they were opting to settle cases or concede even where they felt they had a winnable case in law.

25. For their part, Claimant respondents and many barrister respondents pointed to the fundamental importance of balancing of rights in defamation, between the rights to reputation and privacy and the right to freedom of expression. They felt the balance was about right in legislation and case law, and that in making amendments for SLAPPs the risk would be to fundamentally upset this fine balance. The proposal of introducing an ‘actual malice’ threshold for SLAPP claims was the strongest area of concern in this respect.

## Procedural reforms

26. In SLAPPs, there is often not just an abuse of the law itself, but also of its accompanying procedure. There are a range of mechanisms available for the effective early disposal of an abusive claim, including through the CPR via strike-out. Conduct during the early stages is also important, as regulated by the Pre-Action Protocol. The Call for Evidence invited views on the effectiveness of these measures and whether there are any areas for potential reform.
27. Opinions diverged significantly on the effectiveness of the Pre-Action Protocol in regulating conduct. However, a recurring concern, primarily amongst respondents with experience of defending claims, was with non-compliance with the requirements. The contention was not overwhelmingly that the protocol itself is not fit for purpose, although we did hear from some respondents who thought that this was the case.
28. Respondents to the Call for Evidence, on both sides, suggested a potential amendment to the Pre-Action Protocol to require both Claimants and Defendants to append a Statement of Truth to their Letter of Claim and Letter of Response. A reform of this kind would be intended to discourage unfounded contentions, opening up the risk of contempt of court for those making false statements.
29. Views were polarised on the likely accessibility and success of a strike-out procedure. The Call for Evidence response did reiterate the prevalence of helpful common law to support the CPR, although notably there were limited examples of where this had been relied on in a SLAPP.
30. We received few responses on the issue of use and effectiveness of Civil Restraint Orders (CROs) in this area. In general, there was consensus that a Claimant pursuing litigation that would genuinely be regarded as a SLAPP should fall into the category where the issuing of a CRO would be appropriate, particularly if the Claimant is a ‘repeat offender’.

## Regulatory reforms

31. We received fewer responses on the issue of regulation compared to other areas. There was little consensus and respondents fell largely into three main camps: media organisations/journalists and Defendant lawyers; Claimant specialist firms; and regulators themselves. Media organisations and those advocating for reform tended to argue that regulators were not receptive to reporting and were not doing enough to curb SLAPPs. They generally wanted to see stricter punitive measures such as sanctions. Claimant specialist firms tended to rely on SLAPPs guidance issued by the Solicitors Regulation Authority (SRA) on 4 March 2022, and stated that there was enough awareness and action within the regulatory space. Regulators tended to agree that SLAPPs and wider abuse of process were unacceptable and were of the view that they had taken steps to mitigate against that type of behaviour.
32. Responses were not just limited to professional legal services. Regulation of the press and reputation management services were also brought up as potential areas for regulatory reform.

## Defamation Costs Reforms

33. Questions on costs reforms were answered by a broad spread of respondents, including media organisations, charities, non-government organisations (NGOs), academics, and legal practitioners representing both Claimant and Defendant interests. A number of reform options were put forward for consideration. Many respondents drew on their own experience of how costs operate in SLAPPs.
34. Among those who said that SLAPPs are a significant problem, it was argued that legal costs and funding are the key issue, as the threat of having to pay high legal costs can have a general chilling effect. It was argued repeatedly that costs protection mechanisms need to be strengthened to help mitigate the ‘inequality of arms’ that is often a defining feature of SLAPPs. On the other hand, other respondents argued that the courts already possess adequate tools to deal with costs management.
35. In addressing the theme of adverse costs in SLAPPs, respondents held divergent views. Not all respondents were aware of the precise role of adverse costs, both in SLAPPs and more generally in civil litigation. Other respondents – particularly those from Defendant and media perspectives – noted the importance of adverse costs being protected and suggested that capping adverse costs orders may be worthy of consideration in applicable cases. By contrast, those who were more sceptical of the significance of SLAPPs as a phenomenon suggested that the courts are already well equipped to deal with adverse costs and that no further reform is needed.

36. The point was made, particularly by respondents with first-hand experience of SLAPPs, that costs in these cases can be very high, and that they often escalate at an early stage. It was noted, by multiple Defendant and media respondents, that costs can reach hundreds of thousands of pounds before a case even reaches trial. Many respondents agreed that it would be helpful for reforms to offer levers to control costs and provide greater costs certainty in these cases. Others, however, referred to the existing powers of the courts to utilise costs management.
37. Many media respondents, academics, and those representing Defendant interests agreed with the Call for Evidence proposal that a formal costs protection regime, based on the Environmental Costs Protection Regime (ECPR) which exists to help Claimants in environmental judicial reviews under the UN Aarhus Convention, but inverted, could helpfully be introduced in SLAPPs to help Defendants. It was noted that this would help control costs earlier in proceedings and would also provide a disincentive to those bringing SLAPPs. Others went further, suggesting that an inverted ECPR scheme could be helpful across all defamation cases. On the other hand, several respondents – including legal practitioners and those representing Claimant interests – argued that an adapted ECPR regime should not be introduced for SLAPPs or defamation cases given the complexity of these cases.
38. Respondents representing a variety of different interests made helpful suggestions as to what the default levels of the variable costs caps as in the current ECPR model could be if a formal costs protection regime was applied to SLAPPs or defamation cases. Many respondents suggested that the relevant wealth of parties is an important factor, and that it would be important to be able to vary any costs caps as appropriate. Some respondents made more detailed comments as to what the level of any costs caps should be, whilst others emphasised that it will also be important for Claimants, not just Defendants, to have security as to the costs they may have to pay.
39. Useful wider suggestions were made as to how costs could be reformed in all defamation cases or SLAPPs more specifically. The most common policy options proposed by those in favour of further reform included:
  - i. further financial penalties such as ordering a Claimant to pay punitive costs and possibly even punitive damages;
  - ii. implementing fixed recoverable costs (FRC) for SLAPPs or all defamation cases;
  - iii. widening the availability of civil legal aid to defuse the impact of SLAPPs and legal threats;
  - iv. ensuring that ‘after the event’ (ATE) insurance premiums in publication and privacy proceedings should be made non-recoverable from Defendants; and
  - v. building in a security for costs mechanism for SLAPPs Defendants.

## Responses to specific questions

40. Some questions have been grouped together. This has been done where there was significant overlap in the territory covered by the responses to questions that were grouped on a single theme (for example, where there were several questions about defence of truth in libel law).
41. The overall Government response and next steps is laid out in the next segment of this document, 'SLAPPs: the Road to Reform'. Where necessary, however, responses to specific, detailed and/or niche points have also been included in this segment.

### 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.

42. The first section of the Call for Evidence invited affected parties to come forward with their experiences of SLAPPs. Our initial view, based on third party and anecdotal evidence from those affected, was that formal cases represented a small proportion of all SLAPPs activity. Through the Call for Evidence we have been able to gain a greater understanding of how SLAPPs operate which will provide the basis from which to develop robust reform.
43. Respondents reported being profoundly affected by having to answer what they considered to be abusive and meritless legal letters and court proceedings. Many respondents described feeling distressed and experiencing increased levels of anxiety, with one respondent describing how existing medical conditions had been exacerbated and new medical conditions triggered by the stress of responding to their case. This stress was largely attributed to the high costs attached to responding to legal letters and court proceedings in England, London specifically.
44. Many respondents spoke of the stress caused by the threat of potentially having to cover these costs. For example, a journalist described how with every story they published came concern for their family and business's financial security. This was particularly acute for freelance journalists who do not have the backing of a larger organisation which might be able to cover costs or provide in-house legal services.



45. Further to this, journalist and media respondents in particular stressed that responding to SLAPPs-style letters or proceedings took up the time that would otherwise be used to investigate and write on issues in the public interest. One respondent said that they had taken a period of unpaid leave from their employment because they were responding to a case full-time and were no longer working. While their employer had supported them for a number of months, the respondent felt that this was not a fair and sustainable long-term arrangement. Many of these respondents saw the issue of time-wasting as a deliberate tactic of SLAPPs. In this way a journalist who was being targeted, for example, would be prevented from reporting on other issues, not just those directly related to the SLAPP.
46. A common theme was that there is an “inequality of arms” between Claimant and Defendant, where the Claimant in a SLAPP typically has much higher financial means. Respondents with experience of defending proceedings reported that the risks of very expensive litigation was inhibitive, particularly when the SLAPP was brought against an individual with comparatively limited financial means.
47. On the other hand, some respondents viewed this issue of ‘inequality of arms’ as part and parcel of legal proceedings in England and Wales. Further, in their view, media outlets and publishing houses are sufficiently well-resourced to cover the cost and, when looking at defamation or other types of claims broadly, Claimants are often less well-resourced than Defendants.

**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.

48. Respondents who reported having been affected by a SLAPP almost unanimously said that legal firms or professionals brought SLAPPs, often on behalf of powerful and influential clients. Many respondents referenced the same law firms, suggesting that there is a particular set of Claimant specialist law firms who have experience in this type of litigation and have tended to bring these claims.
49. SLAPPs were most commonly said to be carried out through pre-action letters, most often in response to right to reply requests, pre-publication. These letters were repeatedly said to include language which very much seemed to the recipient to be inflammatory, intimidatory and aggressive, detailing the lengths to which a firm would go to protect their client’s reputation, privacy etc. The letters typically threatened legal action and were also said to often be ‘long’, ‘circuitous’ and “vague”, avoiding the precise requests of the Defendant in their right to reply request or request. This was interpreted by respondents as a time-wasting tactic, for example, to cause delay so

that a journalist's story or academic's critique would face significant delays to publication. One respondent noted that the letter they had received barely covered any of the criteria set out in the Media and Communications Pre-Action Protocol, which they expected would have guided exchanges on a matter relating to publishing in the public interest.

50. Many respondents reflected that letters were addressed to an individual rather than an organisation (for example, a university, publisher or media organisation) and interpreted this as a further intimidatory tactic. A few respondents noted that if not in the first exchange, then at a later exchange, a senior member of their organisation (for example, their editor or manager) would be copied, which was interpreted as a tactic to put further pressure on the individual. A number of respondents noted that these exchanges often called into question the professional integrity and capability of the individual, again, interpreted as a tactic for intimidation.
51. A number of respondents described these pre-action letters as being marked as 'private' and 'confidential', giving the impression that the matters included were not to be discussed more widely. This added further to the aforementioned sense of stress, anxiety and pressure, as respondents explained that they felt that they could not seek advice or support on how best to proceed. These letters were at times said to be signed by the law firm rather than an individual lawyer. This was interpreted by some respondents as a way for the Claimant to evade personal accountability.
52. Conversely, a number of legal professionals, both solicitors and barristers, explained their interpretation, that these legal letters were a legitimate means to set out the risks posed by potentially false or inaccurate information about their clients being published. They contended that these types of letters are part of normal pre-action communication, and so receiving one should not automatically equate to being subject to a SLAPP. Additionally, they reported their understanding that journalists and media organisations are rarely intimidated by such letters, as evidenced by the fact that publication continues.
53. There were accounts of right to reply requests being needlessly long and vague themselves, often sent close to the proposed publication date. Some respondents suggested that this was a way to evade accountability for reporting without nuance and rigour.

**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?

54. As above, many SLAPPs are said to be carried out through pre-action legal letters. One respondent attested that whilst their organisation had never been successfully taken to court in England and Wales, they consistently receive pre-action letters in response to their reporting, which take both a ‘material’ and ‘personal’ toll on the organisation.
55. A number of respondents spoke about their experience of SLAPPs court proceedings. Recurring features of such proceedings included:
  - i. Clustering of multiple claims, often in multiple jurisdictions, often with multiple grounds;
  - ii. Claims brought by the wealthy and powerful against an individual (rather than an organisation);
  - iii. A heavy concentration of claims in London where there is no clear jurisdictional link for Claimant or Defendant.
56. Defendants reported different experiences of this type of proceedings. For example, one individual experienced multiple claims brought against them by different Claimants, some parts of which were upheld whilst others were not. The result was that publication as amended to acknowledge the Claimant’s views in places.
57. A recurring theme expressed by Defendants, was that the outcome, for example, upholding reputation, did not seem to be the purpose for which Claimants commenced litigation. Instead, the intention seemed to be to initiate a long legal process whereby costs would accumulate and the Defendant would therefore be under serious pressure to reconsider their position. Further detail is provided in the Costs section of this response.
58. Defendants also described how they experienced tactical use of litigation by Claimants. One in particular described a Claimant who brought a defamation case within a few days of the statute of limitations running out.
59. Some respondents described settling their claim before a defence needed to be filed but did not go into further detail beyond this.

**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.

60. A substantial number of respondents, not limited to journalists, spoke of a chilling effect of SLAPPs. Many attested to no longer publishing about certain individuals, or topics, known to them to be particularly litigious, primarily because of concerns over not being able to cover the costs of legal proceedings. These respondents were

concerned that, because of this, important issues relevant to the public interest were not being voiced. Again, this was due to either the material existence of legal exchanges and/or court proceedings, or the mere threat of these. One respondent explained the chilling effect of SLAPPs as systemic rather than individual – that is, that those publishing in the public interest may stop doing so because they see others being targeted by SLAPPs.

61. There were further concerns that stories were being diluted, to the detriment of the public interest, in order to fend off legal threats and reach compromise so that stories could be published. Many respondents spoke of ‘self-censorship’ which was seen to reverberate outside of journalism, academia and civil society. For instance, one respondent argued that this had a detrimental effect on law enforcement, suggesting that if issues of corruption were no longer being reported on, law enforcement agencies would be less alive to them.
62. A number of Claimant-specialised law firms did not recognise these accounts. They instead reported that publishers and news outlets have enough resources to finance legal costs when they need to defend a legitimate story.
63. These respondents highlighted that the media and media groups have also been known to abuse their position, citing the findings of the Leveson inquiry.<sup>1</sup> There were accounts of the media itself being bullish, and some concerns that whilst much SLAPPs advocacy was likely to press for sensible measures, other contingents of the media or organisations that claim to act in the public interest would abuse anti-SLAPPs reforms to create an environment where the media could comment on public figures and organisations with near impunity.

**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?

64. On the issue of reporting, responses varied widely but generally there was little reporting of perceived SLAPPs. There was a contingent of respondents on the receiving end of SLAPPs who did not report this to any kind of body as they did not know to whom to report the issue, nor did they have confidence that it would have been dealt with adequately. One respondent explained that they were using the new SRA guidance on SLAPPs as the basis for making a complaint.
65. The issue of reporting is further discussed in the regulatory reform section below.

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<sup>1</sup> An inquiry into the culture, practices and ethics of the press: overview [Leveson report] HC 779, Session 2012-2013 (publishing.service.gov.uk)

**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.

66. Many respondents who reported that they had experienced SLAPPs said that they had been investigating and/or writing about issues of corruption, financial crime, and associated issues. This was not limited to journalists but also included law enforcement agencies and organisations involved in financial due diligence on behalf of other institutions such as banks.
67. These investigations often focused on an individual either in a powerful government position or on or a high net-worth individual who had ties to a non-liberal state. Investigations into these individuals was said to aim to uncover covert action in the public interest and demonstrate the ways in which this type of activity can erode democracy not just in the subject's country of origin but also in the UK.
68. The subject matter of work that sparked SLAPPs was not limited to corruption, however. Other respondents spoke of work on human rights violations, notably at the hands of corporations, and environmental issues as being the subject of SLAPPs.

## Legislative reforms

### Statutory definition for SLAPPs

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

69. The Call for Evidence proposed that a statutory definition of SLAPPs would offer a gateway to other reforms and to increasing the powers and ability of courts and regulators to deal effectively with SLAPPs. To that end, while there is currently no definition for a SLAPP in English and Welsh law, the Call for Evidence suggested that SLAPPs could be characterised as an abuse of the legal process, where the primary objective is to “harass, intimidate and financially and psychologically exhaust one’s opponent via improper means.”
70. This view was corroborated by a number of respondents for whom the questions of whether and how to define a SLAPP was dependent on an indicative understanding of how they work. SLAPPs, they argued, exploit the procedural mechanics of the legal system, misusing them as a threat. As was covered at length in response to questions about the impact of SLAPPs, the fear of racking up high legal costs – sometimes totalling millions of pounds – over the course of lengthy litigation is

intimidating and exerts a chilling effect on Defendants, forcing them to reconsider and at times abandon work that is in the public interest.

71. The import of any definition would, therefore, be to disincentivise abuses of process that are intended to be costly and time-consuming, by designing reforms in areas such as early dismissal processes and costs management that would draw on the definition to classify cases for a special regime. It could have both a deterrent and effective resolution relevance.
72. The overwhelming majority of respondents agreed that a definition of SLAPPs was necessary in some form to address the power imbalance and inequality of arms at the centre of these claims. Many media and advocacy group respondents highlighted that a definition would, first and foremost, help to provide clarity and consistency for both the courts and the legal sector. Its efficacy would be dependent on its link to procedural measures, such as early dismissal mechanisms, whereby the courts would be able to identify when an unmeritorious claim was brought improperly and dismiss it at an early stage. This would reduce the threat of the prohibitive costs and protracted legal entanglements that are hallmarks of SLAPPs.
73. A clear definition could also enable the legal profession to identify a SLAPP early on and decline to act on the matter, while empowering other potential victims to recognise and report SLAPPs to regulators. Some Claimant legal practitioners enthusiastically welcomed the prospect of a narrow definition on the grounds that this would facilitate a distinction between legitimate infringements on free speech and “irresponsible behaviour” on the part of media organisations.
74. Most respondents agreed that any definition would need to be broad in recognition of the fact that SLAPPs are not limited to defamation. They are also characterised by particular tactics, such as threatening legal letters, and also extend to issues of data protection and privacy law. Too rigid a definition would risk cases falling outside of scope and be subject to exploitation of loopholes, offering a roadmap of how to get around anti-SLAPPs measures.
75. A number of Claimant lawyers questioned whether SLAPPs were a common enough occurrence to warrant any action, while at the same time arguing that the courts already had the tools necessary to deal with SLAPPs and filter out unmeritorious claims. This includes strike-out provisions under Civil Procedure Rule (CPR) 3.2(4)(a) or (b) on the basis that the claim serves an improper collateral purpose or discloses no reasonable grounds for bringing the claim. There is furthermore specific Court of Appeal precedent (*Wallis v Valentine* [2002] EWCA Civ 1034) for striking out libel claims which are not genuine attempts to vindicate one's reputation and are instead abusive claims aimed at causing nuisance or damage to the Defendant. Such

challenges, it was observed, can be brought early in proceedings, and costs are likely to be awarded to successful Defendants.

76. Respondents who were opposed to a statutory definition argued that this could risk curtailing access to justice in legitimate claims that do not seek to harass, intimidate, or exhaust an opponent but simply aim to protect one's reputation. This could lead to increased costs and satellite litigation. Some also urged against defining SLAPPs based on case-specific criteria because behavioural aspects, such as intimidation or harassment, are difficult to prove at an early stage. Rather, they commented, the focus should be on protecting public participation and the public interest, which is necessary in order to strike an appropriate balance between any wrong done to a Claimant on the one hand and, on the other hand, a Defendant's right to freedom of expression.
77. Most respondents did, however, recognise that a definition in some form would bring clarity and that if this were to be pursued, this likely would need to take account of the criteria or characteristics involved in a SLAPP. There was, predictably, disagreement over the degree to which such criteria should be incorporated.

### **Government response**

78. The Government recognises that being able to appropriately identify what is – and is not – a SLAPP will play an important role in effectively addressing these types of cases and the behaviours associated with them, including intimidation, harassment and legal threats designed to suppress freedom of expression through an abuse of the legal process. At the same time, the Government is alive to the challenges involved and appreciate that the form and extent of any definition will have wider judicial, legal, procedural, regulatory and costs implications.
79. It is clear that SLAPPs are not just a problem related to defamation, but extend to other areas of law, including data protection and privacy. Our understanding of SLAPPs, therefore, must be flexible enough to incorporate these and other areas, but not so broad that it hinders access to justice for legitimate claims where individuals or businesses are trying to protect their reputations.
80. A key measure at this stage is to introduce a new quick, efficient and cost-limiting early dismissal process so that when a SLAPP claim is made, the Defendant can apply to the court to have it dismissed, thereby limiting the characteristic features of prohibitive costs and protracted legal wrangling that make SLAPPs so threatening. This will require a statutory means for identifying cases, accompanied by defining criteria, to qualify for that process, on which we elaborate further below in response to question 10.

**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?

81. As outlined in the Call for Evidence, public participation can include academic research, journalism and whistle-blowing activity concerned with matters of societal importance, such as illicit finance or corruption.
82. A number of arguments were put forward by respondents in support of a new right to public participation and its centrality to any definition of SLAPPs, including establishing a broad definition of public interest speech in the form of a non-exhaustive list of criteria that would help the courts identify the essential features of SLAPPs. This could be complemented by judicial scrutiny into the motives behind SLAPPs, whereby the court would consider a number of factors early on to determine whether a claim was brought to suppress debate rather than to secure redress, including whether a Claimant would lose at a full trial, whether a Claimant isolates trivial passages out of large amounts of material, and the number of similar cases that have been launched by a Claimant.
83. Many respondents in favour of a new right to public participation saw this as the basis of free-standing anti-SLAPP legislation.
84. In contrast, resistance to a new right to public participation converged around the prospect of curbing access to justice in legitimate cases, resulting in effective immunity from libel complaints. Others contended that this was unnecessary to begin with, as these rights are already granted under the Articles 10 and 11 of the European Convention on Human Rights (ECHR).

### **Government response**

85. Where someone was exercising a right to public participation, there would be a higher threshold for a claim against them than provided for in existing law, thus strengthening existing public interest principles and extending them to wider areas of public debate. However, it is the Government's view that establishing a new right to public participation may create too broad a statutory provision, whilst not necessarily significantly advancing protections for Defendants – and could, therefore, lead to unnecessary complications and satellite litigation around whether a case constituted public participation or not.



**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?

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

86. Responses to this question are closely linked to question 7 above, where many respondents acknowledged the risks of an overly prescriptive definition of SLAPPs.
87. To safeguard against cases falling between ‘criteria gaps’ of a fixed definition, a number of media organisations, advocacy groups, academics and Defendant lawyers proposed a broad set of SLAPP characteristics and indicative criteria that would also encompass the methods employed in these cases. This list would distinguish such claims from normal litigation and would need to be non-exhaustive to include both procedural and behavioural components that highlight the improper purpose for which the claim was brought in the interest of exerting pressure on and intimidating an opponent.
88. Procedural components of SLAPP characteristic behaviours can include:
  - i. sending multiple pre-action letters that are aggressive and intimidating;
  - ii. the use of other areas of law such as data protection and trademark law to circumvent existing defamation and privacy protections;
  - iii. extensive and unnecessary disclosure requests or the use of other legal tools designed to rack up costs and waste time;
  - iv. over-pleading or inflating the meaning of minor or unnecessary points; and/or
  - v. clear attempts at forum-shopping to find a less appropriate jurisdiction in which to bring a claim, or bringing claims in multiple jurisdictions simultaneously.
89. Behavioural components of a definition could be linked to such procedural abuses, for example, identifying behaviour of which it appears that the dominant collateral purpose is to harass, intimidate, threaten or financially or psychologically exhaust an opponent, and where the method of achieving this was through the improper use of legal tools, such as aggressive pre-action letters, or bringing an unmeritorious claim.
90. Other characteristics identified by Defendant respondents included claims targeted at individuals, either on their own or in tandem with publishers, and refusing reasonable offers to amend statements or reach settlement.
91. It was argued that an approach based on the criteria above would help to establish the parameters of what constitutes a SLAPP, enabling the courts to determine and appropriately dispose of improper claims on a case by case basis and in a

cost-efficient way. However, any definition that may lead to too narrow judicial readings of SLAPPs or be too ambiguous for courts to apply would ultimately be an ineffective deterrent against abusive or intimidatory actions aimed at stifling free speech, and could instead provide a blueprint for loopholes.

92. A recurring theme was the imbalance of power and financial resources as a trait of SLAPPs, where many argued that in these circumstances a Claimant should be required to prove serious reputational harm, as outlined in the Defamation Act 2013, or actual malice. Some Claimants were keen to point out that inequality of arms can operate in the opposite direction as well, where Defendants such as commercial publishers, media organisations or wealthy individuals will likely have access to insurance or other financial remedies to which Claimants of moderate means do not.
93. Criticisms of proposals for a right to public participation a characteristic-based definition of SLAPPs were voiced primarily by Claimant interests, who reiterated previous points around the need to balance anti-SLAPP measures against access to justice and to ensure that meritorious claims are not excluded. Claimant representatives argued that an approach based on criteria relating to SLAPPs characteristics would be very subjective and complicated. There was also the risk that a non-exhaustive list could become ever-expanding, unintentionally broadening the scope of what is considered a SLAPP. This raised further questions as to whether all criteria would need to be met, or just some. An alternative would be to focus instead on public interest and public participation elements of expression.
94. One Claimant raised concerns that an overly-generous criteria-based definition could be abused by Defendants such as journalists or publishers to improperly seek SLAPPs protections for any claim made against them.

### **Government response**

95. The Government has carefully considered the responses to these questions in conjunction with those to question 7 above. It is clear that effectively dealing with SLAPPs is contingent on being able to appropriately identify them early on, thereby limiting the threat of time-consuming and costly litigation while preserving access to justice for legitimate claims. We agree that a rigid definition risks claims that should be considered SLAPPs falling out of scope, while too flexible an approach would prevent meritorious claims from proceeding.
96. As such we will be pursuing work to develop a means for identifying SLAPP cases so that they can be subjected to special treatment in terms of case and costs management measures such as an early dismissal procedure.
97. Some of the criteria proposed by respondents have been useful in highlighting which aspects would most help in identifying a SLAPPs claim. This includes the issue of

public interest, which the Government recognises is, as a matter of principle, likely to be an important factor at the core of many SLAPP disputes.

**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.

98. Several jurisdictions in other common law countries and elsewhere have sought to address the issue of SLAPPs. A number of respondents pointed to the United States as offering the most comprehensive example of effective anti-SLAPP legislation, with 32 states introducing specific measures to combat SLAPPs, many of which allow for early dismissal and the recovery of legal fees. While they differ in content and design given the unique features and interests of each state, the basis of these statutes lies in the strong free speech protections of the First Amendment of the US Constitution and general public interest provisions.
99. Canadian anti-SLAPP measures were also frequently cited, in particular the ‘Protection of Public Participation Act’ adopted in Ontario in 2015. Under this model, lawsuits targeting expression on matters of public interest can proceed only if two conditions are met: i) that there is some evidence that the claim will succeed; and ii) that the harm in dismissing the case outweighs the harm in letting it proceed. If a case fails this test, Claimants are fully responsible for the legal fees of Defendants, which many respondents thought worked as a strong deterrent.
100. Support was also expressed for the European Union’s Model Directive on SLAPPs, a key feature of which is the early dismissal of “manifestly unfounded or abusive”<sup>2</sup> court proceedings. Other features include compensation for damages, where the target of a SLAPP will have a right to claim and obtain full compensation for material and immaterial damage suffered, as well as provisions ordering the Claimant to bear all costs if a case is dismissed as abusive, protections against third-country judgements and dissuasive penalties. The draft Directive also contains a definition of public participation, similar to the approach adopted in anti-SLAPP legislation in many common law jurisdictions.
101. Primary criticisms of international models centred around their inability to be transplanted to the specific nuances and traditions of the legal system of England and Wales. In the case of the United States, several respondents noted the different approach to protecting speech on matters of public interest which exempts ‘public officials’ and ‘public figures’ from the right to sue for defamation unless ‘actual malice’ can be proved. This, the respondents contended, has created an artificially high bar

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<sup>2</sup> COM (2022) 177 final, 2022/0117(COD)

that in some instances has evolved into effective immunity from liability for the publication of defamatory statements. At the same time, respondents highlighted the lack of federal anti-SLAPPs legislation.

102. Others cautioned against borrowing from jurisdictions such as Canada and Australia that they argue go too far, making it difficult for Claimants to bring legitimate claims to defend matters of reputation, while doing little to cut down on the time and costs incurred in such cases.

### **Government response**

103. International comparators have helped highlight both the successful and less successful features of anti-SLAPP legislation around the world and whether they would be suitable for the legal system of England and Wales. Responses on this subject highlighted some of the fundamental differences that lie behind them, such as the fact that American anti-SLAPP legislation has tended to stem from an extension of First Amendment rights, which has no direct equivalent here. We will consider any helpful and applicable measures in developing our own reform and legislative proposals.
104. The Government recognises the merits of a public interest test as a means of creating an effective early dismissal mechanism. The EU Directive presents a useful model, as it would encompass not just defamation, but other instances in which SLAPPs are pursued, such as due diligence checks and investigative work by public bodies. It also appears consistent with the guidance on the Public Interest test prepared for the Freedom of Information Act 2000 on enhancing of accountability and preventing harm.
105. However, as mentioned above, the Government does not believe that a definition of public participation as proposed by the EU Directive would be helpful, as this could lead to unnecessary complications and satellite litigation around whether the subject matter of a case constituted public participation or not. Courts in England and Wales have well established existing tests around the public interest, whereas public participation is a new concept that would require interpretation by the courts.

### **Reforms stemming from there being a defined cohort of SLAPPs cases**

**Question 12:** Would you draw any distinction in the treatment of individuals and corporations as Claimants in drawing up definitions for SLAPP type litigation?

106. Respondents to this question were almost evenly split. Those in favour of distinguishing between individuals and corporations noted that one of the fundamental features of a SLAPP is the power imbalance and inequality of arms that

exist in cases where individuals seek to challenge corporate behaviour. Others suggested that individuals and small organisations may be more exposed to SLAPPs and are likely to suffer greater consequences as a result as they are unlikely to be covered by insurance and are likely to have more limited financial means to mount a defence. Corporations, on the other hand, are likely to be better equipped to tolerate higher levels of public scrutiny than individuals.

107. Another respondent rejected the Government's view expressed during the consultation to the Defamation Act 2013 reforms that an absolute bar on corporations suing for defamation could raise issues of compatibility with the ECHR. Rather, they argued that corporate Claimants, unlike individuals, do not have a right to reputation under the ECHR, and that barring them from bringing defamation claims would not be incompatible with the convention.
108. Opposition to differentiating between individuals and corporations primarily centred around existing distinctions in s.1 of the Defamation Act 2013 where the serious harm threshold already imposes a higher bar to prevent corporations trading for profit from bringing defamation claims, serving as a deterrent to meritless claims. Others also noted that both individuals and corporations are equally capable of bringing abusive litigation designed to silence public interest reporting.

### **Government response**

109. While the Government agrees that inequality of arms is a common characteristic of SLAPPs, sufficiently compelling evidence has not been provided at this stage to suggest that drawing a distinction in the treatment between individuals and corporations would be an effective tool in redressing that imbalance. Rather, it is possible that doing so could have the opposite effect. On that basis, the Government believes other measures would more appropriately address the challenges posed by SLAPPs in the immediate term.

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

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

110. Many responses pointed to procedural reforms that have already been addressed, such as the need for an early dismissal or strikeout mechanisms, or others that are dealt with elsewhere in this Call for Evidence response, such as limitations on costs, and reforms to actual malice and the serious harm test.

111. One respondent argued that procedural measures would only prove effective if it were possible for the courts to declare that an action was a SLAPP of their own initiative at any time, as it may become apparent as evidence and other actions are scrutinised over the course of proceedings that an abusive claim is in fact a SLAPP. This coincided with recommendations for greater judicial case management powers that would necessarily accompany judicial training to deepen understanding of the main features of SLAPP claims and how to respond to abuses of the litigation process. This would enable the courts to be more attuned to SLAPPs methods and the impact they have on journalists, the media and campaign groups and how they could be appropriately dealt with using existing judicial mechanisms.
112. Some respondents also advocated for sanctions against repeat offenders, such as requiring a deposit for future claims or the introduction of a reversal of burden of proof in a SLAPPs challenge.
113. One media regulator proposed that greater uptake of mandatory arbitration would disincentivise behaviours associated with SLAPPs. This, they argued, is already encouraged in law through Section 36 and Section 40 of the Crime and Courts Act 2013. Section 36 protects well-regulated publishers from being exposed to exemplary (punitive) damages, while Section 40 protects well-regulated publishers by requiring litigants who wish to take legal action against a publisher to either use the regulator's low-cost arbitration scheme or to risk paying both sides' legal costs in taking the matter to court, regardless of outcome. For some legal practitioners, however, the existence of such a scheme reinforced the notion that there are already sufficient tools to deal with any suspected SLAPPs claims.
114. An underlying theme was the relationship between SLAPPs and broader anti-corruption actions. One respondent suggested that limiting the costs exposure of enforcement agencies would not only address the inequality of arms between state bodies investigating corrupt practices by wealthy individuals or corporations, but would also prevent the use of malicious satellite litigation designed to exhaust resources and frustrate such investigations. Another argued in favour of improving the current legal framework to ensure that whistle-blowers can rely on strong legal protections and can be confident that the concerns they raise will be addressed.

### **Government response**

115. The Government recognises the link between SLAPPs and broader anti-corruption actions, though some of the proposals made here, while useful, are beyond scope. On the other hand, while the proposals around mandatory arbitration appear to apply specifically to publishers and would only address a particular cohort of SLAPPs cases, this is one area which could be explored further.

## Defamation (libel) laws

### The Serious Harm Test

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

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

116. The Defamation Act 2013 (section 1) established in law that a statement is not defamatory unless it has caused or is likely to cause serious harm to the reputation of the Claimant. The legislation also included a clause in relation to businesses ('bodies trading for profit') in which the serious harm test is only met if the business can demonstrate actual or likely serious financial loss.
117. The majority of respondents considered that the serious harm test was relevant as a defence in SLAPPs, and also helped to achieve a fair balance between the Claimant's right to reputation and the Defendant's freedom of expression.
118. While many respondents felt it had relevance and utility in a SLAPPs context, there was also a sense that it came too late in the litigation process to have the effect of deterring SLAPPs or deterring a high volume of threatening legal letters in advance of a claim being issued. There were concerns expressed that the test tended to involve delays and costs to a dispute for both parties even if it offered an eventual means of resolving it.
119. There was some enthusiasm in responses for some sort of process to apply a serious harm test as a preliminary issue – others felt that it does already have a helpful effect in deterring trivial claims, especially by corporate Claimants.
120. Some media respondents sought wider reforms to some defamation common law principles such as the Dingle principle<sup>3</sup> and the repetition rule.<sup>4</sup>

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<sup>3</sup> The Dingle rule (*Associated Newspapers Ltd v Dingle* [1964] AC 371) provides that a Defendant cannot rely in mitigation of damages on the fact that similar defamatory statements have been published about the same Claimant by other persons.

<sup>4</sup> The repetition rule concerns the meaning of a statement and the availability of the defence of truth, "repeating someone else's libellous statement is just as bad as making the statement directly": *Lewis v Daily Telegraph* [1964] AC 234, 260

121. Some interesting points were made on the need for a serious harm threshold to be available for application in non-defamation cases, such as misuse of personal information claims.

### Government response

122. The overall conclusion seems to be that the serious harm test is working well and achieving a reasonable balance between the competing rights in most defamation cases. Its ability to deter or deal expeditiously with SLAPPs cases is less clear cut, but there is a concern that seeking to modify the legislation to deal with this small number of abusive cases might still fail to address the problem and dismantle the delicate balancing of interests the legislation seeks to achieve. Wider questions raised on reforms to libel law would be more appropriate to a review of the substantive law of defamation in England and Wales which the Government does not consider is necessary at present, and which would deflect from the current exercise which is focused on the issue of SLAPPs.

### The Defence of Truth

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

**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?

123. The Defamation Act 2013 (Section 2) amended the common law libel defence of 'justification' to create an absolute defence to a defamation claim of 'truth'. The legislation makes clear that a Defendant does not have to prove every single word published was true, but it has to be 'substantially true'. So, if making a series of claims about someone, if the essence of the piece is objectively true the defence will succeed.
124. Respondents to these questions acknowledged that truth, as an absolute defence in defamation cases, performs an important function in existing libel disputes and as such is an important defence in SLAPP cases.
125. Those responding commented that the truth defence acts as a significant deterrent in normal defamation claims. Where a substantive truth defence is mounted the Claimant needs to assess the risk of pursuing litigation and the potential further effect on their reputation. However, mounting such a defence can be a costly and lengthy process, and given the context of SLAPP claims – that the aim is to financially intimidate the other party – the Claimant is less concerned with the deterrent effect.



The calculation may be that the strength of the defence is outweighed by the cost, pressure and intimidation of the claim, such that cases fold or settle before the truth defence can be deployed in court.

126. Respondents from media organisations suggested that the way of addressing this in SLAPPs, and more generally – especially in relation to corporate Claimants – would be to reverse the burden of proof. This would have the effect of placing the onus on the Claimant to show that the statement complained of was objectively false, rather than on the Defendant to provide evidence that it was objectively true. Many legal practitioners cautioned against this approach as disproportionate and a restraint on access to justice.

### **Government response**

127. The Government considers that the truth defence in defamation law remains an important bulwark in the legal framework. Clearly the nature of SLAPPs means that Defendants may still not decide to fight a claim, even where they are confident they can field a truth defence, because of the costs and risks in prolonged litigation.
128. The Government is not, at this stage, persuaded that the burden of proof should be reversed in truth defences in defamation. It is far harder to prove a negative and a number of concerns were expressed that reversing this places too much of a burden on Claimants and potentially weakens the current standards for media efforts to establish and authenticate the truth of their reporting.

### **The defence of Honest Opinion**

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

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

129. The Defamation Act 2013 (Section 3) amended the common law libel defence of ‘fair comment’ to create an absolute defence to a defamation claim of ‘honest opinion’.
130. The majority of those responding to these questions felt that the position on honest opinion closely resembled the truth defence in defamation cases. They considered it was a robust defence that offered a deterrent to defamation claims generally. Although it is not argued in all cases one advantage of the current law is that it will often be dealt with at an early stage at a ‘meaning’ hearing. Another benefit cited by respondents was that where it is used and the court considered an honest opinion defence is warranted, then it is difficult for a Claimant to show that the publisher did not hold it.

131. Reference was also made to the law being established in this area, with the common law setting out the criteria and distinction between statements which were factual and those which were opinion.<sup>5</sup>
132. One area of amendment suggested by media representatives was to reform the legislation to make it less prescriptive and restrictive – for example to allow evaluative statements to be an expression of opinion.

### Government response

133. The overall assessment is that this defence in defamation law is working reasonably well to widely understood principles. While the defence offers a deterrent in some libel claims it is not clear the extent to which it particularly assists in SLAPP cases, and it is also not clear whether amending it would make any significant difference in the sorts of cases in which SLAPP litigants are engaged.
134. The Defamation Act 2013 broadened the former common law defence, and no further reform of this law is considered necessary at present.

### 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?

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

135. The Defamation Act 2013 (Section 4) provided a new statutory defence to responsible publishers of material that concerned matters of public interest. This built on the former common law defence linked to matters of responsible journalism.
136. The issue of the public interest defence brought a large number of responses, but representing a very wide spectrum of views in terms of the utility of the defence to SLAPPs cases (as opposed to in general) and especially on the question of whether this area of law should be reformed.
137. For Claimant lawyers and a number of other respondents the current statutory public interest test achieved a fair balance of competing rights of reputation and freedom of expression and was if anything already too generous and weighted to the media. The point was made that a public interest defence could be run even where a story was defamatory or untrue. There were also concerns that the defence may not help as much in a SLAPP type lawsuit context, as these were abuses of process not

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<sup>5</sup> See for example the judgment in *Koutsogiannis v The Random House Group Ltd* [2019] EWHC 48 (QB).

concerned with the strength of defensive arguments but with overwhelming and cowering an opponent.

138. For media organisations and Defendant lawyers the public interest test was a rallying point for investigative journalism and publishing and an important defence that acted as a deterrent to Claimants. However, most of the respondents on this side of the argument felt that it did not go far enough. There was also concern that running such a defence brought risks and tended to frontload costs as substantive early hearings on public interest may be necessary ahead of the substantive trial on whether a statement was defamatory or not.
139. Some respondents, including campaign groups and overseas experts, proposed a new statutory right of public participation. This would create a stronger defence with a wider application to non-defamation areas of law.
140. Others thought that the existing defence needed procedural rather than legislative amendment – if an inexpensive early hearing procedure could be devised this would help to counter SLAPPs where a public interest argument was relevant.

### **Government response**

141. The Government acknowledges that the public interest is likely to be at the heart of many SLAPP disputes – in a sense it is likely to be the natural defence to any litigation which is brought with an intention of silencing criticism or reporting of economic and potentially criminal activities. However, it is acknowledged that while it offers an important issue of principle, the realities and costs of litigation mean that it may come to be deployed too late in the piece or be assessed as being too expensive and risky to run.
142. As some respondents observed, the legislation is still to an extent bedding down, and as cases proceeding to trial and testing the defence in the courts have been infrequent (although this does not mean it is not being invoked or helping resolve libel disputes) it is perhaps too early to embark on another series of reforms.
143. The responses advocating a new statutory right of public participation are strongly related to these issues. Clearly a number of common law jurisdictions have decided that the public interest test or defence is inadequate to deal with SLAPPs and a wider-ranging legislative test and right is needed. The arguments here are strong and worthy of further consideration, but it is also the case that creating such fundamental additional rights for what is a small cohort of cases raises concerns about proportionality.
144. As such, the Government feels that reform of the law in this area needs to be kept under careful consideration, but that other, more immediate, measures may address the challenges of SLAPPs more effectively and proportionately.

## 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.

145. The Defamation Act 2013 (Section 7) updated and extended the circumstances in which the defences of absolute and qualified privilege under the Defamation Act 1996 are available. In summary, the two types can be described as:
- i. 'Absolute privilege' – defamation proceedings may be brought where a report is covered by 'absolute privilege'. This includes debate in Parliament and reporting of court proceedings.
  - ii. 'Qualified privilege' – this form of privilege offers a potential defence to libel claims. There are two types – statutory and common law.
146. The majority of respondents felt that the existing defences worked well, were well understood and were seldom used as privilege was generally a strong basis for a defence in defamation. Many respondents also said that SLAPPs were less likely to be pursued in areas where either privilege defence might apply.
147. It was argued by a number of respondents that qualified privilege did not need to be reformed in respect of reporting of Parliamentary proceedings – in part as the Defamation Act 1996 put it on a clear statutory footing, but also as qualified privilege requires malice to be demonstrated by the publisher for it to be overturned which represents a higher threshold.
148. A small number of media respondents wanted to see some aspects currently under the qualified privilege regime moved to being matters of absolute privilege, particularly reporting of Parliamentary proceedings or other areas where the public interest in reporting was particularly strong.

## Government response

149. The Government believes that, overall, the responses on these questions bear out its view ahead of the call for evidence. That is that a SLAPP is less likely to be pursued when a privilege defence is available, that the existing defences are reasonably well understood and respected and that the case for reform is currently not compelling.

## Libel Tourism

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

**Question 27:** Are there any reforms to the appropriate jurisdiction test that could be considered in SLAPPs cases?

150. The Defamation Act 2013 (Section 9) addressed what had been dubbed ‘libel tourism’ (where cases with little connection to England and Wales are brought here). The legislation achieved this by tightening the test to be applied by the courts in relation to actions brought against people who are not domiciled in the UK. It did this by requiring that the court must be satisfied that the jurisdiction of England and Wales is clearly the most appropriate for an action in respect of the statement complained of before agreeing to hear the case.
151. The Government said in the Call for Evidence that there was a question mark over the extent to which reform in this area may be applicable as many high profile cases described as SLAPPs appeared to relate to Defendants who were domiciled in the UK. A number of respondents agreed with this assessment and considered that the test was working well generally and having a beneficial deterrent effect on the sorts of cases that had been brought prior to the 2013 Act’s reform. One respondent pointed to the UK’s withdrawal from the European Union as having strengthened the test, as there were not the same private international law obligations engaged.
152. Other respondents, however (especially from campaign groups and media organisations), considered that this remained an issue and pointed to current and recent cases which appeared to have tenuous links to the UK, but which UK courts had agreed could proceed (even if in part). Some of these cases, it was argued, had the hallmarks of SLAPP style litigation.

## Government response

153. The Government is conscious that this is an evolving area of law as the courts apply the test in the 2013 legislation. It is clear that the reform has had an effect with a succession of court judgments reinforcing the principle (and offering guidance) that the court must be satisfied that England and Wales is the most appropriate jurisdiction for a case to be heard. The Court of Appeal, in the first case it heard on the test (*Wright v Ver* [2020] EWCA Civ 672) upheld the principle.
154. It is clear from some responses this remains an area of concern. Each case will turn on its merits and the individual circumstances, and while the case for urgent reform

has not been demonstrated this remains an area the Government intends to keep under close review.

### 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.

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

155. There was a polarised set of responses to the issue of whether an actual malice threshold should be introduced for defamation claims identified as SLAPPs. A clear majority of respondents considered that this reform should not be pursued, and a significant number felt that it would have an adverse and disproportionate effect. The point was also made that difficulties (and satellite litigation) may be created in identifying which defamation cases would fall into scope.
156. The essence of the criticism was that it would dramatically shift the centre of gravity for the current balance between the right to reputation/privacy and the right to freedom of expression. Concerns were expressed that introducing this test and reversing the burden of proof onto Claimants (to prove a statement had been wilfully defamatory) would give the media/publishers too free a rein, and the prospect of false or misleading statements that could not be challenged if the threshold in place were raised, and the comment was made that legislation of this nature would create an imbalance in the rights under the European Convention on Human Rights.
157. Respondents also pointed to calls made by two current US Supreme Court judges for a reassessment of the actual malice threshold, which had been introduced in the 1960s before social media greatly increased the scale of publishing material, and also that such a threshold had not been adopted by many common law jurisdictions in drawing up legislation to tackle SLAPP litigation.
158. Against these views, a number of media and campaign organisations argued that an actual malice threshold should be introduced. They regarded this reform as creating the necessary higher bar, pointing to the current public interest test not proving a sufficient one to deter SLAPP style suits. Reversing the burden of proof would also provide a much greater deterrence to SLAPP actions.

### Government response

159. The Government does not believe that the case for introducing an actual malice threshold in defamation claims is compelling and feels that on a current assessment

to do so would recalibrate the current balancing of Claimant/Defendant rights to a disproportionate degree. There are fears that applications for applying the threshold would be made in cases which were not SLAPPs.

160. As with other possible defamation law reforms the Government will keep the matter under review.

### 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?

161. A number of responses were made on this question on wider reforms which are addressed in other parts of this Call for Evidence response document; particularly in relation to a new statutory right to public participation and suggested changes to the pre-action protocol for defamation claims.

162. One respondent suggested further amendment to Section 6 of the Defamation Act 2013, to broaden the scope of the measure which created a new defence of qualified privilege for peer-reviewed material in scientific and academic journals.

### Government response

163. The Government will undertake further work to look at the section of broadening the academic journal qualified privilege defence given suggestions of SLAPPs against academic papers.

## Procedural reforms

### Pre-Action protocol

**Question 31:** Do you have any views or experience of how pre-action operates in SLAPPs cases, in particular as that relates to the Pre-Action Protocol for Media and Communications? Please explain your response.

**Question 32:** Do you have any views or suggestions which would improve upon existing pre-action conduct in SLAPP cases? Please explain your response.

164. We understand that a common feature in SLAPPs is the issuing of 'pre-action' letters to journalists, writers and others. We invited views on the effects of this practice and, in particular, how the current Pre-Action Protocol for Media and Communications claims is working.

165. We did receive some views supporting amendments to the Media and Communications Pre-Action Protocol to assist the better management of SLAPPs. However, we also received evidence, mainly from Claimant specialised firms, that the Pre-Action Protocol is fit for purpose and sets out clear expectations for compliance.
166. An interesting idea expressed by several respondents on both sides was a potential amendment to the Pre-Action Protocol to require both Claimants and Defendants to append a Statement of Truth to their Letter of Claim and Letter of Response. We also heard views that all Statements of Truth should be made by Claimants and Defendants themselves or, where they are corporations, by a senior representative of the organisation. We understand that such a reform could discourage assertions which are not corroborated by evidence, or any assertions which are known to be false.
167. The idea of a potential amendment to Practice Directive 53B was also explored, so that on the issuing of a claim, a statement as to serious financial loss having been suffered by a corporate Claimant would need to be signed by an officer of the company and/or the company's auditor to attest to the gravity of the of the loss incurred.
168. What was clear was an overall general frustration, on the part of Defendant parties, that the Pre-Action Protocol was not adhered to in SLAPPs.

### **Government Response**

169. As set out elsewhere in this response, we know that in SLAPPs it is essential that the Court look not only at the conduct of proceedings after a claim is issued, but also at whether the steps prior to the initiation of the claim were abusive. With this in mind, we are very interested in suggestions for reform of the Pre-Action Protocol and, to ensure strict adherence to its rules.
170. We are also clear that conduct during pre-action will need to be given full consideration at the early dismissal stage, as a potential hallmark of a SLAPP. We expect that robust compliance with the pre-action protocol would therefore be assisted by a definition for SLAPPs and an early dismissal mechanism.
171. Should proceedings be issued, we also expect adherence to the Pre-Action Protocol to continue to be a consideration of the Courts in determining liability for costs.
172. We will discuss possible reform with the senior judiciary who oversee the Pre-Action Protocol. As considered above, one area of focus could be the amendment to ensure that both Claimants and Defendants sign a Statement of Truth to accompany a Letter of Claim or Response.



173. We also remain open to further judicial guidance to support identification of a SLAPP, including at the pre-action stage, and robust enforcement of the protocols.

### Abuse of process

**Question 33:** To what extent do you consider that SLAPP type litigation represents an abuse of process, and lead to being struck out as a consequence?

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

174. The Court has the power to strike out some or the whole of a party's statement of case using powers in the CPR or its inherent jurisdiction. Removing such material means that a party cannot pursue part of its case – and if the whole statement of case is struck out the Court will generally give judgment for the other party.
175. Our initial view, was that there is already considerable scope in appropriate cases for the Court to exercise its powers to take strike-out action in SLAPPs. However, we were interested in views on this issue and whether further reform is needed.
176. The Call for Evidence response highlighted where common law can be supportive of the CPR, in encouraging the issuing of a strike out. For example, it was pointed out that strike out under the *Jameel* jurisdiction requires a court to stop, as an abuse of process, defamation proceedings that serve no legitimate purpose and where there has been “no real and substantial tort” committed (*Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75). *Wallis v Valentine* [2003] E.M.L.R. 8 also considers that an abuse in the proceedings would be if they were conducted not to “vindicate a right but rather in a manner designed to cause the Defendant problems of expense, harassment, commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation.”
177. However, although common law examples were cited, we heard limited examples of where they had been applied effectively in SLAPPs.
178. In general there was support for the principle that abusive claims, including SLAPPs be struck-out as early as possible in proceedings, and with costs kept to a minimum. There were, however, varying views on whether current provision for strike out was sufficient to achieve this result. There was also concern, particularly as expected from Defendant parties/representatives, that by the time strike out is issued costs have already accumulated substantially.
179. Again, views were polarised on accessibility and likely success of strike out. Contrary to the contention that strike out works effectively to filter out abusive litigation at an

early stage, we heard from others that in practice it is difficult for Defendants to succeed in such applications given that the threshold for success is technical and set high.

180. In the case of *Attorney General v Barker* [2000] 1 F.L.R. 759] Lord Bingham outlined the characteristics of vexatious conduct which could constitute an abuse of process. One idea put forward was to strengthen the use of CPR 3.4 in relation to SLAPPs by incorporating Lord Bingham’s criteria into Practice Direction 3A. This would make clearer the “vexatious” conduct of a SLAPPs Claimant, thereby encouraging an early strike out.

### Government Response

181. It is clear from responses that there is current provision for unmeritorious claims to be struck out at an early stage, though the extent to which this has worked effectively is less evident.
182. We were struck by the fact that, although available, the common law authorities for striking out abusive cases have failed to be consistently applied in SLAPPs. With this in mind, we believe that more fundamental reform, such as the introduction of an early dismissal mechanism, will be needed.
183. It seems without doubt that a quick, efficient and cost -limiting procedure to adjudicate upon SLAPPs would be helpful. We think that the introduction of an early dismissal procedure, assisted by statutory definition and defining criteria, will support this process.

### Civil Restraint Orders

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

**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?

184. The CPR provides that Civil Restraint Orders (CROs) can restrain vexatious litigants in civil proceedings and stop them from re-applying to the court. Whilst there is no established definition of vexatious litigant, the term generally designates an individual who repeatedly brings litigation to the courts despite previous clear judicial determination of the issue and ignores court orders or repeated claims without merit. Overall, views on, and responses to potential reform of Civil Restraint Orders were more limited. Whilst we did not hear of examples of a CRO being effectively applied in SLAPP litigation, this may be because respondents generally focused on other procedural reforms.

185. We could therefore infer that it should continue to be left entirely to the Court to consider whether to make a CRO in cases it deems appropriate (and, of course, the Court would likely deem it appropriate for a vexatious SLAPP Claimant). The Court taking this initiative would be guided by the directions already set out in CPR 3.11 and Practice Direction 3C.
186. We noted also that some respondents commented on the provision in CPR 3.4(6) which provides that whenever a Court strikes out a Claimant's statement of case and considers that it is totally without merit, the Court's order must record that fact and at the same time consider whether it is appropriate to make a Civil Restraint Order.
187. There was some consensus that repeatedly vexatious Claimants, including a Claimant repeatedly bringing claims considered to be a SLAPP, would, and should, be subject to a CRO. However, some respondents also highlighted the particular risks inherent in SLAPPs; namely that this could mean that a number of cases had already been brought with accumulated costs.
188. A further recurring idea was also that if an early dismissal mechanism for SLAPPs were to be introduced, and a Claimant was found to have brought multiple cases, there should be some scope for the automatic imposition of a CRO without application, and for a record to be made in the registry of vexatious litigants as a future deterrent.

### **Government Response**

189. From the Call for Evidence response, we are not convinced that there is a strong case for specific reform in this area. We are also mindful that any reform to CROs could run the risk of increasing satellite litigation and costs for parties.
190. Our understanding is that Civil Restraint Orders are already used robustly as a means of dis-incentivising vexatious and abusive Claimants. Our firm expectation is that CROs should work effectively in SLAPP cases without the need for additional measures.

**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?

191. One recurring idea put forward in response to this question including making more extensive use of Early Neutral Evaluation (ENE), as already available under CPR 3.1 (2)(B). We note that some respondents however were mindful of impeding access to

the Courts and, therefore, that this could be a risk if ENE were to be made compulsory.

192. We were informed that the Queen’s Bench Guide states that an “ENE involves an independent party, with relevant expertise, expressing an opinion about a dispute or element in it.” In terms of SLAPPs litigation, an ENE could therefore be helpful in determining what is in the public interest at an earlier stage.
193. We noted the views put forward on determination of meaning at an earlier stage and before proceedings have been issued. Parties would apply to a specialist judge in the Media and Communications List, with the intention that early determination of meaning would resolve disputes promptly, thereby limiting the costs and stress of prolonged litigation. This would, however, seem most appropriate for defamation type cases but we are aware that SLAPPs can be multi-faceted, with various legislative vehicles being an option for bringing a Claim. Whilst there were diverging views regarding the effectiveness of procedural rules and processes, more consensus was found on the suggestion of further judicial guidance to support stricter adherence to the rules. We remain open to this suggestion and will discuss further with the senior judiciary.

## 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.

194. Conduct of litigation is generally undertaken by solicitors, though we recognise that SLAPPs tactics are not confined to legal professionals. Whilst we are clear that the legal sector is independent of Government, the regulatory section sought to understand whether existing regulation is working well to uphold the public interest and limit abusive behaviour in these cases.
195. A number of respondents from legal professions found the SRA guidance on SLAPPs useful and clear in helping deal with SLAPPs cases, and that there was ‘ample’ guidance to refer to. Furthermore, they clarified that solicitors are already bound by the SRA’s code of conduct, although other respondents found it to be lacking in substance and incomplete. For instance, there was a suggestion of including SLAPPs case studies so that solicitors could better identify these when taking on clients.

196. A number of respondents argued that whilst the guidance update from March 2022 should be welcomed as a first step towards mitigating against SLAPPs, there was a sense that more could be done. For instance, a response on behalf of a large law firm proposed that the SRA run training to their members on the ethical implications of taking on SLAPPs style matters or cases. Furthermore a few respondents were keen to understand how regulators would enforce punitive measures for members who have been deemed to take on SLAPPs cases repeatedly. From their point of view, until there was any kind of enforcement mechanism, the guidance remained weak.

## 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?

197. There was little confidence from those affected that professional legal regulators would act on the issue of SLAPPs if abuses were reported. Additionally, some respondents were deterred from doing so because they assumed that the law firm in question would be notified of any investigation, which could further make them a target of SLAPPs action.
198. A few respondents said they had reported their cases to the SRA, but this did not lead to what they would consider to be a satisfactory outcome. As above, one respondent mentioned that they were working on re-issuing a complaint in light of the March guidance update on SLAPPs after their initial complaint was not ruled on.
199. There were concerns from regulators that certain tranches of the legal profession were being villainised and generally branded as ‘professional enablers’ to elites trying to stop issues in the public interest being published. Despite this, they agree that any kind of abusive behaviour is unacceptable and goes against the codes of conduct which regulate the industry.
200. The issue of regulation was not limited to legal services. There were calls for the regulation of what was described as ‘reputation management firms’ which are said to work alongside Claimant law firms to ‘launder’ the reputations of wealthy and influential individuals in the UK.
201. Some respondents advocated for more universal and standardised press regulation as well and supported alternative dispute regulation mechanisms like in-house arbitration.

## Defamation costs reforms

### Defamation costs reforms

**Question 40:** How was your SLAPP funded (private funding, CFA, other (please specify))?

202. As set out in the Call for Evidence, ‘no win, no fee’ Conditional Fee Agreements (CFAs) have been available to fund defamation cases since 1998. In this cohort of cases, ‘after the event’ (ATE) insurance is also available to insure against the risk of having to pay adverse costs. The responses submitted to the Call for Evidence have provided the Government with evidence of the funding methods that are employed in SLAPPs. The key trends in the responses to this Question are summarised below.
203. The majority of respondents answered this question. One academic respondent suggested that legal costs and funding is the key issue in SLAPPs, as the threat of having to pay high costs can have a general chilling effect.
204. Of the respondents who agreed that SLAPPs exists as a problem and has not been exaggerated, it was suggested that the current costs protection regime could be strengthened. The majority of Defendant respondents mentioned that their SLAPPs defences had been funded privately, or via a CFA. In addition to this, some Defendant respondents mentioned that their cases had been ‘crowdfunded’, which they said had helped them to obtain access to justice. There was further suggestion, by a few respondents, that defending a SLAPPs claim had led to bankruptcy, and that they had been forced to defend their case as a Litigant in Person (LiP).
205. Other respondents felt that the courts already have a wide discretion in terms of the costs orders that can be made. It was noted, in particular, that under CPR 44.2(4), the court can take account of the conduct of the parties when making orders for costs, meaning that it can penalise parties for abusive or improper conduct. This respondent noted that Claimants bringing SLAPPs already risk costs sanctions. There was a general suggestion, amongst such responses, that the current costs protection regime, and particularly the arrangements that are in place for ‘after the event’ (ATE) insurance, is adequate.
206. One media respondent highlighted that they had been able to fund their SLAPPs defence, as they had been indemnified by their publisher who bore the costs of the defence. This respondent stated that, without this, they would have been unable to defend their publication and it would have been withdrawn. Other media respondents, who stated that they had not been indemnified in the same way, affirmed that legal costs in these cases can be prohibitive and exert a chilling effect on freedom of speech.

207. Some respondents, from both Claimant and Defendant perspectives, suggested that legal costs and funding arrangements might provide a useful mechanism to help to tackle SLAPPs. Various respondents mentioned ‘inequality of arms’ as being a typical feature of SLAPPs, and that SLAPPs usually feature a party which is much better equipped to fund their case. One Claimant respondent, however, stated that the imbalance between ‘aggressive Claimants’ and ‘smaller, weaker, poorer Defendants’ is exaggerated, and, in fact, this imbalance can occur in reverse.

### **Government response**

208. The Government is keen to ensure that costs are appropriately controlled in SLAPPs, and that parties to a claim can obtain appropriate access to justice. Further to this, we consider it important that robust costs protection mechanisms are in place, to ensure that costs are not ratcheted up in a way designed to overwhelm or intimidate an opponent. The Government’s position, as outlined below, is that it would be appropriate to develop a costs protection scheme modelled on the ECPR, which would shield SLAPPs Defendants from excessive costs risk.

209. The Government notes respondent views on the ‘inequality of arms’ that can exist in SLAPPs. The Government is seeking to engineer a change in the climate of these cases, to enable a party to defend themselves without having to capitulate.

**Question 41:** How were adverse costs addressed (private funding, ATE, other (please specify))?

210. As set out in the Call for Evidence, generally in civil litigation, there are two sets of costs: the party’s own costs, and the other side’s costs (‘adverse costs’). The issue of who pays these costs has developed over the past 30 years, including in respect of cases which might be considered SLAPPs.

211. This question was answered by just under half of respondents. Some respondents who answered the other questions on costs issues could not provide much further detail. Other respondents added that they were unsure of the precise role of adverse costs in SLAPPs and other areas of civil litigation.

212. Among respondents who considered SLAPPs to be a problem, it was noted that adverse costs can have a significant and detrimental impact on personal financing. One academic respondent suggested that there is a prevalent issue, in SLAPPs, where less well-resourced parties do not feel that they can defend a case for fear of paying adverse costs. Another academic respondent noted that, without the assistance of their publisher in covering these adverse costs, they would not have been able to publish their work.

213. One legal practitioner stated that adverse costs risk is one factor that may allow a party with an unmeritorious claim to stifle the free speech rights of a less pecunious opponent, but that another important factor is the gap between the Defendant's costs of defending an unmeritorious claim and the amount they manage to recover from the Claimant. This respondent added that capping adverse costs orders may be worthy of consideration in applicable cases, but they saw this as more of a tool to address concerns that meritorious claims are being suppressed by virtue of adverse costs risks (rather than, as in SLAPPs, where it may be that unmeritorious claims by wealthy parties are stifling an impecunious opponent). This respondent proposed a new 'super indemnity' costs basis for SLAPPs cases as a way forward, whereby the emphasis would be more on an unsuccessful Claimant having to pay (substantially) higher costs to a successful Defendant, than on limiting the exposure to adverse costs of an unsuccessful Defendant.
214. Another legal practitioner, by contrast, noted the tools that courts already have to mitigate the risk of adverse costs. They added that, as an abusive claim will be struck out by the court, and therefore the abusive Claimant will face adverse costs and possibly indemnity costs themselves, a costs capping regime would be unhelpful, and potentially damaging to the Defendant. This respondent also noted that it is now common practice for early 'preliminary issues hearings' to be costs capped at low levels. This respondent stated that in practice, then, this means that an unsuccessful party does not currently face the same threat of adverse costs as in previous years.

### **Government response**

215. The Government recognises that the threat of paying substantial adverse costs is one factor that could prevent a less well-resourced party to a SLAPPs claim from defending their case.
216. As is set out below, the Government will pursue reforms to control costs in SLAPPs, both at the initial stage, and then more formally through costs protection where cases do proceed.

**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.

217. Most respondents to this question had direct experience of a SLAPP. However, it was not as frequently answered as other questions on costs and funding in the Call for Evidence, with less than half of respondents answering this question.
218. In the responses that were submitted, helpful further detail was provided on both the costs of SLAPPs, and on costs by stages of a claim.



219. Many respondents who said that they had been involved in a SLAPP affirmed that the costs of such cases are, generally, very high, and can reach hundreds of thousands of pounds. One Defendant respondent mentioned that the costs of their initial defence and counterclaim, in addition to costs management documents, has come to £45,000, which all needs to be paid in the first few months of proceedings. Similarly, one media respondent noted that the costs of a preliminary trial on meanings had been £34,000 for each side, and that it had required £250,000 plus VAT to get to court. Such commentary, of initial costs which exceed £20,000 in SLAPPs, was a prevailing trend amongst responses to this question.
220. In addition, many respondents – from both Claimant and Defendant perspectives – noted that such high costs can be reached very early in proceedings. One legal respondent noted that all the SLAPPs he has witnessed have seen costs in the hundreds of thousands of pounds before the commencement of proceedings, which is a very early stage. Further to this, one media respondent noted that fighting a SLAPP on many issues meant that it cost c. £1.5 million to reach the preliminary hearing on meaning. Many of these responses noted that such high initial costs can have a chilling effect on freedom of speech.
221. There was also a consensus, amongst respondents who considered SLAPPs to be a prevalent issue, that it would be helpful to provide greater certainty as to the costs that might be paid, by stage of a claim. One media respondent noted that there was appetite for some sort of managed ‘costs light’ early resolution process, where a claim is identified as a SLAPP. This respondent suggested that CPR 53 (media and communications claims) would be an ideal place to position such a process, whereby there could be a fast-track preliminary filter stage for all CPR 53 cases that meet the definition of a SLAPP.
222. By contrast, other respondents were of the view that the court already has sufficient powers to manage costs within a case.

### **Government response**

223. The Government agrees that it is important to consider costs in SLAPPs at different stages of proceedings, particularly at an early stage. This is, in part, to address the form SLAPPs take, which can include threatening legal letters at the outset with high costs generated before a case even reaches court. We recognise the distress and anxiety that this can cause and are committed to working to address this issue.
224. The Government considers that, although the court does possess existing powers to manage costs within a case, these should be further strengthened. As such, we will explore whether, when a Claimant has brought a case which is identified by the court as a SLAPP and then dismissed at an early stage as an abuse of process, the Claimant can be ordered to bear all the costs of the proceedings (including the costs

of legal representation incurred by the Defendant before proceedings were issued, unless such costs are excessive, in which case the court would operate its normal costs management role).

225. It is the Government's view that this would complement the procedural reforms outlined above, providing a network of disincentives to those seeking to bring vexatious SLAPPs.

**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?

226. The Call for Evidence provides a brief summary of the Environmental Costs Protection Regime (ECPR), which exists in environmental judicial reviews under the UN Aarhus Convention.<sup>6</sup> In the Call for Evidence, it is noted that the ECPR caps the adverse costs (that a losing party would have to pay to a winning party) for both Claimants and Defendants, if unsuccessful. The ECPR provides default costs caps of £5,000 for individual Claimants, £10,000 for Claimant organisations and £35,000 for Defendants. These default costs caps can be varied upwards or downwards according to financial means.

227. The majority of respondents answered this question. Of those who answered, the majority agreed that it would be helpful for some form of costs protection regime (based on the ECPR) to be introduced for SLAPPs. There were, on the other hand, numerous respondents who did not consider an adapted ECPR regime to be suitable for SLAPPs.

228. Further to the above, many respondents – including media respondents, academics, and those representing Defendant interests – were of the view that an ECPR type scheme should be extended more widely across all defamation cases. Within this group, some respondents also noted that an adapted ECPR scheme could be helpful across a range of defamation, privacy, and data protection cases.

229. Among those who endorsed an ECPR scheme for SLAPPs, some wider rationale was provided as to how this could be helpful. In particular, it was noted that a variant on the ECPR scheme could be helpful in controlling costs earlier in proceedings. One respondent said that an inverted ECPR regime (with strict costs capping for Defendants) would be a large disincentive to those bringing SLAPPs.

230. However, a number of respondents to this question – particularly those representing Claimant interests – were of the view that costs capping, or an ECPR type scheme,

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<sup>6</sup> The Aarhus Convention: Aarhus Convention - Environment - European Commission (europa.eu).

would not be appropriate in controlling costs in SLAPPs. One legal practitioner, speaking to a general trend, noted that it would not be economical to expect specialist solicitors to act for a fixed capped fee, as applicable cases can generally be of great complexity, and it is inevitable that high costs will be generated. Other legal practitioners argued that the current costs management system is working well as it is.

231. A number of other reasons were given as to why an adapted ECPR regime should not be introduced for SLAPPs or wider defamation cases. These included (i) that SLAPPs should not be used as a ‘vehicle’ for implementing wider defamation reform, and (ii) that a ‘one size fits all’ approach would not be appropriate in these complex cases.

### **Government response**

232. It is clear from the responses to this Call for Evidence that there is support for the introduction of a formal costs protection regime, which may be based on the ECPR model, for applicable SLAPPs.
233. It is the Government’s view that a formal costs protection regime, based on the ECPR but adapted, could be implemented to shield SLAPPs Defendants from excessive costs risk, and enable unmeritorious claims to be properly defended. However, the Government does not believe that this should be extended across all defamation cases at this time. The rationale for this is that SLAPPs, as a particular problem, require special measures, given that costs intimidation is a very pronounced aspect of SLAPPs.
234. The Government considers that this costs protection regime could be created as a procedural reform under secondary legislation but using the same definition in the primary legislation that underpins the early dismissal process. The Government will consider further with the Civil Procedure Rule Committee how best to develop these reforms.

**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?

235. As noted in the Call for Evidence, the Government considers that the ECPR provides an interesting model which could be applied for SLAPPs. Respondents were invited to set out what they thought the default levels of the costs caps should be if they agreed that a formal costs protection regime (based on the ECPR) should be introduced for either (i) all defamation cases or (ii) SLAPPs cases only.

236. This question was generally answered by respondents who had also answered question 43. There was variation in the level of detail submitted, but some interesting points were made in respect of the level at which the default costs caps should be set.
237. Respondents to this question varied as to what they thought the level of the default costs caps should be in SLAPPs. One charitable organisation suggested that the default Defendant costs cap should be set at £5,000, inverting the current ECPR costs cap for individual Claimants. Further to this, one media respondent stated that this figure should be capped at £10,000–£15,000.
238. Many respondents mentioned that one important factor to consider, in setting the default levels of any costs caps, is the relative wealth of Claimants and Defendants in SLAPPs cases. It was noted that having variable caps, as in the ECPR, would be of assistance, as the caps could then be varied in accordance with the relative wealth of parties to the claim and could thereby help to address the ‘inequality of arms’ that can occur in SLAPPs.

### **Government response**

239. The Government will need to consider further what the precise levels of any default costs caps for SLAPPs should be. Provisionally, though, the Government is persuaded that it might be sensible to invert the levels currently in the ECPR, with, for example, the default Defendant costs cap set at £5,000. There is, however, a question as to whether a SLAPP Claimant should have any protection in respect of their own adverse costs: one option is that this should be a matter for the judge in individual cases.
240. The precise levels, and design of any scheme, would be explored in due course through work with the Civil Procedure Rule Committee.

**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?

241. In the Call for Evidence, the Government also welcomed further suggestions as to how costs could be reformed across all defamation cases, and specifically in SLAPPs. A number of interesting points were made, the most prominent of which are summarised below.
242. Some respondents – from media, legal, and academic perspectives – recommended that when a SLAPPs Claimant loses at trial (in what the court has determined is a SLAPPs case), the Claimant could be required to pay additional financial penalties to the Defendant, such as punitive damages. It was argued that a further financial

penalty, in combination with an ECPR scheme, might serve as an effective deterrent to bringing a SLAPPs claim.

243. Another common reform option proposed was implementing fixed recoverable costs (FRC) for SLAPPs cases. Some media respondents went further, suggesting that consideration should be given to introducing FRC in all defamation and Media and Communications cases. It was argued that Defendants, in particular, would benefit from knowing that if they lose on particular issues, at particular stages in a case, they will only have to pay a certain amount to the other side by way of adverse costs. It was acknowledged by both Claimant and Defendant respondents that it is desirable for the costs that are recoverable to be proportionate to the value of a claim.
244. Many respondents, including legal practitioners, charitable organisations, and academics, suggested that increasing the provision of legal aid on the rationale of supporting public interest work would be one way to defuse the impact of SLAPPs and legal threats. It was noted by one charity that defamation law does not feature in Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which sets out the areas of civil law that are still within the scope of legal aid.
245. Several media respondents mentioned that ATE insurance premiums in publication and privacy proceedings should be made non-recoverable from the losing party, following on from the Government's 2019 decision to abolish the recoverability of CFA success fees in these proceedings. One respondent noted that ATE premiums can be large, and that the insurance is taken out by the party that does not in fact have to pay the premium.
246. Various respondents suggested that building in a security for costs mechanism for a SLAPPs Defendant could prove to be a deterrent to vexatious litigation. In particular, it was noted by some NGOs that amendments to the rules on security of costs that are currently in the CPR (at 25.13(b)(ii)) could help with this.
247. Other suggestions, made by those representing both Claimant and Defendant interests, included: (i) introducing Qualified One-Way Costs Shifting (QOCS) for applicable claims; (ii) promoting a mandatory arbitration system for defamation claims; (iii) a Government-backed mutual indemnity fund; and (iv) more robust case management.

### **Government response**

248. The Government is grateful to respondents for the detailed suggestions as to how costs in SLAPPs cases, and more widely in defamation cases, could be further reformed.
249. The Government can confirm that it has no plans to extend legal aid as proposed by respondents. The wider extension of FRC in civil cases, currently being considered

for implementation by the Civil Procedure Rule Committee, is not aimed at SLAPPs or defamation cases.

250. However, the Government wishes to do more work looking at the possibility of legislating for a Claimant to pay further financial penalties where a claim is found to be a SLAPP, on application by the Defendant. The Government considers that punitive damages may be an appropriate measure in a SLAPPs context, given that they are currently exercised in cases where a Defendant is being sanctioned for their wrongful conduct, and to deter them and others from acting similarly in the future. This would require extensive policy development and could form part of a later stage of SLAPPs reforms.

## SLAPPs: Conclusion and Plans for Reform

251. The Government is clear that SLAPPs are a recognisable and pernicious form of litigation which seeks to silence, intimidate, and harass opponents. SLAPPs are not conventional litigation designed to resolve disputes or vindicate rights (although they are presented as such). SLAPPs are designed to silence criticism and investigation conducted in the public interest.
252. Evidence was submitted across the board in support of a definition of SLAPPs. Considering the difficulty of nailing down an exact definition, and the risk that doing so could create loopholes, the Government considers that SLAPPs should be defined in reference to their common characteristics.
253. We received strong evidence of the form that SLAPPs take, both pre-action and in court proceeding, and of the personal impact that such lawsuits have on individuals – in financial, professional, and psychological terms. Some of the evidence provided on the impact of SLAPPs was harrowing: enormous costs, careers put on hold, soaring anxiety and stress among Defendants, and more. We cannot reconcile the assurances of some respondents that SLAPPs are exaggerated or do not exist at all with this material.
254. We note submissions that suggest that SLAPPs are no more than the rough and tumble of ordinary litigation and note too submissions based on the fact that everyone is entitled to representation in court as part of the right to a fair trial. However, the Government concludes that the type of activity identified as SLAPPs and the aim of preventing exposure of matters that are in the public interest go beyond the parameters of ordinary litigation and pose a threat to freedom of speech and the freedom of the press.
255. The Government is very concerned about the effects of SLAPPs on freedom of speech and on public interest investigation and reporting. Such lawsuits have a chilling effect, both on the individual against whom they are brought and systematically. We are very clear on the wider harm to society if economic and other activities are not subject to reasonable scrutiny. SLAPPs can have the effect of not just deterring any reporting of certain individuals or organisations, but of pinning down scarce resources that inhibit other public interest stories being covered. That is to the detriment of us all.

256. As a result, the Government intends to pursue legislative reform at the earliest opportunity.
257. We intend to introduce a new statutory early dismissal process to strike out SLAPPs and avoid lengthy SLAPP litigation. This measure will be made up of three parts:
- i. A definition of public interest.
  - ii. A set of criteria for the courts to determine whether a case should be classified as a SLAPP based on one or more of the common characteristics of such actions.
  - iii. A merit test.
258. The Government intends to pursue other reforms which do not require primary legislation, but which would use the statutory definition and criteria as the basis for SLAPPs to be made subject to a special regime. **The focus of these reforms will be a formal costs protection scheme.** It is clear, and the responses provided ample evidence, that costs exposure is the single greatest factor overwhelming and intimidating opponents in SLAPPs cases.
259. The Call for Evidence explored a very wide range of reform options as the Government sought to invite views on the widest possible menu of options to tackle SLAPPs. It is unsurprising that the case for reform was not as strong or clear cut in some of those areas, in particular, reform of the law on defamation. This was in part because existing legislation provides measures which can be used to address SLAPP-style defamation litigation. It is also because the evidence provided was not compelling enough for the Government to be confident reform would have the desired effect and not have undesired consequences. **We intend to continue to monitor the case and need for wider defamation reform, but our immediate focus is SLAPPs reform.**
260. More detailed and specific comments on the various reform subject headings are set out below.

### **Legislative reforms**

261. There is a convincing case for targeted legislative reform to tackle SLAPPs and the specific way in which the legal system is abused to silence criticism through the threat of unmeritorious claims. Equally convincing is the fact that SLAPPs do not just involve defamation, but also other areas of law such as privacy, data protection, and trademark. For legislative reforms to be effective, they would need to operate in conjunction with procedural and costs reforms.
262. The ability to distinguish between what is – and is not – a SLAPP is crucial. The Government recognises that the means of doing so must be balanced, with scope wide enough to encompass the various areas of laws and tactics used, but not so



expansive that it risks hindering access to justice by preventing meritorious claims from proceeding.

263. As mentioned above, any definition would necessarily be linked to procedural mechanisms such as an early dismissal process, as this would be the most effective way of limiting the threats posed by costly and time-consuming litigation. To that end, the Government proposes a three-part test to identify a SLAPPs claim that would be subject to early dismissal: that it has some features of an abuse of process, which would be set out in an illustrative non-exhaustive list of factors that are common hallmarks of SLAPPs litigation, for example (but not limited to):
- i. sending a very large number of highly aggressive letters on a trivial matter;
  - ii. satisfying that a case relates to a public interest issue, for example (but not limited to) investigating financial misconduct by a company or individual;
  - iii. that it has some features of an abuse of process, which would be set out in an illustrative non-exhaustive list of factors that are common hallmarks of SLAPPs litigation, for example (but not limited to) sending a very large number of highly aggressive letters on a trivial matter; and
  - iv. has insufficient evidence of merit to warrant further judicial consideration, for example where a case has no realistic prospect of success.
264. The rationale for the three-part test is to ensure that SLAPPs can be properly identified, and apply to any claim, including in libel, privacy, or data protection. Too broad a test would lead to Defendants in non-SLAPP cases seeking early dismissal, and the first two are the key to identifying a SLAPP suit. The merit test reflects the need for balance as the claim itself will not at this stage have been fully presented with all the evidence. A claim satisfying all three would be dismissed early, whereas a case satisfying the first two but having some evidence of merit could still proceed but would be subject to special measures.
265. The Government is not proposing to establish a new right to public participation at this stage (see questions 8 and 11), as this could lead to unnecessary complications and satellite litigation around whether a case constituted public participation or not. Likewise, the evidence presented is unpersuasive that any distinction between individuals and corporations would redress the inequality of arms that often characterises SLAPPs.
266. However, while only touching on a specific cohort of SLAPPs claims, the Government may consider exploring how proposals around regulator-based arbitration might work alongside these legislative reforms.

### **Defamation law reforms**

267. The Government believes that it would be more sensible to take a more cautious approach to reform of substantive defamation law in respect of SLAPPs. In part this

reflects the view that the most critical areas for reform are instituting early dismissal processes and a costs protection regime; in part a reflection that the necessity and case for reform is less clear cut in this area. It also reflects the potential effect on wider defamation cases where efforts to curb SLAPPs may have an adverse effect on the delicate balance between competing rights at play in libel disputes.

268. These issues are explored fully in the answers to individual questions 15–30 above. For a number of statutory defences in defamation law, the Government is not proposing to pursue any reform at present. This includes in relation to the serious harm test, the defence of truth, the defence of honest opinion and the defence of privilege.
269. Although the Government is not proposing amending section 4 of the Defamation Act 2013 on the public interest test at this stage, it will be keeping this area of the law under close review in the light of how SLAPP cases may evolve. In any event, the legislative reforms being proposed by the Government in introducing an early dismissal and costs protection scheme will be based in part on public interest considerations.
270. The Government is also not proposing at this stage to reform the appropriate jurisdiction test (see questions 26 and 27 on ‘libel tourism’) but is alive to concerns over the application of this legislation (concerns not confined to SLAPP actions) and will keep this under careful review.
271. In relation to the proposed reform to introduce an actual malice threshold for SLAPP defamation claims the Government is not convinced that at present there is a compelling case to pursue reform. This is another area which will remain under review.
272. In general, the Government will continue to monitor defamation case law and any aspects of the statutory provisions which are failing to apply in cases where they should, including in relation to SLAPP actions.

### **Procedural reforms**

273. The Government is clear that SLAPPs are an abuse of process and noted the range of suggestions for procedural reform put forward. These issues are explored more fully in the answers to questions 31 and 37.
274. The Government is very conscious of the integral role of the Judiciary in this area. An immediate next step will therefore be to further discuss the findings of the Call for Evidence with the senior judiciary.
275. The Government is mindful that the introduction of an early dismissal mechanism for SLAPP litigation will likely be a significant step forward. Our intention is that this

should also be used alongside existing protocol and procedure. With this in mind, we are keen to ensure rigorous enforcement to limit the impact and progression of SLAPP litigation. We remain open to the issuing of further guidance which could support this.

### **Regulatory reforms**

276. We are clear that professional regulators act independently of Government. We will continue to engage with these bodies and support them as and when they look to undertake reform on SLAPPs.

### **Costs reforms**

277. The Government agrees that legal costs are a key issue in SLAPPs, and that the threat of high costs is used as a weapon to threaten and overwhelm less pecunious parties. We are, therefore, very keen to control costs in these cases at different stages of proceedings. These issues are explored more fully in the answers to individual questions 40–45 above.

278. In particular, the Government is interested in exploring whether, when a Claimant has brought a case which is identified by the court as a SLAPP at an early stage, any changes to the current costs regime are required. We consider that this would neatly complement the procedural reforms outlined above.

279. The Government considers that a formal costs protection regime, based on the ECPR but adapted as appropriate, could be implemented to shield SLAPPs Defendants from excessive costs risk, and enable unmeritorious claims to be properly defended. The Government does not believe that such a scheme should be developed for all defamation cases at this time, for the reason set out above.

280. It is the Government's view that this costs protection regime could be created as a procedural reform under secondary legislation, but using the same definition in the primary legislation that underpins the early dismissal process. The precise levels of any costs caps, and the design of the scheme, will be explored in due course with the Civil Procedure Rule Committee.

281. Further to the above, the Government wishes to do more work looking at the possibility of legislating for a Claimant to pay further financial penalties where a claim is found to be a SLAPP. We consider that punitive damages may be a particularly appropriate reform measure in a SLAPPs context, given that they are appropriate for cases where Claimants know there is no or very limited risk of paying significant damages so for any misconduct, making the benefit to them of misconduct, for all intents and purposes, unqualified. That is an aspect of SLAPPs and such an approach can justifiably be sanctioned, not least to deter them and others from acting similarly in the future. This would be part of a later package of reforms.

## Equalities

282. The Ministry of Justice has not published an equality impact assessment at this stage as the reforms to be pursued have not been determined at present. A full equalities statement would be prepared as part of any legislation's supporting documents, assessing potential impacts of reforms on people with protected characteristics: disability, race, sex, gender reassignment, age, religion or belief, sexual orientation, pregnancy and maternity, marriage and civil partnership.
283. The Call for Evidence did not seek views on equality aspects of SLAPPs given the relatively small and uncertain number of lawsuits being brought. Equality issues may be a factor in defamation claims in terms of defamatory statements relating to a person's protected characteristics, and such issues would be considered as part of the court's determination of an individual case.

## Annex A – List of respondents

Respondents were given the opportunity to anonymise their evidence or to submit responses in confidence. We have respected these wishes where expressed. Those listed below did not request that their providing a response should be confidential.

Names given via Citizenspace are listed as they were provided by respondents.

Adam Speker QC, 5RB Chambers  
Adrienne Page QC, 5RB Chambers  
Albina Kovalyova, Television Journalist / Director  
Alexander Papachristou, Vance Center for International Justice  
Alex Parsons, on behalf of My Society  
Alex Wade, Review and Cleared  
Alex Wilson, on behalf of the Media Lawyers Association  
Amelia Smith  
Andrew Burgess  
Andrew Willan, on behalf of Payne Hicks Beach LLP  
Anne Kasica  
Bea Adi, on behalf of the National Union of Journalists  
Benjamin Atkin, Ince Gordan Dadds LLP  
Catherine Belton, The Washington Post  
Catherine Courtney, on behalf of News Media Association  
Catriona Stevenson, on behalf of the Publishers Association  
Caroline Kean, Wiggin LLP  
Charlie Holt, on behalf of the UK Working Group on SLAPPs  
Charlotte Leslie, Director of the Conservative Middle East Council  
Chloe Wootton, Serious Fraud Office  
Claire Gill, on behalf of Carter Ruck Solicitors  
Claire Meadows, on behalf of Society of Editors  
Danielle Mumford, S-RM Intelligence and Risk Consulting Limited  
David Acheson, Lecturer in Media Law at the University of Kent  
David Engel, on behalf of Addleshaw Goddard LLP

David Heller, on behalf of the Media Law Resource Centre  
David Hirst, Barrister at 5RB Chambers  
David Korzenik, Miller Korzenik Sommers Rayman LLP  
David Melville  
David O'Hara  
David Price QC, DPSA  
Dr Phil Cox  
Dr Rebecca Harrison  
Dr Sasha Rakoff, Not Buying It  
Ed Siddons, on behalf of the Bureau of Investigative Journalism  
Eleanore Lamarque, on behalf of the Bar Council for England and Wales  
Fiona Gooch, Traidcraft Exchange  
Gareth Jones, on behalf of Ince  
Georgina Berriman, Corporate Justice Coalition  
Gavin Millar QC, Matrix Chambers  
George Turner, TaxWatch  
Gerrard Tyrell, on behalf of Harbottle & Lewis LLP  
Gill Phillips, on behalf of the Guardian News and Media  
Glenn Briski, Hertsmere Borough Council  
Gordon Bendall  
Godwin Busuttil, Barrister at 5RB Chambers  
Greg Callus, Barrister at 5RB Chambers  
Guy Vassall-Adams QC, Matrix Chambers  
Hannah Finer, on behalf of the House of Commons Foreign Affairs Committee  
Hilary Young, Professor Faculty of Law, University of New Brunswick  
Hugo Mason, Simkins LLP  
Hunter Morgan  
Ian Hislop, on behalf of Private Eye  
Jacqueline Griffiths, on behalf of the Solicitors Regulation Authority  
James  
James Coombs, Fellow of the Royal Society of Arts  
Jane Phillips, Barrister at 5RB Chambers

Jasbir Johal

Jean Chown

Joe Snape, on behalf of McCue Law

John Heathershaw, Professor of International Relations, University of Exeter

John Henderson

Julian Santos, Barrister at 5RB Chambers

Julia Whitting, on behalf of the Bar Standards Board

Justin Rushbrooke QC, 5RB Chambers

Kirk Herbertson, Earth Rights International

Lesley Ellis

Lexie Kirkconnell-Kawana, on behalf of IMPRESS

Lindsay Warwick, on behalf of Associated Newspapers Limited

Lukáš Diko, Chairman, Investigative Center of Ján Kuciak

Matthew Caruana Galizia, on behalf of The Daphne Caruana Galizia Foundation

Mark Fenhalls QC, Bar Council of England and Wales (Brussels Office).

Marzena Lipman, on behalf of the Law Society

Mafruhdha Miah, on behalf of RPC

Maria Kearney, on behalf of News UK

Mark Hanna, Lecturer at the School of Law, Queen's University Belfast

Megan Davis, on behalf of Spotlight Corruption

Michael Frost, on behalf of Mischon de Reya

Mike Harris

Miles Ward

Mohamed Amersi, Amersi Foundation

Naomi Colvin, The Blue Print for Free Speech

Nigel Hanson, on behalf of the Financial Times

Nicola Namdjou, on behalf of Global Witness

Nicki Schroeder, on behalf of Reach plc

Paul Farrelly, Former Member of Parliament for Newcastle-under-Lyme

Paul Read

Peter Chown

Peter Elsmore

Peter Frankental, on behalf of Amnesty International

Phil Cox

Phil Hartley, on behalf of Schillings International LLP

Professor Paul Wragg, Professor of Media Law and Associate Fellow of the Inner Temple

Professor Tim Crook, Chair of the Professional Practices Board of the Chartered Institute of Journalists

Rachel Lane

Rachel Welsh, on behalf of the Telegraph Media Group

Rhiannon Plimmer-Craig, on behalf of Protect Advice

Richard Meeran, Leigh Day

Richard Moorhead, Professor of Law and Professional Ethics at the University of Exeter

Rose Zussman, on behalf of Transparency International UK

Sally Al Saleem, on behalf of the Legal Services Board

Scott Devine, on behalf of TheCityUK

Sophie Shavrnock

Scott Stedman, Forensic News

Sean O’Neil, Senior Writer at The Times

Sophie West, Independent Television News Limited

Stelios Orphanides, Journalist

Stewart Dunn

Stewart Kirkpatrick, Open Democracy

Stuart Wilson

Susan Coughtrie, on behalf of the Foreign Policy Centre

Suyin Haynes, on behalf of gal-dem

Taylor Wessling LLP

Timothy Hicks, NUJ

Tom Burgis, Investigations Correspondent Financial Times

Tom Stocks, Organised Crime and Corruption Reporting Project

Tom Jarvis, on behalf of Harper Collins Publishers Limited

Tom Wright, on behalf of Taylor Hampton Solicitors Limited

Vanessa Warwick

Will Jordan, The Organized Crime and Corruption Reporting Project





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