Explanatory Note: Approaches to Countering Legal Intimidation and SLAPPS in the UK

Discussions held through the UK anti-SLAPP working group, during April - June 2021, resulted in the identification of four different approaches that should be included in any efforts to counter legal intimidation and SLAPPs in the UK. These are:

1. **The introduction of an Anti-SLAPP law to strengthen procedural protection.**
2. **Legal review and reform of relevant laws to reduce opportunities for abuse.**
3. **Tighten regulatory and ethical standards covering industries facilitating SLAPPs or issuing baseless legal threats.**
4. **Expanding admissibility of legal aid or otherwise providing funding for defendants acting in the public interest.**

Each approach is explored briefly in turn below, as a starting point for addressing this issue, with the intention for further examination and development, including hopefully as part of an official inquiry. It is important to note that the UK is made up of several legal jurisdictions - England and Wales, Scotland and Northern Ireland - and while local laws may vary, the components outlined should be applied in each.

1. The Introduction of a new Anti-SLAPP Law to strengthen procedural protection

While anti-SLAPP laws continue to proliferate in the US and Canada, there is so-far no dedicated law against SLAPPs in Europe.[1] The Coalition Against SLAPPs in Europe (CASE) is promoting the case for an EU anti-SLAPP directive[2] – but with the UK now out of the EU, this would have no application in the UK. There is, therefore, both a need for the UK to introduce its own legislative measures to tackle SLAPPs – and an opportunity for the UK to lead the way in safeguarding free speech against the threat of abusive lawsuits and legal intimidation. Given that the UK is a leading international source of transnational legal threats, anti-SLAPP legislation would have an impact both domestically and abroad. While a full analysis of how this would work in progress should be commissioned, an anti-SLAPP law should have the following components:

- *Accelerated Procedures:* any lawsuit targeting acts of public participation should be subject to a merits test (e.g. probable chance of success) at the earliest possible stage in proceedings. This could potentially take the form of an amendment to CPR 3.4, providing a new special motion to strike a claim before a case proceeds to disclosure, or a new mechanism that can be invoked after a claim is submitted.
- *Sanctions*: where the special motion is successful, full legal costs should be awarded to the defendant with the possibility of punitive/exemplary damages for repeat (or particularly egregious) offences.
- *Stay of Proceedings:* the disclosure process is often the most time and resource-intensive part of any civil lawsuit.[3] It is, therefore, often used by SLAPP plaintiffs to make the litigation process as painful for the defendant as possible. It is therefore crucial that, pending resolution of the anti-SLAPP motion, all disclosure obligations are suspended.

Other options could include: strengthening existing provisions on abusive proceedings (e.g. providing specific standards on what constitutes an abuse of process in the context of SLAPPs, or allowing the court to declare an action abusive at any time and of its own initiative); reforming the law on malicious prosecution in civil proceedings to provide clearer standards of "malice"; instituting sanctions on repeat offenders (e.g. requiring a deposit for future claims); or introducing a new law on malicious threats (based on the unjustified threats provisions that exist in UK IP law) as well as the introduction of reverse burden of proof in a SLAPP challenge.

[1] Jeremy Goldman, Freedom of Speech Gets a Big Boost With New York's Passage of Widely Expanded Anti-SLAPP Law, Lexology, November 2020, https://www.lexology.com/library/detail.aspx?g=de4a0093-e3e9-4172-b0a2-b3eac0741b99; Ryan Patrick Jones, B.C. legislature unanimously passes anti-SLAPP legislation, CVC, March 2019, https://www.cbc.ca/news/canada/british-columbia/legislature-passes-anti-slapp-1.5049927

[2] CASE website: https://www.the-case.eu/; CASE, The need for an EU Anti-SLAPP Directive, https://www.the-case.eu/campaign-list/the-need-for-an-eu-anti-slapp-directive

[3] Paul Radu, How to Successfully Defend Yourself in Her Majesty's Liberal Courts, GIJN, February 2020, https://gijn.org/2020/02/26/how-to-successfully-defend-yourself-in-her-majestys-libel-courts/

2. Legal review and reform of relevant laws to reduce opportunities for abuse

There are a number of laws utilised for the purposes of legal intimidation and SLAPPs, with the most common being defamation, but also privacy, copyright and breach of confidentiality. Eight years after the adoption of the 2013 Defamation Act in England and Wales, defamation laws are still all-too easily weaponised against public watchdogs. A full assessment of the Defamation Act 2013 should therefore be carried out, with a particular focus on the following:

1. *Burden of proof*: since falsity is not built into the definition of a "defamatory statement", the burden falls on the plaintiff to advance an affirmative truth defence. In practice, it can be enormously costly to meet the high legal standards this involves, with little certainty in advance about how the court will construe the "legal meaning" of words to require. Such a presumption of falsity therefore makes legal threats a powerful means of silencing criticism.
2. *Libel tourism*: Section 9 of the Defamation Act 2013 has led to some notable restrictions on international libel litigation.[4] At the same time, examples of international plaintiffs abusing English courts continue to proliferate: see, for example, the case filed against OCCRP's Paul Radu.[5] Given the free global flow of information across borders, plaintiffs domiciled outside of the UK should not be automatically entitled to access English courts on the basis of digital speech alone.
3. *Northern Ireland*: the crucial (though limited) protective measures provided for in the Defamation Act 2013 still do not apply to Northern Ireland. Unsurprisingly, statistics from the Northern Ireland Law Commission show there were six times as many claims for defamation per capita in Northern Ireland as in England and Wales.[6] Such reform is long-overdue, having been first proposed by a report commissioned by the Stormont executive in 2016.[7]

More broadly, public interest defences should be instituted for those engaging in good faith acts of public participation, applicable beyond defamation law (which is already subject to Section 4 of the Defamation Act 2013, which provides as defence of "publication on a matter of public interest"). It would also be pertinent to review other laws related to public participation, such as the Public Interest Disclosure Act (located in the Employment Rights Act) to provide immunity from civil proceedings for those who make a protected disclosure (reflects the legislation in the Republic of Ireland) and a public interest defence for persons disclosing information in accordance with the Act, in circumstances where they may face criminal prosecution.[8]

3. Tighten regulatory and ethical standards covering industries facilitating SLAPPs or issuing baseless legal threats

Steps should be taken to tighten industry and ethical standards in relation to abusive legal threats and SLAPPs, both with regards to law firms and reputation management companies, the latter of which is an unregulated industry. More care should be taken by companies when on-boarding clients, ensuring in particular that the source of income being used to pay for the services is fully vetted. Those in the legal profession have to balance competing obligations – including responsibilities to the court, the public interest and ensuring access to justice – as well as financial demands. However, In England and Wales, neither the Solicitors Regulatory Authority nor the Bar Council's Codes of Conduct have provisions explicitly relating to SLAPPs. The same is true of the Law Societies of Scotland and Northern Ireland. This means there is nothing stopping lawyers from knowingly pursuing lawsuits filed with the improper purpose of silencing criticism. This can result in the protection of, and impunity for, powerful corrupt individuals with deep pockets. All

[4] Michael Cross, Court of Appeal deals blow to libel tourists, The Law Society Gazette, June 2020, https://www.lawgazette.co.uk/law/court-of-appeal-deals-blow-to-libel-tourists/5104480.article
[5] Juan Ameen, The silence behind the SLAPP, The Shift, March 2020, https://theshiftnews.com/2020/03/11/the-silence-behind-the-slapp/
[6] Mariella Brown (Society of Editors), Freedom of expression curtailed by lack of NI defamation law reform, InPublishing, January 2021, https://www.inpublishing.co.uk/articles/freedom-of-expression-curtailed-by-lack-of-ni-defamation-law-reform-17132
[7] John Campbell, NI defamation law 'should be brought into line with England and Wales', BBC News, July 2016, https://www.bbc.com/news/uk-northern-ireland-36836036
[8] Peter Geoghegan and Mary Fitzgerald, Jeffrey Donaldson sued us. Here's why we're going public, openDemocracy, May 2021, https://www.opendemocracy.net/en/opendemocracyuk/jeffrey-donaldson-sued-us-heres-why-were-going-public/

Codes of Conduct relevant for the legal sector across the UK should therefore be updated, with information and guidance on identifying SLAPPs circulated and publicised to members of the profession.

Law firms and reputation management companies should adopt and publish ethical principles that inform how they implement their on-boarding policies, processes and procedures regarding high-risk customers; for example, if a law firm wants to take on a client accused of grand corruption on an 'access to justice' basis, it could decide only to do so at legal aid rates.[9]

4. Expanding admissibility of legal aid or otherwise providing funding for defendants acting in the public interest

Fighting a defamation case in particular can be a lengthy and costly process, with potential legal costs spiralling into the thousands if not millions. While some of this will be recoverable on a win, many struggle to meet these costs upfront. Furthermore, given the ambiguities in existing defamation law, a win is far from certain; and given that most threats are issued against individuals or groups without easy access to legal advice, the absence of financial support can be enough to force a retraction and apology – regardless of the legal merits.

Reforming legal aid would perhaps be the most effective way to defuse the power of SLAPPs and legal threats. Indeed, perhaps the most famous SLAPP in UK history – the McLibel lawsuit – ended with the European Court of Human Rights concluding that the UK had violated Article 10 of the ECHR by not providing the defendants with legal aid. While defamation law does not feature in Schedule 1 of LASPO, which lists out those areas of civil law still within the scope of legal aid, the McLibel judgement is notionally satisfied through Exceptional Case Funding (ECF).[10] This allows the applicant to show that their ECHR rights would be breached without the legal aid. The guidance issued by the Lord Chancellor, however, makes it clear that ECF should only be applied where the applicant would be "incapable of presenting their case without the assistance of a lawyer" – a much lower standard than that applied in criminal law.[11]

It is unclear how often ECF has been used in defamation cases, but 94% of applications received between April and June of 2020 related to immigration, inquest, and family.[12] Given the complexity of the ECF procedure and the high threshold that needs to be met, Schedule 1 should itself be amended – providing a means of accessing legal aid to any defendant sued for acts of public participation. This should be applicable beyond defamation claims.

Reforming legal aid should not be considered a "magic bullet" even if the above requirements are met. However, it would also provide an opportunity for those with genuine grievances, but without the funds to cover their legal costs, to also pursue legal redress. This would better serve to uphold the principle of 'access to justice', which is often held out as a justification against anti-SLAPP initiatives.

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[9] Drawn from recommendations published as part of Transparency International UK, At Your Service: Investigating how UK businesses and institutions help corrupt individuals and regimes launder their money and reputations, October 2019, https://www.transparency.org.uk/publications/at-your-service

[10] UK Public General Acts, Legal Aid, Sentencing and Punishment of Offenders Act 2012, legislation.gov.uk, http://www.legislation.gov.uk/ukpga/2012/10/schedule/1/part/1/enacted

[11] Lord Chancellor's Exceptional Funding Guidance (Non-Inquests), January 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/956612/Lord_Chancellor_s_Exceptional_Funding_Guidance__Non-Inquests__January_2021.pdf

[12] Ministry of Justice, National Statistics: Legal aid statistics England and Wales bulletin April to June 2020, Gov.uk, September 2020, https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-april-to-june-2020/legal-aid-statistics-england-and-wales-bulletin-april-to-june-2020