



## Countering legal intimidation and SLAPPs in the UK

### A POLICY PAPER

By the UK Anti-SLAPP Coalition

**A growing body of evidence has identified abusive legal threats and strategic lawsuits against public participation (SLAPPs) as a key emerging issue of concern for freedom of expression and the right to information in the UK. The impact goes beyond those directly subject to these legal tactics, posing a wider challenge to society and the principle of public participation.**

#### **Summary**

SLAPPs are abusive lawsuits pursued with the purpose of shutting down acts of public participation. These legal actions are directed against individuals and organisations - including journalists, media outlets, whistleblowers, activists, academics and NGOs - that speak out on matters of public interest. SLAPPs have been gaining wider recognition as an issue in several jurisdictions. However, there is also a significant concern regarding the 'hidden problem' of UK law firms sending threatening legal communication prior to any official filings, which can have a similar effect to SLAPPs. These legal threats are particularly effective when emanating from the UK, which is seen as a more plaintiff-friendly jurisdiction and where mounting a defence is a particularly costly and lengthy process.

**The aim of this policy paper is threefold:**

1. To provide an overview of the problem in the UK context;
2. To identify the key principles for mitigating the threat of legal intimidation and SLAPPs; and
3. To form a starting point for legislative and regulatory initiatives to address this issue in the UK.

As an immediate step, a formal Parliamentary inquiry into legal intimidation and SLAPPs is needed to **a)** examine this issue in the UK, including the impact it is having on those subject to these tactics as well as more broadly on public debate and discussion; and **b)** explore the legislative and regulatory proposals needed to counter it, including a potential UK Anti-SLAPP Law.

#### **About the UK Anti-SLAPP Coalition**

The UK Anti-SLAPP Coalition is an informal working group established in January 2021, co-chaired by the Foreign Policy Centre, Index on Censorship and English PEN. It comprises a number of freedom of expression, whistleblowing, anti-corruption and transparency organisations, as well as media lawyers, researchers and academics who are researching, monitoring and highlighting cases of legal intimidation and SLAPPs, as well as seeking to develop remedies for mitigation and redress.

# Background to the issue of legal intimidation and SLAPPs in the UK

## Common hallmarks

From the many cases members of the UK anti-SLAPP coalition have studied and worked on, we can identify a number of common hallmarks or qualities:

- The lawsuit or legal threats are generally based on defamation law, though an increasing number of lawsuits invoke other laws concerning privacy, data protection, and harassment.
- There is an imbalance of power and wealth between the plaintiff and defendant.
- The plaintiff engages in procedural manoeuvres or exploits resource-intensive procedures such as disclosure to drive up costs.
- The lawsuit often targets individuals instead of/as well as the organisation they work for.
- The plaintiffs often have a history of legal intimidation and use many of the same law firms to facilitate their SLAPPs.
- The plaintiff may claim to pursue a disproportionately large amount of compensation from the defendant if they refuse to comply with the plaintiff's demands.
- Legal threats are increasingly being issued in response to 'right to reply' requests and result in journalists being drawn into a protracted quasi-legal communication process prior to publication.

## Broader context

Legal intimidation and SLAPPs do not happen in isolation, but come in tandem with other forms of harassment and must be seen also in the context in which they are financed and pursued:

- Subjects of legal intimidation and SLAPPs have also raised concerns regarding online trolling, smear campaigns as well as on-and-offline surveillance.<sup>1</sup>
- Cases of legal intimidation and SLAPPs in the UK are frequently linked with investigations into financial crime and corruption. Law enforcement bodies, such as the Serious Fraud Office, have also been subject to lawfare tactics that share similar characteristics.<sup>2</sup> How legal intimidation and SLAPPs are financed must also be examined as part of a wider cause for concern. Investigations into transnational financial crime and corruption are rarely published without the mention of funds being used to pay for property, education or indeed legal and reputation services in the UK.<sup>3</sup>
- Reputation management appears to be a common driving force behind legal intimidation and SLAPPs taken against media, with reputations seen as assets to be defended against criticism or enquiry, with media pressured to remove 'uncomfortable' information from the public domain.<sup>4</sup>
- Even well-funded media organisations or NGOs are not immune from the "chilling effect" of legal intimidation - watering down reports or stories, avoiding pursuing litigious individuals/organisations, and generally holding back on contentious speech in order to avoid draining their funds. This is particularly true in light of the growing journalism-funding crisis, with declining revenues.<sup>5</sup>
- This is taking place against a backdrop of other worrying trends for media freedom in the UK, regarding attempts to restrict freedom of information and challenges to public scrutiny. The UK is ranked 33rd out of 180 countries in Reporters Without Borders' 2021 World Press Freedom Index.<sup>6</sup>

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<sup>1</sup> The Editorial Board of the Financial Times, *London, libel and reputation management: The English courts attract those with deep pockets and much to lose*, May 2021, <https://www.ft.com/content/e37f3349-479f-42c6-85fe-11b5a29bdee0>; The Foreign Policy Centre (FPC), *Unsafe for Scrutiny: How the misuse of the UK's financial and legal systems to facilitate corruption undermines the freedom and safety of investigative journalists around the world*, December 2020, <https://fpc.org.uk/publications/unsafe-for-scrutiny-12-2020-publication/>. The FPC's contribution to the working group is based on the findings of the Unsafe for Scrutiny research programme and any views expressed are those of Project Director Susan Coughtrie.

<sup>2</sup> Index on Censorship, *Index and 21 other organisations condemn lawsuits brought by ENRC against public watchdogs*, June 2021, <https://www.indexoncensorship.org/2021/06/lawsuits-brought-by-enrc-against-uk-serious-fraud-office-and-dechert-llp/>; RAID, *ENRC's egregious attempts to curtail freedom of expression jeopardise anti-corruption efforts*, June 2021, <https://www.raid-uk.org/blog/enrcs-egregious-attempts-to-protecting-media-freedom-and-preventing-corruption-globally>

<sup>3</sup> Ben Cowdock and Rachel Tekka Davis, *How UK anti-corruption groups work with journalists to push for change*, FPC, December 2020, <https://fpc.org.uk/how-uk-anti-corruption-groups-work-with-journalists-to-push-for-change/>

<sup>4</sup> The Editorial Board of the Financial Times, *London, libel and reputation management: The English courts attract those with deep pockets and much to lose*, May 2021, <https://www.ft.com/content/e37f3349-479f-42c6-85fe-11b5a29bdee0>; Susan Coughtrie, *The UK as a key nexus for protecting media freedom and preventing corruption globally*, FPC, December 2020, <https://fpc.org.uk/the-uk-as-a-key-nexus-for-protecting-media-freedom-and-preventing-corruption-globally/>

<sup>5</sup> Rob Sharp, *Solutions to the journalism funding crisis: what are they?*, LSE, April 2020, <https://blogs.lse.ac.uk/polis/2020/04/21/solutions-to-the-journalism-funding-crisis-what-are-they/>

<sup>6</sup> Reporters without Borders, United Kingdom - <https://rsf.org/en/united-kingdom>; 2021 World Press Freedom Index - <https://rsf.org/en/ranking>

## Supporting evidence

Usually cases of legal intimidation and SLAPP do not get publically reported until after the legal threat has dissipated, if at all. Recently, however, there has been an increasing effort to research and document cases:

- A report from the Foreign Policy Centre (FPC) published in November 2020, which surveyed 63 investigative journalists in 41 countries working to uncover financial crime and corruption, found:<sup>7</sup>
  - **73% of all respondents stated they had received legal threats** as a result of information they had published, with **more than half saying it had made them more cautious as a result**.
  - Of the 71% of respondents who reported experiencing threats, **legal threats were identified as having the most impact on their ability to continue working (48%)**, more so than psychosocial (22%), or physical and digital threats (each 12%).
  - Crucially, **the UK was found to be by far the most frequent international country of origin for legal threats after the journalists' home countries**. It was almost as frequent a source of these legal threats (31%), as all EU countries (24%) and the United States (11%) combined.
- Eight years after the passage of the Defamation Act 2013, UK courts continue to attract authoritarian governments and other international plaintiffs: recent examples include the lawsuits filed by Russian billionaires against Catherine Belton;<sup>8</sup> the lawsuit filed by Swedish businessman Svante Kumlin against the Swedish publication Realtid, their journalists, and editor;<sup>9</sup> the lawsuits filed by allies of the Malaysian Prime Minister against Clare Rewcastle Brown;<sup>10</sup> and the lawsuit filed against OCCRP and its co-founder Paul Radu by an Azerbaijani politician.<sup>11</sup>
- Cases do not even have to reach court to create a detrimental impact. In May 2020, journalists at openDemocracy described the effects of legal action pursued against them by Jeffery Donaldson, the now Democratic Unionist Party leader, stating *“Those two years cost us a lot. We spent months dealing with legal letters, burning through thousands of pounds and precious time that would otherwise have been spent on our journalism. The psychological toll was even higher.”* The case eventually became time expired.<sup>12</sup>
- So concerning are the threats of potential legal action that it has led to instances of self-censorship – such as the delayed publication of *Billion Dollar Whale* or the blocked UK publication of Karen Dawisha’s *Putin’s Kleptocracy*, believed to be the tip of the iceberg.<sup>13</sup>
- The abusive potential of UK existing laws beyond its borders is also of concern. Indeed, the Balkans Investigative Reporting Network (BIRN), which covers countries in Southern and Eastern Europe, created a guide specifically on English libel law that is mandatory reading for all its journalists. One of the last sections is particularly telling: *“For now, our advice regarding third-country libel suits (i.e. not in your country and not in England) is straightforward: I. Know the law in your own country; II. Know the law in England; III. Assume that any third country would be just as strict on libel as England.”*<sup>14</sup>
- On a European level, a number of groups have documented a rise in SLAPPs across the continent, with the Coalition Against SLAPPs (CASE) in Europe working to collect research on the issue.<sup>15</sup>

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<sup>7</sup> Susan Coughtrie and Poppy Ogier, *Unsafe for Scrutiny: Examining the pressures faced by journalists uncovering financial pressure and corruption around the world*, November 2020, <https://fpc.org.uk/wp-content/uploads/2020/11/Unsafe-for-Scrutiny-November-2020.pdf>.

<sup>8</sup> Nick Cohen, Are our courts a playground for bullies? Just ask Catherine Belton, *The Guardian*, May 2021, <https://www.theguardian.com/commentisfree/2021/may/08/are-our-courts-a-playground-for-bullies-just-ask-catherine-belton>

<sup>9</sup> Index on Censorship, SLAPP Lawsuit against Swedish Magazine Realtid Filed in London, December 2020, <https://www.indexoncensorship.org/2020/12/slapp-lawsuit-against-swedish-magazine-realtid-filed-in-london/>

<sup>10</sup> Clare Rewcastle Brown, A scandal of corruption and censorship: Uncovering the 1MDB case in Malaysia, FPC, December 2020, <https://fpc.org.uk/a-scandal-of-corruption-and-censorship-uncovering-the-1mdb-case-in-malaysia/>

<sup>11</sup> Paul Radu, How to Successfully Defend Yourself in Her Majesty’s Libel Courts, GIJN, February 2020, <https://gijn.org/2020/02/26/how-to-successfully-defend-yourself-in-her-majestys-libel-courts/>

<sup>12</sup> 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/>

<sup>13</sup> *The Economist*, *The Story Behind Billion Dollar Whale*, September 2019, <https://www.economist.com/books-and-arts/2019/09/19/the-story-behind-billion-dollar-whale>; Jim Waterson, Bookshops threatened with legal action over book about Malaysian ‘playboy banker’, *The Guardian*, September 2018, <https://www.theguardian.com/world/2018/sep/14/bookshops-threatened-with-legal-action-jho-low-billion-dollar-whale>; Ellen Barry, *Karen Dawisha, 68, Dies; Traced Roots of Russian Corruption*, *The New York Times*, April 2018, <https://www.nytimes.com/2018/04/17/obituaries/karen-dawisha-68-dies-traced-roots-of-russian-corruption.html>

<sup>14</sup> English libel law for journalist: A brief Guide, Balkan Fellowship of Journalist Excellence, <http://fellowship.birn.eu.com/en/file/show/English%20libel%20law%20for%20journalists.pdf>

<sup>15</sup> For more about the work of the Coalition against SLAPPs in Europe (CASE) - <https://www.the-case.eu/>

## Principles for mitigating the threat of legal intimidation

Given the aforementioned problems, any effort to address legal intimidation and SLAPPs should seek to apply the following principles:

1. **SLAPPs are disposed of and dealt with expeditiously in court:** SLAPPs take advantage of the litigation process to harass and intimidate their targets. The shorter the process, the less potential there is for abuse. The importance of disposing of a SLAPP quickly is particularly acute prior to the costly disclosure process, which provides the greatest opportunity for legal harassment.
2. **Costs for SLAPP Targets are kept to an absolute minimum:** an award of costs post-SLAPP is an important measure, but not sufficient in this regard. Costs need to be minimised throughout the litigation process to avoid the financial threat of prolonged litigation.
3. **Costs for SLAPP Litigants are sufficient to deter SLAPPs:** these must be made automatically available so as not to represent a further burden for those already exhausted by the litigation process. Can take the form of punitive or exemplary damages or other sanctions.
4. **Laws implicating speech are narrowly drafted and circumscribed:** that is to say, they must be tightly worded enough to prevent their application being stretched to cover legitimate acts of public participation.
5. **The use of SLAPPs or legal intimidation is delegitimised as a means of responding to criticism:** this principle requires a process of delegitimation, involving an expansion of industry standards, engagement with stakeholders on the incoming standards and finally clear enforcement if the use of SLAPPs or legal intimidation is used in contradiction to these standards.

## Approaches to countering legal intimidation and SLAPPs in the UK

There are four different approaches that, taken together, would address the principles outlined above and should be encompassed in any efforts to counter legal intimidation and SLAPPs in the UK:

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.**

These are explored briefly in turn in the accompanying explanatory note, set out as a starting point for addressing this issue, with the intention for further examination and development, including hopefully as part of an official inquiry.<sup>16</sup> To note, initiatives to examine and address the issue of SLAPPs are already underway elsewhere. The 2021 Annual Report of the Council of Europe Platform explicitly identifies the UK as the “foremost country of origin” of SLAPPs, and warns that the practice “threatens to bring the UK and its legal profession into disrepute in the eyes of the world.”<sup>17</sup> Council of Europe Commissioner for Human Rights Dunja Mijatović has called on Council of Europe member states, which includes the UK, to take action saying that it is “high time” to tackle SLAPPs.<sup>18</sup> The European Commission has already committed to taking action against SLAPPs: in 2021 it set up an expert group on SLAPP and it is due to present an anti-SLAPP initiative later this year.<sup>19</sup> Commissioner Věra Jourová has repeatedly voiced her support for EU anti-SLAPP legislation.<sup>20</sup>

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<sup>16</sup> Explanatory Note: Approaches to Countering Legal Intimidation and SLAPPs in the UK -

<https://fpc.org.uk/wp-content/uploads/2021/07/Explanatory-Note-Approaches-to-Countering-Legal-Intimidation-and-SLAPPs-in-the-UK.pdf>

<sup>17</sup> Partner Organisations to the Council of Europe Platform, ‘Wanted! Real Action for Media Freedom in Europe’, May 2021,

<https://rm.coe.int/final-version-annual-report-2021-en-wanted-real-action-for-media-freed/1680a2440e>

<sup>18</sup> Dunja Mijatovic, ‘Time to take action against SLAPPs’, Council of Europe, October 2020,

[https://www.coe.int/en/web/commissioner/blog/-/asset\\_publisher/xZ32OPEoxOkq/content/time-to-take-action-against-slapps?](https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/time-to-take-action-against-slapps?)

<sup>19</sup> European Commission, ‘Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Democracy Action Plan’, December 2020,

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A790%3AFIN&qid=1607079662423>

<sup>20</sup> Jessica Ni Mhainin, ‘Fighting Back against the Menace of SLAPPs’, Index on Censorship Magazine, April 2021,

<https://journals.sagepub.com/doi/full/10.1177/03064220211012279>

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