



Bar Council response to the Ministry of Justice Strategic Lawsuits Against Public Participation (SLAPPs) call for evidence

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice call for evidence paper on Strategic Lawsuits Against Public Participation (SLAPPs).¹
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).
4. The Bar Council welcomes the opportunity to respond to the Call for Evidence. Our response will focus on the following:

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061468/slapps-call-for-evidence-web.pdf

- a. The difficulty with providing a working definition of SLAPPs and possible solutions to that issue; and
 - b. Potential procedural solutions which may be considered, including potential reforms to the Civil Procedure Rules in relation to SLAPPs and costs issues.
5. We do not respond to the matters raised by the following questions:
- a. Questions 1 – 6, which ask for respondees’ direct experience of SLAPPs litigation. The Bar Council is not in a position to provide the same.
 - b. Questions 15 – 30, which deal with the adequacy of existing laws relating to defamation. This is an area which has enjoyed recent scrutiny and reform. The Defamation Act 2013 (“the Act”) was introduced to fulfil the commitment in the Coalition Agreement following the 2010 General Election to “*review the law of libel to protect legitimate free speech*”.² Post-legislative scrutiny in October 2019 indicated “*There has not been any body of opinion calling for a review or for the amendment of the Act*”.³ We are aware that the concerns arising from SLAPPs also relate to causes of action which are not caught by the Act, including claims for infringement of privacy rights under article 8 of the European Convention on Human Rights, and claims in respect of data protection. Some commentators have suggested that these causes of action present a greater problem than defamation claims, precisely because they are not subject to the provisions of the Act. In our view, it is likely to be more productive to consider the issue of SLAPPs on a broader basis, rather than by specific consideration of the adequacy of the law and procedures relating to defamation alone.
 - c. Questions 38-39, which deal with matters of regulation which are outside the remit of the Bar Council. We do, however, address the professional obligations of members of the Bar in the context of the call for evidence.

² [Post-Legislative Memorandum: The Defamation Act 2013 \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/414447/post-legislative-memorandum-the-defamation-act-2013.pdf) at paragraph 3.

³ *Ibid*, paragraph 25.

- d. Questions 40-42, which seek specific information as to the costs relating to specific SLAPPs litigation. The Bar Council is not in a position to provide the same.

Defining SLAPPS

6. We agree that any legislative action which is taken specifically in relation to SLAPPs needs to be firmly based. However, a statutory definition will be difficult to produce in a form which covers the mischief intended, avoids unintended consequences for legitimate claims and is sufficiently flexible to make it future proof against (for example) technological developments in social or broadcast media and/or developments in the law.

7. Some of the problems with providing a workable definition are apparent from the approach taken in the draft proposal for an EU Directive relating to SLAPPs published on 27th April 2022.⁴

8. Article 1 of the current draft provides as follows:

*This Directive provides safeguards against **manifestly unfounded or abusive court proceedings in civil matters with cross-border implications brought against natural and legal persons, in particular journalists and human rights defenders, on account of their engagement in public participation** (emphasis added).*

9. Article 3 sets out the important definitions:

1. *'public participation' means any statement or activity by a natural or legal person expressed or carried out in the exercise of the right to freedom of expression and information on a matter of public interest, and preparatory, supporting or assisting action directly linked thereto. This includes complaints, petitions, administrative or judicial claims and participation in public hearings;*

2. *'matter of public interest' means any matter which affects the public to such an extent that the public may legitimately take an interest in it, in areas such as:*

(a) public health, safety, the environment, climate or enjoyment of fundamental rights; (b) activities of a person or entity in the public eye or of public interest;

⁴ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation") <https://bit.ly/3w1U1zD>

- (c) matters under public consideration or review by a legislative, executive, or judicial body, or any other public official proceedings;
- (d) allegations of corruption, fraud or criminality;
- (e) activities aimed to fight disinformation;

3. 'abusive court proceedings against public participation' mean court proceedings brought in relation to public participation that are fully or partially unfounded and have as their main purpose to prevent, restrict or penalize public participation. Indications of such a purpose can be:

- (a) the disproportionate, excessive or unreasonable nature of the claim or part thereof;
- (b) the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matters;
- (c) intimidation, harassment or threats on the part of the claimant or his or her representatives.

10. The first point to note is the reference in Article 1 to claims which are "manifestly ill-founded" and, in Article 3(3), to claims which are "fully or partially ill-founded". If one assumes that the intention is to refer to claims which are ill-founded as a matter of law, any claim brought in England and Wales which is "manifestly" or "fully" ill-founded would be vulnerable to summary dismissal under existing procedural safeguards, on the basis that the statement of case disclosed no reasonable grounds for bringing the claim (CPR Rule 3.4(2)(a)).

11. As the Call for Evidence notes, the Court can make such an order of its own motion or on application by the other party. If the Court considers that the claim was "totally without merit", that fact must be recorded and consideration given as to whether it is appropriate to make a civil restraint order (CPR 3.4(6)). Such claims are therefore likely to be weeded out by existing procedural safeguards, regardless of the motivation for such a claim.

12. We are not aware of any evidence to suggest that the powers of the Courts of England and Wales to dispose of wholly unmeritorious claims are insufficient. It is not clear whether there is evidence that they are insufficiently *exercised* in relation to SLAPPs litigation.

13. If it is suggested that existing legal safeguards are not sufficient to protect litigants at the *pre-action stage*, there may be a number of reasons. For example, it may be that some litigants are not in a position to access proper legal advice, or that they are aware of the strength of the available safeguards, and that they wrongly assume that recourse to Court may be a potential risky and costly process.

14. However, it seems to us to be more likely that the greater problem lies with claims which have sufficient legal merit to survive the existing procedural safeguards, but which are brought for an improper and abusive purpose. Any definition of SLAPPs would therefore need to enable the parties and the Court to readily identify such claims.

15. Before we turn to the identification of such claims, we address in summary the Court's existing powers to dispose of claims which are an abuse of process (CPR Rule 3.4(2)(b)). As the commentary in the White Book notes, "*the categories of abuse of process are many and are not closed*" (paragraph 3.4.3, p. 129). Abuse of process will encompass pointless and wasteful litigation, in which the costs of the litigation will be out of all proportion to the benefit to be achieved (*Jameel v Dow Jones and Co* [2005] QB 946). However, there is considerable authority to support the view that it is not appropriate to strike out merely because the remedy sought is of a low value.

16. It is also an abuse of process to pursue a claim for an improper collateral purpose (see the White Book at paragraph 3.4.15, pp 141-2). However, that jurisdiction has been sparingly exercised and authority indicates that "*the institution of proceedings with an ulterior motive is not of itself enough to constitute an abuse*"⁵..

17. We can therefore see a case for reform which would enable litigants to have greater certainty as to the likely approach which a Court would take to litigation which a potential defendant considers to be a SLAPP. This might take the form, for example, of a bespoke procedural step in relation to potential SLAPPs, with specific provisions relating to costs. We expand on this further below.

18. Returning to the crucial issue of definition, it seems to us that the most effective way to define such litigation would be by reference to indicative criteria rather than to seek a single definition. The criteria by which a SLAPPs claim could be identified seem to us to fall into three broad categories:

⁵ *Broxton v McClelland* [1995] E.M.L.R. 485, cited in the White Book at p. 141

- a. The identity and relative resources⁶ of the parties – for example a claim by a wealthy individual with alleged links to corruption making a claim against an NGO whose purpose is to combat corruption is much more likely to constitute a SLAPP than a celebrity threatening to sue a newspaper in relation to a story about their private life;
- b. The conduct of the litigation, including in particular the nature of pre-action conduct. A SLAPPs claim is more likely to involve aggressive pre-action conduct, such as threats relating to the litigation process and the expense thereof, and an unwillingness to resolve the matter through ADR;
- c. The nature and underlying purpose of the litigation – whilst this will be a matter for inference in the majority of cases, a claim which is, for example, wholly disproportionate to the legal remedy which may be awarded by the Court is more likely to be considered to have been issued for an improper and collateral purpose.

19. As to the first of these elements, we consider that there is no reason to distinguish individuals from other legal persons. It seems to us that both individuals and corporations are capable of making abusive claims, and both can also be the victim of the same. There is likely to be some benefit in expressly identifying certain individuals and entities as more likely to be the victims of SLAPP litigation, which would include those for whom the making of public statements on matters of public interest is their professional role or purpose.

20. As to the second, it seems to us that Courts are likely to be well capable of identifying pre-action conduct which is indicative of abusive litigation. Any definition of the same would be unlikely to provide significant increases in clarity or certainty, but the examples we suggest above may be of some help.

⁶ We do not suggest, of course, that wealthy individuals cannot be defamed – indeed in one sense they may be more likely to be of interest and therefore more vulnerable to the same – but asymmetry of resources may be a significant factor in at least some cases.

21. As to the third, we consider that the approach taken in article 3(3) of the proposed Directive may form a helpful model – i.e. to define the improper purpose (there, “to prevent, restrict or penalize public participation”) and then to provide an indicative list of matters which tend to demonstrate such a purpose. However, we consider it important that the Court should retain the power to make its own overall assessment of these criteria, and to consider whether other matters are also relevant to that overall assessment.

Procedural solutions

22. We consider first whether there are existing procedural safeguards which might afford sufficient protection for victims of SLAPPs, whether as currently enacted or with some modification. It seems to us that the key issue is to enable such persons to obtain an early Court resolution at an appropriate cost.

23. The Court’s existing case management tools include:

- a. The trial of a preliminary issue (CPR 3.1(2)(i) and (l)). Such a procedure may be employed, for example, to determine meaning in a defamation claim⁷. However there can be judicial reluctance to adopt such a course, particularly if there are disputed facts which may be determinative of the claim.⁸
- b. Early Neutral Evaluation (“ENE” – CPR 3.1(2)(m)). This process enables litigants to obtain an early non-binding evaluation of a dispute or an element of it. However, its primary purpose is to facilitate settlement between the parties, which is something which seems unlikely in the context of SLAPPs litigation.

24. Our initial view is that these existing tools would not be likely to provide a solution, unless suitably adapted. For example, there could be a form of early evaluation in relation to the issue of whether litigation constitutes a SLAPP. Under the existing procedures for ENE, that determination would not be binding on the parties, but it could serve as a form of safeguard if (for example) the finding gave rise to costs safeguards which could only be

⁷ See the Queen’s Bench Guide 2022 at para 17.30.

⁸ *Ibid*, para 10.31.

overturned in certain circumstances. That would represent a middle ground between simply allowing a case to proceed to trial (which would provide no protection for a SLAPPs defendant) and striking the claim out (which might be too harsh a result for a litigant with a genuine cause of action).

25. It is apparent from the majority of the cases which have given rise to the issue of SLAPPS that a central feature of the 'abuse' arises from an inequality of arms arising from the relative resources of one party (usually the Claimant) compared to the other (usually the Defendant). To that end it may well be possible for a costs regime to be introduced to mitigate the undesirable consequences of SLAPPs claim and reduce or limit the effect.

26. The existing costs regimes to consider may include:

- a. increasing the availability of legal aid;
- b. introducing a fixed costs regime tailored for such claims;
- c. qualified one-way costs shifts; or
- d. a particular protected fixed costs regime such as that provided in respect of Aarhus Convention Claims for environmental judicial review cases (see CPR 45 Pt VII rule 45.41-45).

27. As to the first of these, we are of course well aware that funding such a proposal may not be attractive. However, it should not, in our view, be rejected out of hand for that reason. Those who contribute to the public good by reporting matters which would otherwise remain secret are, we suggest, entitled to ask whether the public service they provide is properly supported.

28. As to the second, the current regime for the use of fixed costs is in personal injury litigation for lower value claims. Lord Justice Jackson undertook a wide-ranging review into civil costs "*in order to promote access to justice at proportionate cost*"⁹. Lord Justice Jackson in part 5 of his first report discussed fixed costs. He opined that fixed costs generally "*are*

⁹ <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf> - See terms of reference at page 3

working well” in the areas that they operated¹⁰; he proposed there should be a “*fixed costs system in fast track cases*”¹¹. This proposal has largely been implemented in personal injury litigation.

29. However, if a fixed costs regime were to apply to both parties in SLAPPs litigation it may well have a negative rather than positive impact. As Lord Justice Jackson noted, “*In a fixed costs regime a wealthy party can generate much expense by procedural manoeuvres and thus grind down the other side, which will never recover all of its costs.*”¹² This grinding down of the less financially powerful party can also happen in budgeted cases. There may be benefits to fixed costs, such as reduction of costs to be paid, but equally there may be unintended negative effects, such as exacerbating an inequality of arms.

30. A “no costs” regime does exist in certain jurisdictions – for example health and welfare proceedings in the Court of Protection and financial remedy proceedings in the Family Court – FPR 2010 Rule 28.3 (5) – but whilst this would provide some welcome protection for defendants with limited means we would be concerned that it might lead to the same problems outlined above.

31. One-way costs shifting was at the time of proposal in the Jackson report justified on the basis that “*one-way costs shifting rule would (a) be cheaper for defendants than the present two-way rule and (b) reduce the burden on claimants.*”¹³ The CJC considered qualified one-way costs shifting (QOCS) which by that time of the report in 2016¹⁴ had been implemented in the CPR (the relevant provisions now being found at 44.13 to 44.17). The CJC considered in that report the extension of QOCS to types of litigation other than personal injury. It was noted that the main policy justification for adopting QOCS “*lies in the asymmetric relationship between the parties*”¹⁵.

¹⁰ Ibid – p200

¹¹ Ibid – p203 para 1.11

¹² Ibid – p213 para 1.3(ii)

¹³ Ibid – p224 para 1.2

¹⁴ <https://www.judiciary.uk/wp-content/uploads/2011/03/cjc-qocs-2016-report.pdf>

¹⁵ Ibid – p8 para 2.4

32. The difference between personal injury litigation and SLAPPs claims is, of course, that the party which is in the more vulnerable position in PI claims is the Claimant rather than the Defendant. However, there is no obvious reason why costs shifting could not work in the opposite direction to that in which it is currently employed, so that the Defendant, as opposed to the Claimant, would not face the prospect of paying the Claimant's costs, save in respect of exceptional circumstances.

33. There are tightly-drafted exceptions in PI litigation to QOCS, namely: where the claim is struck out, on the basis the claim discloses no grounds for bringing the claim; the claim is an abuse of process; or the conduct is likely to obstruct the just disposal of the proceedings (CPR 44.15). These exceptions, or something like them, might work in reverse, for example QOCS might be disapplied in a SLAPPs case to the Defendant's disadvantage where (for example) the Defendant seeks a determination that a case constitutes a SLAPP with no reasonable grounds for doing so, for reasons which are abusive or where the Defendant's conduct obstructs the just disposal of proceedings. A Claimant might also be given the opportunity to reopen the point if, having pursued the case to trial, relevant matters relating to the Defendant's conduct become apparent which were not considered in the course of the early determination.

34. The technical implementation of QOCS or something like it, is therefore probably possible, but would plainly require proper and detailed consideration. However, the anterior question of *when* QOCS should apply, whether that be to defamation cases, SLAPPs claims, or some other categorisation is much more problematic. QOCS applies well to personal injury as it is, nearly all of the time, very easy to determine whether a person has suffered injury. However, as we hope is clear from our views as to the definitional difficulties set out above, it is not easy to determine which claims are SLAPPs and which are (for example) proper claims in defamation.

35. With regard to Aarhus Convention Claims ('ACCs'), the costs regime was brought in in 2013 (and amended in 2017 and 2019) following the finding by the ECJ in *European Commission v United Kingdom* (C-530/11) that the costs regime in the UK did not properly

implement the requirements in the “*UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998*” (‘the Aarhus Convention’) (a treaty binding on EU member states and other signatories) that access to environmental justice must not be prohibitively expensive.

36. The regime¹⁶ enables a claimant bringing a challenge by way of judicial review or (now) review under statute to the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1) or 9(2) or 9(3) of the Aarhus Convention, to a limit that applies to both parties’ eventual costs claims. An unsuccessful individual ACC claimant will be exposed to costs of a maximum of £5000 and an unsuccessful ACC claimant which is a business or body or other legal person will be exposed to a maximum of £10,000. Where a defendant in an ACC is ordered to pay costs the amount payable is a maximum of £35,000.

37. These maximum amounts may be varied or the limit may be removed from one or other of the parties in circumstances set out in r45.44, central to which is that the costs do not become prohibitively expensive and in particular that the claimant is protected. The regime may be opted out of at the start of the claim even if it is an ACC.

38. Initially the scope of claims was limited by exclusion of statutory reviews (e.g. under s288 of the Town and Country Planning Act 1990) but the availability of the costs protection was an objective matter and not related to the specific means of the parties. This changed with the introduction of the requirement at the commencement of a claim if the protection is sought, to file and serve with the claim form a schedule of the claimant’s financial resources, including evidence of the claimant’s significant assets, liabilities, income and expenditure; and details of any financial support which any person has provided or is likely to provide to the claimant and the aggregate amount provided and which is likely to be provided. The aim of the latter was clearly to help introduce a ‘means’ test to enable the Court to vary the costs

¹⁶ Referred to as Environmental Costs Protection Regime (ECPR) in the SLAPPS call for evidence paper.

limit but which also arguably had and has a chilling effect upon those who wish to claim the protection given the public nature of the information.

39. It is considered an effective and relatively simple form of costs protection and clearly requires transparency. It also bears the hallmarks of one of the principles seemingly at the heart of the SLAPPs proposals which is the protection of 'public participation' in challenging the actions of others which affect the public interest. There is of course however by comparison no equivalent treaty to the Aarhus directed at SLAPPs (as yet), other than the ECHR Article 10 right to freedom of expression.

40. The issue however lies with the fact that the costs protection in most SLAPP circumstances and the mischief at the heart of the Government (and the Commission's) concerns is that the inequality of arms bears upon the defendant and not upon the claimant. Any protective costs regime would therefore have to be available at the request of a defendant as well as a claimant. The question of 'means testing' to justify the costs protection would in theory allow for either party to choose not to expose themselves to scrutiny but equally may remain an issue for the weaker party as well.

41. We do not offer a view as to which of these approaches may be the most effective – in our opinion all of these factors need to be considered in the round when formulating an appropriate legislative and/or procedural response.

Regulatory issues

42. We note above that views are sought as to matters concerning the regulation of solicitors' firms by the SRA. That is not within our remit, but we would make the following observations in relation to the professional obligations of members of the Bar.

43. The Cab-Rank Rule (Rule C29 of the Code of Conduct) states that (subject to other conditions and exceptions) as a barrister, you:

“... must ... accept the instructions addressed specifically to you, irrespective of:

- a. the identity of the client;*
- b. the nature of the case to which the instructions relate;*

- c. *whether the client is paying privately or is publicly funded; and*
- d. *any belief or opinion which you may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client."*

44. The Requirement not to discriminate (Rule C28) states:

"You must not withhold your services or permit your services to be withheld:

1. *on the ground that the nature of the case is objectionable to you or to any section of the public;*
2. *on the ground that the conduct, opinions or beliefs of the prospective client are unacceptable to you or to any section of the public;*
3. *on any ground relating to the source of any financial support which may properly be given to the prospective client for the proceedings in question."*

45. Members of the Bar are therefore not permitted to refuse instructions on the basis (for example) that they consider that litigation is being brought with a motivation that they consider to be objectionable.

46. The Code of Conduct does, however, contain important safeguards against abusive litigation. Rule C9.2 states:

You must not draft any statement of case, witness statement, affidavit or other document containing: ...

.a ...

.b any contention which you do not consider to be properly arguable;

.c ...

47. It is also a part of a barrister's professional duty to advise their lay client as to all relevant aspects and risks of the litigation, which would include (for example) the risks of potential adverse costs consequences which a particular course of action may attract.

BAR COUNCIL¹⁷

24 MAY 2022

¹⁷ Prepared by the Law Reform Committee

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