



## UK ANTI-SLAPP COALITION: MODEL ANTI-SLAPP LAW

*Advancing robust protection against SLAPPs within the parameters of the MOJ's proposed legislative framework*

The UK Anti-SLAPP Coalition [welcomed](#) the MOJ's commitment to bring in legislative reform to tackle SLAPPs in July. While the framework proposed has the potential to provide meaningful protections against SLAPPs, much will depend on how this is fleshed out. There are three conditions in particular that we believe any effective law must meet:

1. **CONDITION 1 – SLAPPs are disposed of as quickly as possible in court:** in order to achieve this we need a new statutory mechanism that will require claims targeting public participation to meet a **higher threshold** in order to advance to trial. Such a threshold must be high enough to prevent such abusive lawsuits being stretched out to trial. Judges should also have discretion to filter out cases that exhibit abusive qualities or would otherwise have a disproportionate impact on freedom of expression.
2. **CONDITION 2 – Costs for SLAPP targets are kept to an absolute minimum:** costs must be awarded to targets of SLAPPs on a **full indemnity basis**. Since SLAPPs operate through the litigation *process*, however, it is important that SLAPP targets are able to see that process through to a resolution. While we recognise that the government has no plans to expand legal aid, there are other ways the costs can be minimised for those targeted by such lawsuits - including by reducing the burden of disclosure.
3. **CONDITION 3 – Costs for SLAPP filers are sufficiently high to deter further SLAPPs:** in addition to costs being made available on a full indemnity basis, **exemplary damages** should be available for cases where the claimant has exhibited particularly egregious conduct, and where the time and psychological harm caused to the defendant needs to be compensated. This must be proportionate to the resources available to the claimant so as to provide an effective deterrent to those using such tactics.

To achieve the above, we have drawn up a UK Model Anti-SLAPP Law in consultation with senior lawyers from across the sector. We hope this draft law, outlined overleaf, will guide the proposals currently being developed by the Ministry of Justice (MoJ) and will also be discussed and adopted by the devolved governments in the UK. In particular, we would point to the importance of the following three features:

- **A Higher Merits Threshold:** it is emphatically not enough to simply bring forward a test for summary judgement (i.e. a “real” or “realistic” prospect of success). Since a motion for summary judgement can already be filed at an early stage in proceedings, an early dismissal mechanism that uses the same test will be redundant. The problem is that the summary judgement threshold is *too low* to filter out SLAPPs and provide meaningful protection for those targeted. Given ambiguities in laws such as defamation, it is simply too easy for a SLAPP claimants to show they have a “real” prospect of succeeding at trial. We have therefore proposed that SLAPP claimants must show a *likelihood* of prevailing at trial.
- **Wide and Robust Criteria for Identifying Abuse:** under the three-part test proposed by the MOJ (fleshed out in the model law), the early dismissal mechanism will only be triggered when a case has been identified as showing “hallmarks of abuse”. This should embolden those drafting the law to provide for a more rigorous merits test (see above), since only abusive claims will be subject to such a test. It is crucial, however, that these “hallmarks” are wide enough to cover all qualities that are indicative of an improper purpose. We have therefore proposed ten specific criteria that capture common features of SLAPPs.
- **An Objective Test for Dismissal:** the MOJ's framework requires that only cases identified as having features of abuse are subject to an early dismissal mechanism. This does not require courts to identify the *purpose* of the lawsuit. Lawsuits filed with an improper purpose can in theory already be dismissed and made subject to sanctions: the problem is that courts are too reluctant to infer such a purpose where doing so would lead to dismissal. Our objective test - requiring the court to identify *abusive* lawsuits (i.e. those with features of abuse) as opposed to *strategic* lawsuits - would avoid the problems associated with such a subjective inquiry.

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Protect acts of public participation and expression on matters of public interest; prevent the abuse of court processes to silence speech; discourage the use of litigation as a means of limiting expression and investigation on matters of public interest.

BE IT ENACTED by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

## 1. Definitions and Purpose

(1) The purpose of this law is to protect and promote the ability of individuals and organisations to participate in public debate, advance accountability, and speak out on matters of public interest, and to prevent the use of the courts to undermine these rights through abusive lawsuits.

(2) As used in this Act -

- a. An “act of public participation” means any expression or expressive act carried out on a matter of public interest, and any preparatory, supporting or assisting action directly linked thereto. This includes but is not limited to complaints, petitions, participation in public hearings, academic research, journalism and whistleblowing activities concerned with matters of societal importance, administrative or judicial claims, protests, and demonstrations;
- b. An “abusive lawsuit against public participation” means court proceedings brought in relation to an act of public participation that have some features of an abuse of process. Such features may include but are not limited to:
  - i. The scope of the claim, including whether there is a real risk it will deter acts of public participation beyond the issues in dispute;
  - ii. The excessive or unreasonable nature of the claim, or part of it, including but not limited to the remedies sought by the claimant;
  - iii. Any disproportion between the resources deployed by the claimant and the likely legitimate benefit of the proceedings to the claimant if the claim succeeds;
  - iv. The claimant’s litigation conduct, including but not limited to the choice of jurisdiction, the use of dilatory strategies, excessive disclosure requests, or the use of aggressive pre-action legal threats;
  - v. Any failure to provide answers to good faith requests for pre-publication comment or clarification;
  - vi. The seriousness of the alleged wrong, and extent of previous publication;
  - vii. The history of litigation between the parties and previous actions filed by the claimant against this party or others against acts of public participation;
  - viii. Any refusal without reasonable excuse to resolve the claim through alternative dispute resolution;

- ix. Tangential or simultaneous acts in other forums to silence or intimidate the defendant or related parties; and
  - x. Any feature that suggests the lawsuit has been brought with the purpose of intimidating, harassing, or otherwise forcing the defendant into silence
- (3) For the purposes of Section 2, a “matter of public interest” is defined as an issue that affects the public to such an extent that it may legitimately take an interest in it. This includes, but is not limited to, the following:
- a. Harm or risk of harm to 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;
  - 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, money-laundering, tax evasion or avoidance
  - e. Criminal activity or any other financial, business or political misconduct
- (4) Provisions in this Act should be broadly construed and applied to advance the purpose defined in subsection (1)

## **2. Dismissal of proceedings that limit public participation**

- (1) On an application by a defendant to a proceeding brought in the High Court or the County Court, a judge must, subject to subsection (2), dismiss the proceeding against the defendant if it is found to constitute an abusive lawsuit against public participation.
- (2) A judge must not dismiss a proceeding under subsection (1) if the claimant satisfies the judge that:
- a. The claim is likely to prevail at trial; and
  - b. The harm suffered or likely to be suffered by the claimant as a result of the defendant’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in dismissing the case before trial.
- (3) A judge may, on a motion brought by a defendant or of his or her own motion, dismiss the proceeding at any stage if the judge concludes that the claim shows serious signs of abuse as per Section 1(2)(b).
- (4) In considering subsection (2)(b) the court should take into account factors including but not limited to those listed in Section 1(2)(b), as well as:
- a. The right and value of public participation;
  - b. The extent to which the claimant is a public figure;
  - c. The extent to which the case can be managed in an efficient and proportionate way;
  - d. The actual or potential chilling effect of the proceedings on freedom of expression; and
  - e. The right of the claimant to vindicate their reputation or otherwise seek an effective remedy through litigation.

## **3. Stay of proceedings**

- (1) Upon an application made under Section 2(1) by a defendant to a proceeding, no further step may be taken in the proceeding by any party until the application, including any appeal against the application, has been finally disposed of.
- (2) Unless a judge orders otherwise, the claimant is not permitted to amend his or her pleadings in the proceeding -
  - a. In order to prevent an order under this Act dismissing the proceeding; or
  - b. If the proceeding is dismissed under the Act, in order to continue the proceeding.

#### **4. Costs and Penalties**

- (1) If a judge dismisses a proceeding under this Act, the defendant will be entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances.
- (2) If the judge does not dismiss a proceeding under this Act, the claimant is not entitled to costs on the motion, unless the judge determines that the application was brought in bad faith.
- (3) If the judge finds that the claimant has brought an abusive lawsuit against public participation under Section 1(2)(b), the judge may award the defendant such damages as the judge considers appropriate to sanction and deter the claimant's conduct.
- (4) In considering Section 4(3) the court should take into account the factors listed in Section 2(4).

#### **5. Disclosure**

- (1) In any proceeding brought in relation to a matter of public participation the Court must ensure that the defendant's disclosure obligations are reasonable and proportionate having regard to the following factors -
  - a. The financial position of the defendant and the resources available to them;
  - b. The actual or potential chilling effect of the disclosure order on freedom of expression; and
  - c. The financial, professional and psychological impact of the disclosure order on the defendant
  - d. The nature and complexity of the issues in the proceedings;
  - e. The likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;
  - f. The number of documents involved;
  - g. The ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
  - h. The need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.
- (2) In pursuit of 5(1) there shall be a strong presumption that the defendant's disclosure obligations will be limited to:
  - a. Known adverse documents;
  - b. The key documents on which they have relied (expressly or otherwise) in support of the claims or defences advanced in their statement(s) of case; and

- c. The key documents that are necessary to enable the other parties to understand the claim or defence they have to meet;

## 6. Exemptions

(1) This Act does not apply to:

- a. Any action brought solely in the public interest or on behalf of the general public;
- b. Any action brought against a government unit or an employee or agent of a governmental unit acting or purporting to act in an official capacity.

## 7. Rules

(1) The Civil Procedure Rules 1998 are amended as follows:

- a. **[Space for provisions modelled after ECPR]**

## 8. Commencement and short title

(1) This Act comes into force on the day on which it is passed.

(2) This Act may be cited as the Protection Against Abusive Litigation Act 2022.

## EXPLANATORY NOTES

1. The broad definition of public participation in Clause 1(2)(a) gives discretion to the court to define the full scope of the law while emphasising the need to extend protection to *acts* as well as *statements*. Crucially, this is explicitly extended to include protest and demonstrations as well as judicial claims - thereby preventing the anti-SLAPP law being itself weaponised against public interest litigation. The scope of the law is also narrowed by a tightly-defined purpose (Clause 1(1)) and an instruction to the court to interpret the law's provisions in a way that advances this purpose (Clause 1(4)). An "abusive lawsuit against public participation" (Clause 1(2)(b)) is defined in relation to features of abuse exhibited by the lawsuit, thereby avoiding the need for a subjective enquiry into the mind of the filer. The list of such features reflects common qualities found in SLAPP cases but is non-exhaustive. Note that this includes so-called *Jameel* abuse, codified here under Clause 2(3)(iii): i.e. where costs are out of proportion to any tangible or legitimate benefit likely to be yielded by the lawsuit.
2. Clause 2(2) ensures that abusive lawsuits targeting acts of public participation must meet a higher threshold in order to proceed to trial. This threshold test ("likely to prevail at trial") is a higher hurdle for such claimants to meet than the standard test for summary judgement ("realistic prospect of success"). This is designed to make it harder for such abusive claims to proceed to trial and exhaust the resources of the defendant. Clause 2(2)(b) and Clause 2(3) provide means for the court to dismiss claims that are superficially meritorious but which it would be contrary to the interest of justice to allow to proceed (e.g. claims where the abusive conduct has been so abusive as to merit dismissal).
3. The stay of proceedings in Clause 3(1) helps minimise the financial harm caused to the SLAPP target. By preventing claimants from being able to exploit resource-intensive processes such as disclosure, Clause 3(1) helps keep costs low and (in limiting the evidence that can be considered by the court) prevents the special motion to strike in Clause 2 from becoming a trial-within-a-trial. Clause 3(2) prevents the claimant from amending or withdrawing the complaint to avoid the application of the anti-SLAPP law. This is taken from Ontario's Protection of Public Participation Act 2015, which was itself informed by the experiences of US courts. In the case of *Simmons v. Allstate Ins Co.* [92 Cal.App.4th 1068], for example, the Californian Court of Appeal noted that '*allowing the SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape [from the early dismissal mechanism]*'. The SLAPP plaintiff would be able to '*go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading*'. This would trigger a second round of pleadings, a fresh motion to strike, and another request for leave to amend - all of which will drive up costs, increase the ability of the claimant to harass the defendant, and unnecessarily further burden the judicial system.
4. Any anti-SLAPP law must provide for the full recovery of costs (i.e. on a full indemnity basis) from the SLAPP claimant. Since SLAPPs operate through the litigation process, this is a crucial means of ensuring that a SLAPP - even if unsuccessful on its *merits* - does not succeed in advancing its real purpose: i.e. to drive up costs and make the litigation process as painful as possible for the defendant. This should not in itself be considered a sufficient means of sanctioning the SLAPP litigant, however. In order to fully deter the use of SLAPPs, it is crucial that the Court be empowered to impose penalties that are commensurate with the conduct (and indeed the wealth) of the Claimant. Clause 4(3) aims to provide the Court with the means to sanction SLAPP litigants "as [it] considers appropriate".
5. Even if no features of abuse are identified, or if an abusive lawsuit against public participation successfully passes the merits threshold, it is still crucial for acts of public participation to be protected against excessive costs. This is because such costs can *themselves* work to deter acts of public participation, and in many cases will prevent defendants from fighting such cases. Given that the disclosure process is the most resource-intensive part of pre-trial proceedings, this Clause focuses on reducing the disclosure burden on those defending acts of public participation. This is based on the more restrictive models of disclosure provided for under CPR PD 51U, where restrictions can be placed on the disclosure obligations of the defendant where a claim is allowed to go ahead which is "problematic". This would recognise that, given the broader public interest in protecting acts of public interest, a differential obligation is appropriate (just as in criminal proceedings there are greater obligations on the prosecution than on the defendant.)

6. As mentioned above, public interest litigation is itself an important form of public participation and should be subject to the same protection against retaliatory lawsuits. The aim here is to prevent the anti-SLAPP law from *itself* being weaponised against lawsuits brought in the public interest. Clause 6 therefore makes explicit a point implied in the definition of public participation in Clause 1(2): that the application of the law should not extend to public interest lawsuits and lawsuits targeting government officials.
7. We have left space here for the MOJ to develop a regime for cost protection modelled on the Environmental Cost Protection Rules (CPR 45.41-45.45). While we recognise that this could play an important role in reducing the chilling effect caused by the threat of civil proceedings, we understand that the Government will be considering how best to develop these reforms with the Civil Procedure Rules Committee and do not think it would be appropriate for us to propose measures in this law.

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\* The FPC's support for the model law is based on the findings of the Unsafe for Scrutiny research programme and any views expressed are those of Deputy Director Susan Coughtrie